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«They say things are happening at the border, but nobody knows which border» (Mark Strand)

The final seller's right of recourse in a french-italian perspective.

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Abstract: This article deals with the action of recourse stressing the importance of a comparative view. Although the main priority of Directive 1999/44/EC's is to give recognition to consumer protection, this achievement must be always considered in harmony with other targets of the aforementioned EU legislative measure, such as the modernization of the Member States' laws, the simplification of the overall discipline applicable to contracts of sale, and the approximation, at the EU level, of the Member States laws relating to the private law area. Therefore, it is on the light of the above that the action of recourse, namely a institution that does not seem to involve – primarily and directly – consumers' position but rather business parts of the contract of consumer sale (retailers and his/her predecessor), must be pondered. This approach is even more truth if the recourse is evaluated, on the one side, looking at the Italian legislature, and on the other, at the French one. Indeed, although the Italian legal system has structured the action under a right of redress in order to overcome the limitations to the accountability of the producer in accordance to art. 1495 of the Italian civil code, he has not, simultaneously, filled the gaps of protection emerging in the event of retailer insolvency. Thus, no legal action can be undertaken due to lack of the constituent elements, when the final seller in a financial state of insolvency cannot satisfy the claims of the consumer based upon proven lack of conformity. In France, instead, through the action directe, the case law, which was developed in the framework of the Code Civil, has allowed the buyer to act against any previous link in the distribution chain, and as a consequence the consumer is able to act not only against the dealer, but also against the wholesaler or retailer. All professional members of the contractual chain, therefore, are liable to the purchaser, although the seller effectively summoned to court has the right to be compensated from the part of the chain who is really liable for the defect occurred. The core idea that guides the present essay is, therefore, to reflect on the different solutions apparently adopted in Italy and France in matter of action of recourse to understand which appear to be the better orientation.

Summary: 1. Introduction. – 2. The nature of the institution as compromise: a look at the different implementation models. – 3. The action under a right of recourse: its general features, and the difficulties of systematic framework. – 4. The action under a right of recourse and its relationship with the guarantee of quality.

1. The implementation in the EU Member states of Directive 1999/44/EC on "Certain Aspects of the Sale of Consumer Goods and Associated Guarantees" ("Directive 1999/44/EC" or "EU Directive on Sale of Consumer Goods"), as well as Directive 93/13/EEC on Unfair Terms in Consumer Contracts ("Directive 93/13" or "EU Directive on Unfair Terms") provide a fertile source of comparison on different approaches to contractual liability and its border line with liability arising from wrongful acts. Whereas the joy of comparative law is to confirm how same problem yield in many instances similar results, not less sobering is to find out how differences in national laws may still allow for a harmonic or quasi-uniform law.

For a foreign observer, however, peeping through a looking glass outside the European Union, it is the difference in result what proves most interesting and instructive.

This article on "The Final Seller's Right of Recourse in a French-Italian Perspective" is a good case in point.

The main purpose of the EU Directive on Sale of Consumer Goods is to ensure a minimum level of consumer protection throughout the EU member states.

The standards laid out in Directive 1999/44/EC is to ensure a "floor", that is, a minimum standard, allowing member states to retain or adopt "more stringent provisions [which, though compatible with the Directive] ensure a higher level of consumer protection" (EU Directive 1999/44/EC, Art. 8.2).

In order to achieve this goal, member states may choose to implement the EU Directive through various means, and it is this choice what makes this comparative analysis most captivating.

General contract law may vary from country to country, making proof of fault particularly difficult in some countries. It is also by virtue of a general principle of contract law such as the need for "privity" (res inter alios acta or the principle of relativity or privity of contracts) that consumer's rights are limited insofar as its possibility of reaching the distributor or manufacturer of the goods.

Once the manufacturer is made a proper defendant, issues of burden of proof and measure of damages also play a significant role on how far the consumer is protected.

Consumers' remedies may also be limited by more or less extensive limitation periods or the determination as to when such period starts to run or may be tolled.

The extent to which a consumer may be recovering from the manufacturer or producer may be limited by more fundamental principles, such as the contractual or extra-contractual nature of the remedy available to the consumer.

Thus, under German law, an injured consumer having no direct link with the manufacturer can sue the latter only in tort, on the basis of § 823 BGB, which clearly requires fault. It is thanks to Germany's highest court on civil and commercial matters (the Bundesgerichthof) improved the consumer's task by reversing its burden, requiring the manufacturer to show that it was not at fault.

In contrast, American law, at least before the impact of Section 402A of the Restatement of Tort, developed a remedy on the basis of sales law, to the exclusion of tort law.

Similarly, French courts, relying on old provisions of the Napoleon Code seemingly aimed at protecting only the "purchaser" of goods, extended the coverage to any subsequent owner. Not only was the ultimate consumer entitled to an action directe against the manufacturer, but also the burden of proof was reversed by virtue of the jurisprudence developed by France' s highest court.

Whereas the remedy against the seller was limited by the French Civil Code (Arts. 1645-1646) to the return of the purchase price and out-of-pocket expenses unless it was established that the seller was aware of the defects, the Cour de Cassation held that a seller in the business of selling goods of the same kind was presumed to know all defects, hence is always held liable for consequential damages.

Thus, although the seller's liability was formally based in fault, in the German law of torts and the French law of sales, jurisprudential developments achieved a higher level of consumer protection that came close to the result achieved under a regime of strict liability.

As shown in this essay, Italian law continued to rely on fault as the basis of liability, Italian courts proving less ready, con comparison with their German and French counterparts, to reverse the burden of proof.

Despite some scholarly opinions to the contrary, Italian courts by and large refused to extend the application of Article 2250 of the Codice civile, meant to apply in the event of harm caused by dangerous activities, imposing on the seller the burden of showing that everthying possible was done in order to avoid the harm. Things changed after the adoption of Italy's Consumer Code (Law Decree No. 206 of 2005).

Fault remaining the basis of liability in a number of countries of the EU, such variations were regarded as impeding the free flow of goods across national borders, distorting conditions of competition by giving manufacturers in low liability countries an unfair advantage of those governed by a regime closer to strict liability.

This article explores the compromise solution reached by the EU Directive on Sale of Consumer Goods, exploring the roots of Article 131 of the Italian Consumer Code which, while seeking to implement Article 4 of the EU Directive, attempts to provides consumers with a direct right of action but without renouncing to the general principle of the relativity of contracts. The article explores subsequent jurisprudential developments in France and Italy, relying on a variety of scholarly opinions aimed at constructing a coherent body of product liability law favouring consumers.

Even though the EU Directive on Sale of Consumer Goods is now the point of departure, it is expected that decision law, by national courts and eventually the European Court of Justice, will continue to develop this area of the law.

It is expected that those courts will ultimately benefit from this essay as much as of similar analysis of the interaction between EU Directive 1999/44/EC and the pertinent provisions of national civil codes in general and consumer codes in particular.

2. Among all the provisions transposed in the Directive 1999/44/EC, the fulfillment of a high level of consumer protection certainly appears to be the priority that EU standards meet and from which it moves[1].

It is, however, not likely to incur forms of "overprotection" of the private purchaser. As the unbridgeable and predominant gap exists between the person and the market[2], there is the need to grant the individual means of protection that are appropriate and balanced with the new economic framework that Community legislation has intended to create and develop.

Furthermore, in spite of a full commonality of consumer purposes underlying the Directive 1999/44/EC, it should be noted that the uncertain and contradictory events, related to the Community measure implementation, have highlighted relevant operational obstacle resulting from the actual positioning of the rules in Member States and different regulatory systems.

The implementation process has been further blurred by the space that the Community rules, while seeking an even greater protection in favor of consumers, left to the variety of national legal systems. Member States are empowered to adopt or maintain, in the covered area, "more stringent provisions, and compatible with the Treaty, to ensure a higher level of consumer protection"[3].

It is noteworthy, in fact, that the Member States already had a law applicable to the sale of consumer goods at national level before the adoption of the Directive 1999/44/EC. However, on then one hand, the European regulatory background was characterized by numerous and manifest lack of uniformity due mostly to the nature of sale that ensues from the general contract law. On the other hand, looking at the systematic areas covered by the directive, the fundamental differences between the Member States could be caught between those EU countries that, in terms of sales, had already adopted prior to the Directive legislation. Those are specifically directed to consumer protection, and those EU countries that had a general legal framework to regulate all types of sales, including the sale to consumers[4].

Within this landscape, Italy, which at first implemented the Directive 1999/44/EC by way a simple Legislative Decree (Law Decree 2004 no. 24), drives itself into (or attempt to) gather all the legislation relating to consumers together in a dedicated code by way the Consumer Code (Law Decree no. 206 of 2005). It is the latter, then, that we must examine to seize the rules under which is provided the right of redress for the last seller.

The model received by art. 4 of Directive 1999/44/EC and the corresponding internal measure of implementation can be considered as a compromise between the traditional model, so common both in civil law systems and in common law systems and focused on the principle of relativity of

the effects of the contract (privity of contract), which allows to claim the contractual liability only against the immediate contractor, and the French model, which is based on the recognition of the action directe even in favour of the last seller against the initial ring of the distribution's chain.

The latter solution, which implies the automatic transfer of the guarantee for hidden defects in any intermediate transfer of the ownership, should provide a more effective protection because the guarantees of economic stability offered by the manufacturer are usually more secure than the ones of a small trader. According to the described mechanism, the transfer of the property implies ex se a simultaneous transmission of the remedies as an integral part of the sales contract, according to the brocard accessorium sequitur principale that art. 1615 Code civil assumes[5].

However, it seems appropriate to point out that the EU legislator, because it failed to impose a pure French model in all Member States, opted, then – as it was mentioned earlier –, for an unusual regulation that is a mixture of privity of contract and direct action. The rule, indeed, although does not provide the possibility to act directly against the manufacturer of the final seller or other parties to whom the defect is attributable, does not even require a necessary chain of recourse claims that follow, step by step, the individual contractual relationships, in order to require each buyer to make reference only to his/her predecessor.

Article 131 of the Consumer Code[6], therefore – following the provision of art. 4 Directive 1999/44/EC[7], and the example of art. 36, paragraph 4 of the Consumer Code– seeks to respond to the need to strengthen the final seller position. That provision grants him a remedy under a right of redress as against the producer or any other intermediary seller that is liable for a lack of conformity, even with no direct contractual relationship with the consumer (privity of contract).

A mechanism, which splits the position of the retailer from the manufacturer or other intermediary[8], enables reconciling the final seller claims to the needs of consumer protection[9]. Such mechanism has supported the development of the provision on the right of redress that simultaneously meets two requirements: expanding the range of protections available to the last link in the distribution chain (Vertriebskette)[10], and, thus, countervailing the strengthening of consumer rights[11].

The final seller, which often acts with less bargaining and economic power, is not forced, then, to endure the full capital charges resulting from lack of conformity, whereas, after spreading business risks and benefits, he is given the alternative to pour on any of the previous sellers – to whom the defect is imputable – the cost of the guarantee[12], i.e. the costs incurred to satisfy the consumer claims under arts. 130 and 135, paragraph 1 of the Consumer Code[13].

Such a regulatory solution is due to the fact that he does not have the slightest chance of influencing the activity of traded goods production, whose anomalies are, in general, refer to the manufacturer.

Reasons of fairness, therefore, require that the financial consequences of the non -conformity alleged by the consumer are assigned, finally, to the subject who can control and manage the factors generating the risk of economic initiative.

Thus the last dealer should anticipate the cost of the guarantee that, in the end, is the liability of the person in charge of the lack of conformity, either producer or wholesaler.

The described regulatory mechanism would also work in favor of a constant and prompt improvement and refinement of production and distribution processes, and, consequently, the quality of the goods offered to the public. It would prevent the producer to be, in fact, risk free asset thereby charging distributors the negative economic consequences of the non-conformity he caused[14].

The final seller, hence, pursuant to art. 2058 of the Italian Civil Code, can claim under a right of regress either the equivalent[15] or the specific performance[16], where the requirements are met[17]. Therefore, if he had to replace the good purchased by the consumer, he may ask his supplier a eadem res free of any defects, against handling the good originally delivered to his customer.

Although the Italian legislature has structured the action under a right of redress in order to overcome the limitations to the accountability of the producer in accordance to art. 1495 of the Italian civil code[18], he has not, simultaneously, filled the gaps of protection emerging in the event of retailer insolvency. Thus, no legal action can be undertaken due to lack of the constituent elements, when the final seller in a financial state of insolvency cannot satisfy the claims of the consumer based upon proven lack of conformity.

Within the described case a weakened protection is afforded to the consumer that cannot directly suit the producer[19], while a privileged protection is recognized to the dealer, who can avoid the risk of insolvency of his assignor in addressing the third producer responsible for the defect.

However, a different problem arises where the final seller, pursuant to art. 131 of the Italian Consumer Code, seeks a remedy against the upper link of the contractual chain, while – purchasing the good – he knew or could not reasonably have been unaware of the defect. For instance, an importer based in Italy that supplies goods from non-EU markets where use is made of materials or techniques whose quality standards are lower than those required in Europe[20].

Part of the Italian academic writing, arguing in accordance to art. 1642 and art. 1491 of the Italian civil code, does not recognize such a remedy to the final seller[21]. In fact, on the one hand, consciously offering the public a defective thing, he would betray consumer trust and expectations – that is the reason why he should bear the consequences of the losses arising from consumer fair claims[22]; on the other hand, the obvious lack of conformity would justify, within the relation between entrepreneurs, the final assumption of risk upon the retailer, with no recovery under the right of redress[23].

The final seller protection grated by art.131 of the Italian Consumer Code may appear as the projection of art. 9 Law no. 192 of 18 June 1998, on the abuse of economic dependence[24], as it also aims to correct the anomalies of a market system in which the hegemonic or better-organized party exercises an authoritarian power. However, the first glance clearly turns away as demonstrated by art.131, paragraph 1; notwithstanding the foregoing rules provided to offset excessive bargaining power, it allows the retailer to renounce the right to redress without limit[25].

Although the provision of art. 131 of the Italian Consumer Code is not binding whereas the principle of freedom of contract is not affected[26], yet it should be stated that alongside the legislature has allowed the presence of the necessary conditions to submit the waiver to a safeguard clause. It tacitly reserves the court the opportunity to examine contingent failures, surreptitiously underlying the conventional exemption, which unveils the abuse of power by those who conceived the agreement in their own interest[27].

Ensuring the full integrity of the principle of freedom of contract does not mean allowing the abuse of freedom of contract. On the contrary, the principle can be protected only by avoiding heteronomy or, better, situations where the weaker party might suffer any conditions, even the most grossly unfair, imposed by the stronger one[28].

In the absence of expressed limits to the freedom of contract under the art. 131 of the Italian Consumer Code, a different perspective has given upon the final retailer aware of the lack of conformity, when there is evidence that the supply of defective material constitutes the symptomatic index of the abuse of economic dependence[29].

One can have the case of a retailer who purchases goods from a supplier, perfectly conscious of lowering quality standards, but compelled by the alternative between continuing the relationship with the same producer or contacting the competitors – facing the risk of losing his client due to the new trademark reduced attractiveness. In such event it has to be assessed whether the diminished quality standards is attributable to normal business risk, which must necessarily meet the seller[30].

The judges of the Italian Supreme Court favor a negative response to the mentioned issue, but the question seems to engender – avoiding hypothesis of mere speculation – from a different point of view, the impairment of expected trust placed by the final seller in the prestige and level of reliability he enjoyed through the producer brand[31].

In that case, then, the factory distinctive sign seems at sudden to heavily characterize the distribution chain conditioning the activation of the same legal circulation that may create profit for the retailer, providing that he can benefit from the brand power to intercept customers[32].

3. The genuine action under a right of redress is intended to indemnify the seller with respect to all adverse consequences potentially caused by the granted complaint filed by the purchaser. Its plan is due to a contractual liability that leads to a dual relationship: the one takes place between the seller and the consumer, the other is established between the final seller the producer or any intermediary in the same supply chain.

Art. 131 of the Italian Consumer Code meets the essential need for justice in order to avoid serious economic consequences repercussions upon a subject that is not often liable for any consumer damage. Nonetheless, that provision does not widen the consumer sales warranty in favor of non-consumers, even where they may hold an objective unequal bargaining position against any other intermediary[33].

Then, in case of consumer claims based on the lack of conformity with the contract, the rule under art. 131 of the Italian Consumer Code can be applied just in two cases: in primis, the lack of conformity of goods shall exist where delivered from the producer to the final seller; in secundis, the defendants shall be part of the supply chain. Instead, the right of redress does not apply where – once the contractual chain is trespassed – the buyer purchased goods from a private individual. Such statement is made clear by the definition of seller laid down in art. 128, par. 2 b) of the Italian Consumer Code, which does not include a private individual. Whereby, in the case mentioned, required conditions for the class action are not met.

The main problem with regard to the action under the right of redress concerns the evaluation of its legal framework in order to not only the existing legal categories, but also the legislative technique. Whereas its applicability to the seller has a direct impact on the same legal and conceptual identification of consumer definition. An important role is given, indeed, to the actual imbalance of bargaining power between entrepreneurs that are differently dimensioned but bound by obligations to carry out a professional activity.

The doctrine, despite the efforts aim to draw up a general concept of recourse, has failed in its attempt, because it is hard to clarify an overall definition of redress, which uniformly collects all the variety of hypothesis that may occur[34].

The same issue arises in the analysis of redress qualification under art. 131 of the Italian Consumer Code, where the trilateral relationship elapsing between seller, professional and consumer-purchaser cannot be framed in the classic joint l liability, since a different kind of obligation seems to bind seller and intermediary.

The action under the right of redress for the final seller is not rather attributable to the joint obligations only if we consider, in addition to the non-exhaustive remedies granted by article 131 of the Italian Consumer Code – the condition for subjectively complex obligations. In such legal bonds, in fact, the uniqueness and identity of performance and consideration distinguish them from all other legal relations, where a single creditor is opposed to more co-debtors (or viceversa). In parallel, a more tenuous connection would exist regards to joint obligations, although both the active and passive subject are completely different[35].

Therefore, the trilateral relationship between consumers, final sellers and intermediaries of the same contractual chain, reveals a link between different subject positions, and a broad solidarity from passive side (i.e. final seller and the previous intermediary), as a reflection of the relationship between consumer and seller. It cannot, however, be considered a classic joint obligation that would be characterized by the ability of both the consumer and the seller thereof to file a claim indistinctly against any link of the same distribution chain (producer, intermediary, or seller).

The action under the right of redress pursuant to art. 131 of the Italian Consumer Code, might be framed, at most, in a generic category of joint obligations[36] deemed atypical by the law, or attenuated for protection purposes. In this case, the latter could consist in the legislative choice to grant the consumer a direct and immediate legal relation with the last contractual series professional related to a given good[37].

Just the concept of redress would suggest the attempt to set a merely internal solidarity between the seller and another intermediary in the same supply chain[38]. Identifying a general and homogeneous definition of recourse, in hindsight, seems to be impossible[39], whereas the non-configurability of a two-way relationship between the right of redress in joint obligations, and other assumptions of recourse in which solidarity either is assumed or is regulated differently under art. 1299 Italian Civil Code[40].

It appears that the Italian legislator, in the end, wanted to use the right of redress under art. 131 of the Italian Consumer Code to achieve two goal: first of all, to remedy the absence of direct action for the consumer against the producer or other intermediary in the contractual chain[41], and, secondly, to rebalance the seller position, eventually sentenced to pay damages for a defect that is not imputable to him[42].

Then the consumer cannot suit either the seller or the producer, between whom an ordinary joint obligation does not exist. Instead, a joint obligation separated from the consumer position might be relevant in favor of the seller, when he is convict[43].

Within relations between the final seller and the consumer, therefore, continues to rely on the principle of relativity of contracts, consecrated by art. 1372 Italian Civil Code[44]; thereby the non-liability of the producer towards le particulier is not at issue, when he appeals to indirect distribution chain. On the contrary, the Italian legislator has waived the same principle in favor of the final seller. In fact, he is entitled to file an action under the right of regress against the previous link of the distribution chain, whose act or omission has been the defining event the lack of conformity and from which is derived the liability of the plaintiff to the consumer, although there is no immediate relationship between the parties. This choice is justified by the predominance of the principle of liability (Verantwortungsprinzip), which, herein, has broken the classic and rigorous coincidence between obligation and contract, and whose origin lurks in the lack of conformity descendant from the antinomy between given and due.

The first source of liability for the author of the offence, against whom the remedy is filed, coincides, then, with the fracture of the contract between the retailer and the consumer. Moreover, the chance to glimpse a commitment to protect the producer and the intermediate distributor always remains[45].

The consumer has granted an immediate protection of his rights related to the closer professional subject, i.e. the last seller. That is the purpose of the right of redress together with the exclusion of a direct remedy against the producer.

Art. 131 of the Italian Consumer Code shall not allow, in fact, the retailer to cede, by a contractual term, his right to redress the producer, neither to file legal action based on defects for which he is liable.

So that, a double effect would be obtained. Preventing the seller to escape a conviction, as much as avoiding a lack of protection for the consumer if, during the proceedings, it is found that the defect could not be causally reconnected, either directly or indirectly, to fact or behavior of the producer or other professional but to the final seller.

Art. 131 of the Italian Consumer Code, otherwise, unveils a significant problem of interpretation that concerns the figure of consumer and his concept breadth. The named provision is an expression of the need, perceived at EU level, to extend the applicability of the consumer regulation to the intermediary links of the distribution chain, i.e. the subjects between the producer and the final consumer.

In France, through the action directe, and in Belgium, through kwalitatieve rechten or droits qualitatifs, the case law, which was developed in the framework of the Civil Code, has allowed the buyer to act against any previous link in the distribution chain, and as a consequence the consumer is able to act not only against the dealer, but also against the wholesaler or retailer. All professional members of the contractual chain, therefore, are liable to the purchaser, although the seller effectively summoned to court has the right to be compensated from the part of the chain who is really liable for the defect occurred[46].

The regulation of consumer goods sales is conceived on an extreme formalism regarding the subjective side, and neglects, at the same time, the actual position of the contracting parties. Therefore, it excludes the professional from the special protection granted to the individual purchaser, by a choice that leads us to consider so indistinct and on a level similar bargaining power, all professionals of the series contract.

The interpretation of the action under the right of redress for the final seller may even rely on a systematic approach that takes step from art. 36 of the Italian Consumer Code. The first part of the rule, in truth, envisages hypothesis of absolute presumption of unfairness – generally referred to the exclusions of liability for the professional; but the second part recognizes the seller the right of redress against the supplier. This remedy is, then, a tool designed to rebalance the position of those weak professionals[47], also called "intermediate customers"[48], who will suffer neither judicial rulings of unfairness – which usually target the contractual clauses set by the producer – nor convictions for lack of conformity beyond their control.

By the same token, the concept of consumer gradually widens, favored by a more substantial rather than formal regulation that is aimed to enlarge, indirectly, the formal contents of provisions enacted to protect consumers in the strict sense intended. Thus, the legislation at hand highlights both the objective inequality of the contractors' economic strength, and the injustice of a regulation that aims to restrict, a priori, the definition of consumer.

However, an underlying and, yet, not fully expressed will to change the foundation of consumer regulation is still present and would act through the transition from a subjective to an objective vision, based on the actual comparison of bargaining powers strong and weak bargaining powers.

The need for new and modern setting hermeneutics flows, at least in Italy, from the analysis of the functioning of trading market at a business level, as well as the assessment of sectoral regulations designed to protect the alleged weak professional. Among those rules, Law 10 October 1990 no. 287 (Antitrust law)[49], specifically art. 3 A), foreseen the abuse of dominant position when price or contract terms are unduly burdensome. Moreover, Law 18 June 1998, no. 192 on subcontracting in productive activities[50], which aims at protecting the weakness positions in contractual relationships between professionals with – only theoretically – similar bargaining power[51].

The same Italian Consumer Code seems to have adopted an innovative system, centered on the act of consumption as a tool for engaging and protect the professional-consumer[52]. In fact, due to stringent contractual relations between companies with different commercial skills and strengths characterize, phenomena of exploitation of dominant positions may occur in economic exchange against small distributors and retailers. The creation of economic dependence leads to the assimilation of the latter to the individual consumer.

The respective industry regulations, therefore, feel a similar need for protection, common to weak professionals and consumers. Although they formally refer to different subjects, both laws seek to ensure the forms of protection, representing a further stimulus to the reconsideration of the subjective limits in order to define the overall scope of consumer rules.

4. A right of redress enforceable without cut-off point would damage, deadly, the certainty and stability of the legal movement of goods, as well as expose the previous links in the contractual to a considerable economic risk, which is not justified by a corresponding need to protect the final seller.

His defense would not be harmed, but rather assured adequately and sufficiently, if the date of accrual is not before the retailer fulfilling the purchaser's warranty expectations.

Given the fact that the last sentence of art. 4 Directive 1999/44/EC leaves the procedures and modalities up to the national legislatures, the Italian Consumer Code in art. 131, paragraph 2, is perfectly consistent with the above described protection needs for both the market and the final seller.

Furthermore, art. 131 Italian Consumer Code adopts a solution that appears to be more favourable than the one built by the French case law on vice caché, according to which the prescription period for recovery starts when the final or intermediate seller is summoned by his/her direct buyer[53].

The wording of art. 131, paragraph 2, prescribes an annual limitation period for the action under the right of redress: the time period runs on the date when the performance begins, i.e. after the retailer carries out his duty to pay or to do to the satisfaction of the consumer's claims[54].

This mechanism makes a significant progress in the creation of a quite efficient system for the allocation of responsibility in the consumer goods distribution[55]. It is also able to ensure effective protection of dealers, which would have been otherwise compromised if their rights had elapsed before the consumer brought remedies under art. 130 of the Italian Consumer Code.

Thus, the traditional model based on a short limitation period – running from the date of delivery of goods to the final seller[56] – has been abandoned. It is true thought that the speed of movement of consumer goods, together with their rapid obsolescence, make it rarer the case of goods lying in the retailers' warehouses for too long.

The problem of the complaint for lack of conformity to the contract, however, remains unsolved. So that, ancient questions posed by the guarantee application pursuant to articles 1490 and following of the Italian Civil Code.

Two different thesis have been supported about the limitation period of eight days laid down by art. 1495 Italian Civil Code. One argument sets the date of accrual on the delivery of goods to the sub-buyer, while the other considers the beginning of the period from when the dealer is approached with a claim.

The reported hermeneutics doubts cannot find an easy solution. Either according to art. 132, paragraph 2, of the Italian Consumer Code, which cannot be implemented, because the retailer is not a consumer; or considering the assumption that the legislator, willing to ensure an effective legal arrangement, wanted to free the redress from the burden of reporting pursuant to art. 1495, paragraph 1, of the Italian Civil Code.

The Gordian knot must, thus, be disentangled not by the stiff and formal canon interpretation for which ubi lex voluit dixit, ubi nocuit tacuit, but in accordance with the requirements underlying the arrangement, in the light of the legal type under art. 131 of the Italian Consumer Code, read in conjunction with art. 135, paragraph 2, of the same Code, and articles. 1490 and following of the Italian Civil Code.

The rule expressed by the industry code, in fact, wanted to overcome the principle of relativity of contracts, which is the basis of the institute forged by the Judiciary, and at the same time to avoid moving on the ground of fault liability, which, instead, is unrelated to art. 1490 of the Italian Civil Code[57]. This mechanism is nevertheless in full respect with the right of redress under art. 131 of the Italian Consumer Code – enforced to rebalance the position of the seller, eventually convicted to pay damages for a defect he is not responsible for[58].

Consequently, the need arises to adopt a solution that, reading between the lines of art. 131 Italian Consumer Code, is likely to seize the reasons why the legislator has provided such rule. Moreover, it should highlight the dual difference intervening in the regulation of the same institute, between the statute of the sale of consumer goods and the common regulation.

The mentioned provision, then, just wants, on one hand, to overcome the principle of relativity of the contracts, otherwise set out in art. 1495 of the Italian Civil Code. In fact, it allows the dealer to bring a claim against any previous link in the same contractual chain. On the other hand, it want to clarify the legal cut-off point for the action under the right of redress in consumer sales. More precisely, it aligns the two limitation periods stated in the sectoral code, and in art. 1495 of the Italian Civil Code, differentiating the date of accrual. In the case at hand, it runs after that the final seller meets a consumer claim, while, in the case of contract of sales, it begins from the delivery of the goods to the buyer.

Art. 131 of the Italian Consumer Code ultimately, has brought to light only the heterogeneity present in the regress statute. It did not bear to predict, explicitly, a repose period within which the seller should file a complaint. That is due to, in the first place, the following art. 132 of the same Code cannot be clearly applied – the subject is a professional not a consumer; secondly, it leads to art. 135, paragraph 2, which refers to "the provisions of the Civil Code on the contract of sale", and, consequently, art. 1495 of the Italian Civil Code.

The final seller, therefore, is bound to the limitation period under art. 131 of the Italian Consumer Code and the expiry period under art. 1495 of the Italian Civil Code. He will be able to file a complaint, according to the first rule, either against his predecessor or against the previous link in the supply chain considered imputable. In fact, the right of redress can be claimed regardless of etiological profile of the remedy[59]. Even if the act or omission of the producer or a previous seller are not due to negligence or wilful misconduct, as set out in the said art. 1495.

The redress ex art. 131 of the Italian Consumer Code, then, is an autonomous presumption that slightly unfolds with regard to statute of defects, as the legislator would only dictate specific exceptions to the general rules. They are sufficiently functional to ensure consistent implementation of the sectoral code, and to simplify the exercise of the rights ex empto, payable to the dealer against the previous links in the distribution chain.

It follows that, besides the mentioned exceptions, the redress requires, mutatis mutandis, the implementation of articles 1490 and following of the Italian Civil Code, irrespective of negligence of the defendant.

If it acted otherwise, there might be cases where only the final seller would ultimately meet faulty good claims, without any reason[60]. Furthermore – as demonstrated by art. 135, paragraph 2, of the Italian Consumer Code – it would challenge the obvious nature of "variant"[61] that the consumer goods sale has acquired in comparison to sale in general, as well as its full integration into the system as it is enshrined in art. 1470 of the Italian Civil Code and following.

In its entirety, the arrangement of redress under art. 131 of the Italian Consumer Code has not substantially moved away from the guidelines of the guarantee ex empto, as to which the fault, pursuant to art. 1494 of the Italian Civil Code, detects only in case of damages, and the burden of proof, in accordance of art. 1495 Italian Civil Code, also relies on the final seller who wishes to exercise the remedy devised by Community law.

The discussion reveals that the dealer will be freed from the sequential order in art. 130 of the Italian Consumer Code. So that, when he pursues a lawsuit under the right of redress against his direct supplier, the final seller shall be entitled to ask, if desirable, for the immediate termination of the contract, pursuant to art. 1453 Italian Civil Code, which fits well within the principle of substantive equality because of the consequential equal treatment between consumer and professional-retailer.

This latest survey shows genuine circularity of the sale system, able to solve all threads about the disparity of contracting parties' statute, which often result from arrangements that fragment the legal system unity, if not welded to authentic and distinctive profiles.

* Although the article is the result of joint observations of the two authors, the abstract and the paragraph 1 have to be attributed to Alejandro M. Garro, while paraghraps 2, 3, 4, to Ettore M. Lombardi.

[1] The Directive 1999/44/EC's priority to give recognition to consumer protection fits harmoniously in the achievement of other targets that the EU bodies aimed to achieve throughout the aforementioned legislative measure, such as the modernization of the Member States' laws

that appear unsuitable for the current production and mass marketing; the simplification of the overall discipline applicable to contracts of sale; the approximation, at the EU level, of the Member States laws relating to the private law area. See Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees, COM (1995) 520 final – COD (1996) 161, in OJ C 307, 16.10.1996, p. 8 ff. It is worth to notice that the Directive on Consumer Rights (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council) replaces, as of 13 June 2014, Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 85/577/EEC to protect consumer in respect of contracts negotiated away from business premises. Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees as well as Directive 93/13/EEC on unfair terms in consumer contracts remains in force. See, for a general analysis of the Directive 1999/44/EC's targets, H. Albrecht, Die Verbrauchsgüterkauf-Richtlinie 1999/44/EG und ihre Vorgaben für das deutsche Kaufrecht, in Zeitschrift für die Anwaltspraxis, 2000, p. 93 ff.; P. Nocerino, La nuova disciplina comunitaria della garanzia nella vendita di beni di consumo, in Dir. comm. e degli scambi intern., 2000, p. 315; E. Hondius, C. Jeloschek, Towards a European sales law. Legal challenges posed by the Directive on the sale of consumer goods and associated guarantees, in Eur. Rev. Priv. Law, 2001, 9, p. 157 ff.; C. Twigg-Flesner, EC consumer sales law: Are you being served?, in Consumer Policy Rev., 2001, 1, 1 ff.; G. De Cristofaro, Difetto di conformità al contratto e diritti del consumatore, Padova, 2000, p. 1 ff.; Id., La nuova disciplina codicistica dei contratti per la fornitura dei beni mobili conclusi da consumatori con professionisti, in Studium iuris, 2002, p. 1174 ff.; P. Pardolesi, La direttiva sulle garanzie nella vendita: ovvero di buone intenzioni e di risultati opachi, in Riv. crit. dir. priv., 2001, p. 442 ff.; A. Luminoso, Chiose in chiaroscuro in margine al d. legisl. n. 24 del 2002, in Le garanzie nella vendita dei beni di consumo, in Tratt. dir. comm. e dir. pubb. dell'econ., diretto da F. Galgano, XXXI, 2003, p. 10 ff.; A.-M. Leroyer, Conformité des biens – Transposition de la directive, in RTD civ., 2005, p. 483 ff.; S. Patti, Garanzia legale di conformità e garanzie commericali per i beni di consumo. Art. 129 (Conformità al contratto), in Nuove leggi civ. comm., 2006, p. 362 ff.; A. Scarpa, La vendita dei beni di consumo: la conformità al contratto e i diritti del consumatore tra codice del consumo e codice civile, in Giur. di merito, 2008, p. 3038 ff.; P. Gentile, Il riconoscimento dei vizi e gli effetti dell'impegno del venditore ad eliminarli, in Rass. dir. civ., 2010, p. 603 ff.; R. Schulze, The Evolution of Torts in European Business Law, in Compensation of Private Losses: The Evolution of Torts in European Business Law, edited by R. Schulze, Munich, 2011, p. 9 ff.

[2] N. Irti, L'ordine giuridico del mercato, Roma-Bari, 2004, p. 97 ss.

[3] See art. 8, § 2, Directive CE/99/44.

[4] The presence of general rules on the sale is reported, for example, in the United Kingdom, Italy, Belgium, Cyprus, France, Germany, Hungary, Ireland and Malta.

[5] See, in case law, ex multis, Cass. 1re, 26 mai 1999, in Juris class. pér., 2000, p. 231; and, in the tenet, P.H. Antonmattei, J. Raynard, Droit civil. Contrats spéciaux, Paris, 2000, p. 176 ff. The alienating, then, can present against the sub-buyer exceptions that are based either on clauses that limit or exclude the liability or on arbitration clauses that the former could assert against his/her direct successo. See Cass. 1re, 7 juin 1995, in Dalloz (Somm.), 1996, p. 14; contra, J. Calais-Auloy, F. Steinmetz, Droit de la conommation, Paris, 2006, p. 278, where it is believed that the consumer should be consider holder of the right of ascertaining the unfairness of the mentioned clauses. As a

consequence, if the sub-buyer gets in his/her favour a preliminary redhibitory against the manufacturer, the latter will be merely convicted to return what he/she got by the first purchaser, with possible charges of the difference in compensation for the damages. See Cass. 1re, 27 janvier 1993, in Juris class. pér. (Tabl. Jur.), p. 91; Cass. 1re, 8 juin 1999, in Dalloz (Inf. Rap.), 1999, p. 206; nonché, P. Le Tourneau, Responsabilité des vendeurs et fabricants, Paris, 2001, p. 229. See, on the action directe, in case law, ex multis, Cass. comm., 17 mai 1982, in Bull. civ., IV, n. 182; Cass. 1re, 27 janvier 1993, in Dalloz (Somm.), 1995, p. 210 ff.; and, in the tenet, M. Cozian, L'action directe, Paris, 1969; C. Jamin, Brèves réflexions sur un mécanisme correcteur: l'action directe en droit français, in Comparaisons franco-belges, dirigé de M. Fontaine et J. Ghestin, Paris, 1992, p. 295 ff.; C. Jamin, La notion d'action directe, Paris, 2001, p. 225 ff.; J. Ghestin, C. Jamin, M. Billiau, Traité de droit civil. Les effets du contract, Paris, 1994, p. 852 ff.

[6] Before the entry into force of the Consumer Code, in which the art . 131 finds its raison d'être and its justification, some authors have considered stranger to a regulatory system direct to assure a specific protection of the consumer, the prevision of a right of redress. See A. Luminoso, Appunti per l'attuazione della direttiva 1999/44/CE e per la revisione della garanzia per vizi nella vendita, cit., p. 128 ff.; C. Iurilli, Autonomia contrattuale e garanzie nella vendita dei beni di consumo, cit., 213 ff.; contra, R. Calvo, Vendita e responsabilità per vizi materiali. II. Il regime delle «garanzie» nelle vendite al consumo, cit., p. 321.

[7] The Article 4 of Directive 99/44/EC originally seemed oblige national systems to provide the final seller of a right of redress against any person (i.e. manufacturer, any previous seller or other intermediary) reliable for the lack of conformity, regardless the real composition of the contractual chain starting from the final seller. However, the final text of the directive has slightly changed the previous rule, giving Member States the option to choose the preferred model of recourse. The Article 4 of the Directive has not been implemented through specific provisions by all Member States, in fact, some of them (Cyprus, Estonia, Finland, France, Greece, Italy, Latvia, Malta, Poland, Hungary) has opted for the mere inclusion in a particular article of the regulation to be implemented, while other ones (Austria, Belgium, Cyprus, Denmark, Germany, Ireland, Lithuania, United Kingdom, Czech Republic, Slovenia) have stated that in this sector the recourse should follow the general contractual principles. More to the point, with reference to the first group of countries, in France, Article L. 211-14 of the Consumer Code, provides that, in the sale of consumer goods, the recourse should follow "les principes du Code civil" and consequently leaves room for case law, which justifies the relaxation of the principle of conventions' relativity by means of the rule maximum accessorium sequitur principale presupposed in art. 1615 Code civil; in the Netherlands and Finland (art . 31 , Chapter 5 , Potection Consumer Act), it is expected that the final seller may claim only against the previous link in the chain of contracts, but while in the former country it impossible to act just when the last seller was aware of the good's defects, in the second country the action of recourse may be brought either when the lack of conformity is not derived from causes that emerged after the previous trader has already delivered the good, or the final seller does not base its action on statements made by persons other than the previous professional, or the final seller does not require a price reduction or a refund higher than the price paid to the previous professional; in Malta, Article 1431 Civil Code provides that the retailer is required to enforce the right of recourse within six months starting from the judgment favourable to the consumer; in Portugal, the recourse must be brought within two months starting from the conviction, in favour of the consumer, of the final seller, and provided that, on the one hand, a period of five years has not passed from the sale's conclusion yet, and, on the other, the lack of

conformity is not found just after the delivery of the goods to the retailer (in this case, the previous link in the chain of contracts can not be held responsible for); in Spain, the final seller must act within one year starting from the conviction, in favour of the consumer, of the professional who is currently responsible for the defect, and as a consequence, and unless the manufacturer has been convicted directly, the recourse may be brought by the latter, if the retailer is currently responsible for the defect. As for the second group of countries, while some of them (Czech Republic, Denmark, Ireland, Lithuania, United Kingdom, Slovakia, Slovenia, Sweden) has not taken any measures to implement the provisions contained in Article 4 of Directive no. 44 of 1999, but they did implicit appeal to the general rules, in Austria, § 933b ABGB recalls the rule under which the recourse have to be exercised by the final seller or other intermediary against his/her predecessor within two months starting from when the consumer or the consecutive trader have obtained a ruling favourable to him/her, unless a period of five years starting from the last sale has not passed yet and the amount requested does not exceed what was paid to the person claiming under the guarantee; in Belgium, art. 1649 Code civil, which sanctions the ineffectiveness to the consumer for any contractual clause that limits the liability of the retailer to the private buyer for defects caused by actions or omissions of the previous link in the chain of contracts, is recalled; in Germany, it is possible to invoke the rule that the final seller can sue his/her distributor – although this rule relates more to new assets than to all consumer goods considered by the Directive –, and as a consequence the principle of relativity, which has avoided a setback per saltum in favor of a Stufenregress, is complied with.

[8] See E. Moscati, Art. 1519-quinquies, Note introduttive, in Commentario alla disciplina della vendita dei beni di consumo, a cura di L. Garofalo, V. Mannino, E. Moscati e P.M. Vecchi, op. cit., p. 462.

[9] See S. La China, La chiamata in garanzia, Milano, 1962, p. 44, where the A. asserts that the word "recourse" does not identify with a unitary and homogeneous category, but represents a «[…] generica etichetta, una parola buona a molteplici usi, una mera allusione al dato, grossolanamente osservato e descritto, del rivolgersi all'indietro verso qualcun altro, in conseguenza di una certa vicenda anteriore e diretta»; and, in this sense, B. Gambineri, Garanzia e processo, I, Milano, 2002, p. 237, where the A. affirms that «[…] il termine regresso – di solito – è usato per indicare solo la funzione economica che una serie di azioni, aventi natura giuridica diversa, perseguono e che consiste nel riversare su altri le conseguenze economiche negative derivate da un diverso rapporto giuridico corrente con un soggetto terzo».

[10] Considering the possibility to extend the entitlement of the claim of recourse, beyond the final seller who art. 131 Italian Consumer Code directly refers to, it must be considered that the solution adopted in Austria and Germany expressly allows to involve other intermediate rings of the distribution chain, but in these systems the recourse remains linked to the contractual relationship (Stufenregress). Under Italian law, although this profile is not specifically regulated, it appears normal that the power granted to the final seller to exercise the right of recourse against any previous professional step of the distribution chain is not excluded, even in absentia of a contractual relationship. Therefore, the dealer would not be banned to act against any previous ring of the distribution chain considered responsible, when he/she was forced to bear the negative economic consequences arising from the lack of conformity asserted by the consumer. See, for further details on the Austrian and German law, supra note 7.

[11] See G. Cassano, Professionista debole e clasuole vessatorie (a proposito dell'azione di regresso di cui all'art. 1469-quinquies, 4° comma, c.c.), in Danno e resp., 2000, p. 587 ff.

[12] Cfr. F. Bartolotti, Azione di regresso e vendite a catena, in M. Bin e A. Luminoso, Le garanzie nella vendita dei beni di consumo, op. cit., p. 477; G. De Cristofaro, La vendita di beni di consumo, op. cit., p. 1076; P. Paganelli, Art. 1519-quinquies, in La vendita dei beni di consumo. Commentario breve agli artt. 1519-bis ss. c.c., a cura di C. Berti, Milano, 2004, p. 141. The recourse, however, may be brought even if a used goods was sold, while it is not allowed when it would determine a transfer from the distribution chain to the production chain. This phenomenon is due to the transformation processes that the good must cope with and that make it alia res compared with its previous status (for example, the retailer will not be able to act directly against the software vendor, when the lack of conformity is attributable to a design error linked to an electronic system malfunction of the manufacturer). Cfr. C. Cicala, La dismissione del diritto di regresso, in Aspetti della vendita dei beni di consumo. Atti del dottorato in «Diritto dei contratti ed economia di impresa, Milano, 2004, p. 137.

[13] See E. Moscati, Art. 1519-quinquies, Note introduttive, in Commentario alla disciplina della vendita dei beni di consumo, a cura di L. Garofalo, V. Mannino, E. Moscati e P.M. Vecchi, op. cit., p. 462. It must be pointed out that only a mixture of contractual remedies and non-contractual remedies (derogating from the principle of relativity of the contract) appear to ensure a fully protection of the final seller. This solution, indeed, would allow him/her to choose whether to take action against his predecessor or directly against the persons who caused the defect. Such freedom of choice is assured in France, where the action directe competes with the ordinary remedies arising from the defects' guarantee. Furthermore, it is worth to notice that the latter can be exercised over an extended period of time (thirty years) in compliance with art. 1604 Code civil, and its action for l'inexecution de l'obligation de délivrance. See, for a critique of the short two-year term required by the EU directive, P.Y. Gautier, Contrats speciaux, in Droit civil, dirigé de P. Malaurie et L. Aynès, Paris, 1999, n. 400; A. Pinna, I termini nella disciplina delle garanzie e la direttiva 1999/44/CE sulla vendita dei beni di consumo, cit., 2000, p. 527 ff. Unlike the French case law, then, the Italian courts, in principle, deny the possibility of extending the effects of the warranty for defects provided by the first seller to the assignees of the buyer as well. See App. Roma, 19 dicembre 1989, in Giust. civ., 1990, I, p. 450 ff.; Cass., 6 dicembre 1995, n. 12577, in Danno e resp., 1996, p. 524; Cass., 21 gennaio 2000, n. 639, in Contratti, 2000, p. 903.

[14] Cfr. F. Bocchini, La vendita di cosa mobili, Milano, 2004, p. 504 ff. It must be clarified, however, that if the dealer would like to be indemnified for the damages resulting from the bad business reputation should act in compliance with art. 1494 and 2043 Italian Civil Code. See A. Zaccaria, G. De Cristofaro, La vendita dei beni di consumo, op. cit., p. 112; contra, F. Bocchini, La vendita di cose mobili, op. cit., p. 514 ff.

[15] See, ex multis, A. Zaccaria, G. De Cristofaro, La vendita dei beni di consumo, cit., p. 112; nonché G. De Cristofaro, La nuova disciplina codicistica dei contratti per la fornitura dei beni mobili conclusi da consumatori con professionisti, op. cit., p. 1184, note 45, where the A. argues that, in case the consumer has filled a damage claim against the final seller, he/she, by means of the action of recourse, could «[…] ottenere soltanto il rimborso delle somme erogate per compensare il danno consistente nella diminuzione del valore economico del bene cagionata dal difetto di conformità, non invece le somme che sia stato costretto a versare per risarcire gli ulteriori e diversi danni eventualmente derivati dall'inadempimento dell'obbligo di "consegnare beni conformi al contratti"»; contra, E. Bilotti, Art. 1519-quinquies, in Commentario alla disciplina della vendita dei beni di consumo, a cura di L. Garofalo, V. Mannino, E. Moscati, P.M. Vecchi, op. cit., p. 505, where the A. affirms that «[…] mentre sembra del tutto coerente che il venditore finale

possa trasferire sui soggetti "a monte" della catena distributiva i costi della riparazione o della sostituzione del bene viziato, nonché, in caso di risoluzione del contratto, il rimborso delle spese e dei pagamenti legittimamente fatti per il contratto, trattandosi di rimedi connessi al fatto obiettivo della pregiudizievole alterazione di un interesse giuridicamente tutelato, non sembra invece affatto ragionevole consentire al venditore finale di liberarsi delle conseguenze di una sanzione risarcitoria. Il rischio cui si va incontro è quello che tale sanzione finisca per perdere gran parte del suo significato».

[16] See C. Iurilli, Autonomia contrattuale e garanzie nella vendita dei beni di consumo, op. cit., p. 212, where the A. assumes that the recoupment is «[…] da intendersi sia in natura che per equivalente, non essendo ipotizzabile una interpretazione della […] disciplina che, in un certo senso, "costringa" il venditore a dover accettare da parte del produttore o del precedente professionista, un ulteriore bene in sostituzione, a fronte del venir meno di ogni fiducia sul comportamento contrattuale del proprio dante cause»; E. Bilotti, Art. 1519-quinquies, in Commentario alla disciplina della vendita dei beni di consumo, a cura di L. Garofalo, V. Mannino, E. Moscati e P.M. Vecchi, op. cit., p. 503. See, contra, F. Bocchini, La vendita di cosa mobili, cit., p. 513, ove l'Aut. afferma che «Anche con riferimento al regresso, i rimedi satisfattori (per quanto compatibili) sono sovraordinati a quelli redibitori». Cfr., sul tema, A. Zaccaria, G. De Cristofaro, La vendita dei beni di consumo, op. cit., p. 111 ss.; A. Colombi Ciacchi, Art. 1519-quinquies, in Commentario sulla vendita dei beni di consumo, a cura di S. Patti, cit., p. 308. See, on the recoupment throughout an equivalent or a specific performance, I. Pagni, Tutela specifica e tutela per equivalente: situazioni soggettive e rimedi nelle dinamiche dell'impresa, del mercato, del rapporto di lavoro e dell'attività amministrativa, Milano, 2004, p. 7 ff.

[17] See G. Gorla, Considerazioni in tema di garanzia per vizi redibitori, in Riv. trim. dir. e proc. civ., 1957, p. 1276 ff.

[18] See F. Bocchini, La vendita di cose mobili, op. cit., p. 504 ff.

[19] It seems useful to recall that, even before the entry into force of art. 131 Italian Consumer Code, the right of the buyer to recourse against the seller was peacefully recognised, so that he/she could be compensated for any sums he/she had to pay the sub-buyer for defects existing at the time of the first sale. See Cass., 23 ottobre 1959, n. 864, in Giust. civ., 1960, I, p. 1033 ff.

[20] See R. Calvo, Vendita e responsabilità per vizi materiali. II. Il regime delle «garanzie» nelle vendite al consumo, op. cit., p. 327.

[21] See J. Ghestin, C. Jamin, M. Billiau, Traité de droit civil. Les effets du contrat, Paris, 1994, p. 804 ss.; A. Zaccaria, G. De Cristofaro, La vendita dei beni di consumo, op. cit., p. 107.

[22] A. Zaccaria, G. De Cristofaro, La vendita dei beni di consumo, op. cit., p. 107; E. Bilotti, Art. 1519-quinquies, in Commentario alla disciplina della vendita dei beni di consumo, a cura di L. Garofalo, V. Mannino, E. Moscati e P.M. Vecchi, op. cit., p. 500.

[23] R. Calvo, Vendita e responsabilità per vizi materiali. II. Il regime delle «garanzie» nelle vendite al consumo, op. cit., p. 328, where the A. points out that «Non si può del resto escludere che il controllo esercitato dal grande produttore sulla modulistica contrattuale impiegata dal grossista sia talmente invasivo da obbligare quest'ultimo, nei rapporti con i dettaglianti, ad inserire nel corpo delle condizioni generali di contratto la clausola che li costringa a rinunziare ad agire in rivalsa contro il produttore medesimo. […] in situazioni di questo tipo l'intermediario agisce nell'interesse del produttore contro l'ultimo rivenditore».

[24] The effect of extending the discipline of the abuse of economic dependence to the sale of consumer goods would be the possibility of subjecting the pact amending art. 131 Italian

Consumer Code under the control of art. 9 Law n. 192 of 1998. See A. Zaccaria, G. De Cristofaro, La vendita dei beni di consumo, op. cit., p. 117; E. Bilotti, Art. 1519-quinquies, in Commentario alla disciplina della vendita dei beni di consumo, a cura di L. Garofalo, V. Mannino, E. Moscati e P.M. Vecchi, op. cit., p. 511; F. Bocchini, La vendita di cose mobili, op. cit., p. 504 ff.; A. Colombi Ciacchi, Art. 1519-quinquies, in Commentario sulla vendita dei beni di consumo, a cura di S. Patti, op. cit., p. 327; G. Chiappetta, Art. 131, in La vendita dei beni di consumo. Commentario, a cura di C.M. Bianca, in Nuove leggi civ. comm., 2006, p. 512 ff.

[25] R. Calvo, Vendita e responsabilità per vizi materiali. II. Il regime delle «garanzie» nelle vendite al consumo, cit., p. 329, where the A. affirms that «[…] pare perciò sfornito di fondamento l'indirizzo accolto da chi intravede qui gli estremi del contratto a favore del terzo siccome, così ragionando, non ci si avvede che il vantaggio del terzo è per l'appunto raggiuto tramite un negozio di rinunzia»; and, contra, C. Cicala, La dismissione del diritto di regresso, op. cit., p. 145 ff.

[26] See G.B. Ferri, Divagazioni intorno alla direttiva n. 44 del 1999 su taluni aspetti della vendita e delle garanzie dei beni di consumo, op. cit., p. 66.

[27] L. Colantuoni, M. Valcada, Art. 1519-quinquies (Diritto di regresso), in L'acquisto di beni di consumo, a cura di G. Alpa e G. De Nova, Milano, 2002, p. 52, where the A. assumes that «[…] l'esplicito richiamo al principio dell'autonomia contrattuale tra i diversi professionisti presenti nella catena contrattuale […] potrebbe in alcuni casi intaccare l'effettiva operatività del diritto in rivalsa o regresso tra i diversi anelli della catena stessa»; A. Zaccaria, G. De Cristofaro, La vendita dei beni di consumo, cit., p. 117; G. De Cristofaro, La nuova disciplina codicistica dei contratti per la fornitura dei beni mobili conclusi da consumatori con professionisti, cit., p. 1185. See, for an in-depth analysis, O. Lando, International Trends: Requirements concerning the quality of movable goods and remedies for defects under the Principles of European Contract Law, in S. Grundamann, D. Medicus, W. Rolland (Hrsg.), Europäisches Kaufgewährleistungsrecht, Köln-Berlin-Bonn-München, 2000, p. 66 ff.; R. Mongillo, Il difetto di conformità nella vendita di beni di consumo, Napoli, 2006, p. 280 ff.; R. Calvo, Vendita e responsabilità per vizi materiali. II. Il regime delle «garanzie» nelle vendite al consumo, op. cit., p. 329.

[28] In German law, for example, the principle of defence from heteronomy contract is explicitly risen to constitutional significance, because it is understood as an explication of the fundamental right of freedom of action provided by art. 2 , paragraph 1, Grundgesetz. See A. Colombi Ciacchi, Le fideiussioni rovinose: un nuovo campo di applicazione delle clausole generali del BGB a tutela della parte debole, in Annuario di diritto tedesco 1999, a cura di S. Patti, Milano, 2000, p. 149 ff. In Germany, the right of recourse is, not surprisingly, strongly limited, so that the § 478, paragraph 4 BGB provides that the pacts in derogation from the three preceding paragraphs – which govern the conditions of action of recourse, if they are disadvantageous for the entrepreneur-buyer – can be initiate by the vendor-supplier only when the loss or limitation of the right of recourse is compensated by an equivalent benefit (gleichwertriger Ausgleich). Thus, this rule, on the one hand, does not allow any abuse of freedom to renounce the recourse – this profile was already considered by §§ 9, 11 AGB-Gesetz that protected the weaker party, although entrepreneur, if the abuse steamed from general contractual conditions –, and, on the other, it requires also the equivalence between the benefit and the loss of compensatory advantage coming from the right of recourse.

[29] See R. Mongillo, Il difetto di conformità nella vendita di beni di consumo, op. cit., p. 264 ff. and p. 268, where the A. affirms that «Sembra, in definitiva, che la conoscenza o la conoscibilità

del difetto da parte del venditore finale rilevi, diversamente che nella disciplina tradizionale delle azioni edilizie, non per escludere il diritto di agire nei confronti del proprio dante causa, bensì per valutare le rispettive responsabilità di produttori e distributori tenendo conto dei loro diversi ruoli al fine dell'immissione dei prodotti sul mercato e della circolazione»; P. Paganelli, Art. 1519-quinquies, in La vendita dei beni di consumo. Commentario breve agli artt. 1519-bis ss. c.c., a cura di C. Berti, op. cit., p. 69.

[30] R. Calvo, Vendita e responsabilità per vizi materiali. II. Il regime delle «garanzie» nelle vendite al consumo, op. cit., p. 332.

[31] R. Calvo, Vendita e responsabilità per vizi materiali. II. Il regime delle «garanzie» nelle vendite al consumo, cit., p. 333, where the A. assumes that «Siamo oramai prossimi a delineare in capo al concedente un obbligo di protezione del prestigio del marchio, al fine di non pregiudicare, per mezzo di condotte negligenti o malaccorte, la capacità del marchio stesso di catturare l'attenzione del consumatore». See, furthermore, O. Cagnasso, Scambio e collaborazione quali «elementi» fondamentali del contratto di concessione di vendita, in Giur. it., p. 1653.

[32] Cass., 22 febbraio 1999, n. 1469, in Giur. it., 1999, fasc. 8-9, p. 1653 ss., with note of O. Cagnasso, Scambio e collaborazione quali «elementi» fondamentali del contratto di concessione di vendita, where the A. affirms that «[…] è connaturato con le caratteristiche proprie della concessione di vendita l'obbligo, per il concedente, di non pregiudicare con la propria condotta nell'esecuzione del contratto il prestigio del proprio marchio, sì da evitare che il concessionario possa subire danni economici. E tale pregiudizio può indubbiamente verificarsi per la reiterata fornitura di prodotti affetti da vizi di produzione, che, pregiudicando l'immagine del marchio, si risolva in un fatto negativo per la produttività dell'impresa commerciale del concessionario e, conseguentemente, per la sua redditività».

[33] See A. Zaccaria, G. De Cristofaro, La vendita dei beni di consumo, op. cit., p. 108; E. Moscati, Art. 1519-quinquies, in Commentario alla disciplina della vendita dei beni di consumo, a cura di L. Garofalo, V. Mannino, E. Moscati e P.M. Vecchi, op. cit., p. 499.

[34] See F.D. Busnelli, L'obbligazione soggettivamente complessa, Milano, 1974, p. 60, 85 ff. e 451; C.M. Mazzoni, Le obbligazioni solidali e indivisibili, in Obbligazioni e contratti, in Trattato di diritto privato, diretto da P. Rescigno, IX, t. I, p. 731 ff.

[35] R. Calvo, Vendita e responsabilità per vizi materiali. II. Il regime delle «garanzie» nelle vendite al consumo, op. cit., p. 322, where the A., in footnote 5, points out that «Più esatta di rivela la locuzione "diritto di rivalsa". Ciò in quanto il diritto di regresso, a stretto rigore, pare presupporre la responsabilità solidale tra i coobbligati, che nel caso di specie manca, non essendo legittimato il consumatore ad agire – sulla base del difetto di conformità – contro il produttore o altro rivenditore intermedio diverso dall'immediato dante causa»; G. De Nova, La proposta di direttiva, op. cit., p. 28; A. Colombi Ciacchi, Art. 1519-quinquies (Diritto di regresso), in Commentario sulla vendita dei beni di consumo, a cura di S. Patti, op. cit., p. 292 ff.; E. Bilotti, Art. 1519-quinquies, in Commentario alla disciplina della vendita dei beni di consumo, a cura di L. Garofalo, V. Mannino, E. Moscati, P.M. Vecchi, op. cit., p. 484 ff.; C. Cicala, La dismissione del diritto di regresso, in Aspetti della vendita dei beni di consumo, a cura di F. Addis, op. cit., p. 132; E. Moscati, Note introduttive, in Commentario alla disciplina della vendita dei beni di consumo, a cura di L. Garofalo, V. Mannino, E. Moscati, P.M. Vecchi, op. cit., p. 464 ff. See, in case law, ex multis, Cass., 11 agosto 1990, n. 8202.

[36] The main features of the so called obligations subjectively complex are three, such as 1. the number of subjects composing the same part of the relation; 2. the performance intrinsically and

originally only-one and identical for the various debtors; 3. the indivisibility of the cause from which steams the relation, or, in other words, the indivisibility of the legal fact from which steams the contractual bond. See A. Ciacchi Colombi, Art. 1519-quinquies, in Commentario sulla vendita dei beni di consumo, a cura di S. Patti, op. cit., p. 292 ff.
[37] See D. Rubino, Delle obbligazioni. Artt. 1285-1320 c.c., in Commentario al cod. civ., a cura di V. Scialoja e G. Branca, Bologna-Roma, 1957, p. 130.
[38] C. Iurilli, Autonomia contrattuale e garanzie nella vendita dei beni di consumo, op. cit., 217 ff., where the A. affirms that «[…] alla luce dell'ampiezza della figura delle obbligazioni solidali e dei numerosi istituti che ad essa sono stati ricondotti (le c.d. obbligazioni solidali spurie), la fattispecie di cui all'art. 1519-quinquies c.c. (author's note, now art. 131 Italian Consumer Code) potrebbe essere ricondotta ad altre ipotesi di rapporti obbligatori, sussumibili nella citata categoria, in quanto finalizzati ad assicurare una maggiore tutela alle parti del rapporto obbligatorio: si pensi, ad esempio, alla previsione di cui all'art. 54, l. 14 dicembre 1933, n. 1669 (la c.d. legge cambiaria), ove ex lege si individua espressamente una obbligazione solidale esistente tra il traente, l'accettante, il girante e l'avallante nei confronti del portatore del titolo. Ma sul punto, parte della dottrina rilevava che la solidarietà, più che effetto diretto della struttura del rapporto, avrebbe trovato la sua ratio in una maggiore esigenza di tutela e di rafforzamento del titolo astratto». See, furthermore, A. Ravazzoni, voce Regresso, in Novissimo dig. it., XV, Torino, 1968, p. 358.
[39] See F.M. Andreani, voce Regresso (azione di), in Enc. dir., XXXIX, Milano, 1988, p. 704, where the A. defines "recourse" as «[…] l'istituto mediante il quale il legislatore persegue l'obiettivo di redistribuire un sacrificio patrimoniale fra una pluralità di soggetti a vario titolo cointeressati»; A. Ravazzoni, voce Regresso, op. cit., p. 356, where the A. describe "recourse" as «[…] il diritto e la conseguente azione riconosciuta a colui che abbia adempiuto l'obbligazione, di riversare in tutto o in parte su altri le conseguenze dell'inadempimento»; G. Sicchiero, voce Regresso, in Dig. civ., XVI, Torino, 1997, p. 549 ff.
[40] D. Rubino, Delle obbligazioni. Artt. 1285-1320 c.c., in Commentario al cod. civ., op. cit., p. 193; G.F. Campobasso, voce Regresso (azione di), in Enc. giur., XXVI, Roma, 1991, p. 1 ff.
[41] The choice of the Spanish legislature was, however, in the way to pave the way to the direct action of the consumer against the producer, against whom, under art. 10 Ley de Garantías en la venta de bienes de consumo no. 23 of 2003, he/she could request the repair or replacement of dissimilar, where it is impossible or very costly to act against his/her predecessor in title. The consumer can use a remedy usable only when it is justified by the stringent requirements set out by law. See M. Vérgez, La Protección del Consumidor en la Ley de Garantías en la Vente de Bienes de Consumo, Cizur Menor, 2004, p. 117 ff.; R.M. Méndez, A.E. Vilalta, Garantías y acciones derivadas de las ventas de bienes de consumo, Barcelona, 2004, p. 14 ff.; P. Represa Polo, Los derechos del consumidor ante el incumplimiento de la obligación de conformidad, in S. Díaz Alabart, Garantías en la venta de bienes de consumo (Ley 23/2003, de 10 de julio), Madrid, 2004, p. 174 ff.; D. Mezquita García-Granero, Los plazos en la compraventa de consumo. Estudio comparativo de la cuestión en el derecho español y portugués, in Rev. der. priv., 2005, p. 113 ff.; F.J. Sánchez Calero, La obligación de saneamiento por vicios o gravámenes ocultos y la ley de garantías en la venta de bienes de consumo (Ley 23/2003, de 10 de julio), in La compraventa: ley de garantías, Madrid, 2006, p. 79 ff.

In Portugal, the legislative option was even more radical, because art. 6, paragraph 1, of the Decreto-lei no. 67 of 2003 recognizes the consumer freedom to choose between action against his predecessor in title and action against the manufacturer, from who he/she may require repair or

replacement of a dissimilar good. See D. Mezquita García-Granero, Los plazos en la compraventa de consumo. Estudio comparativo de la cuestión en el derecho español y portugués, op. cit., 99 ff.; J. Calvão Da Silva, Compra y venda de coisas defeituosas, Coimbra, 2006, p. 174 ff. In Latvia, then, according to art. 28, paragraph 1, of the Consumer Rights Protection Law, as well as in Lithuania, in presence of a defect, the consumer can act also against the manufacturer. In Slovenia, although generally the producer can not be directly sued by the consumer for any lack of conformity, with reference to an extensive list of so called technological goods it is provided a parallel system of conventional guarantees, lasting one year at minimum, which allows him/her to report the defect both to the producer and the retailer.

[42] T. Pasquino, Art. 1469-quinquies c.c., in Le calusole vessatorie nei contratti dei consumatori, in Commentario agli artt. 1469-bis – 1469-sexies c.c., a cura di G. Alpa e S. Patti, Milano, 1997, p. 729 ff.

[43] G. Alpa¸ Autonomia privata e "garanzie" commerciali, in Vita not., 2002, p. 15; A. Zaccaria, Riflessioni circa l'attuazione della direttiva n. 1999/44/CE «su taluni aspetti delle vendita e delle garanzie dei beni di consumo», op. cit., p. 269.

[44] According to art. 1372 Italian Civil Code, in the sales chain characterized by a sequence of transaction with the same good, the principle of relativity of the contract prevents the sub-buyer to act for hidden defects directly against the first seller. See, for example, Cass., 28 luglio 1986, n. 4833, in Nuova giur. civ. comm., 1987, I, p. 241 ff., with note of M. Moretti, where the A. affirms that «[…] nelle vendite c.d. "a catena" ciascuno dei successivi acquirenti agisce in materia di garanzia per vizi, in regresso contro l'immediato dante causa in forza del proprio e distinto rapporto contrattuale, senza che fra l'azione principale ed il rapporto obbligatorio che sta alla base della successiva domanda di regresso si costituisca alcun vincolo di interdipendenza». See, contra, Cass., 15 dicembre 1969, n. 627, in Riv. giur. circ. trasp., 1972, p. 144 ss., with note of F. Molfese; Cass., 22 febbraio 2000, n. 1960, where the Italian Supreme court states that « in caso di vendite successive dello stesso oggetto, qualora uno dei venditori venga meno al suo obbligo primario, nascente dalla norma ex art. 1477 c.c., di consegnare i titoli e i documenti relativi alla proprietà e all'uso della cosa venduta, il danno si ripercuote su tutta la serie dei trasferimenti successivi, e il contraente in buona fede è legittimato a pretendere il risarcimento nei confronti del primo venditore inadempiente, nonostante l'autonomia dei singoli contratti, sulla base dei rapporti obbligatori di garanzia che legano a catena i vari contraenti».

See, for further in-depth analysis, C.M. Bianca, La vendita e la permuta, op. cit., p. 945 ff.; R. Calvo, Patologie contrattuali e vendite a catena, op. cit., p. 1477 ff.

[45] See C. Castronovo, Problema e sistema nel danno da prodotti, op. cit., p. 480.

[46] See S. Whittaker, Liability for Products, Oxford, 2005, p. 96 ff.

[47] See, for an extensive analysis of recourse that, in case of unfair contractual clause, includes any professional exposed to a contractual duty, F. Di Marzio, Clausole vessatorie nel contratto tra professionista e consumatore – Prime riflessioni sulla previsione generale di vessatorietà, in Giust. civ., 1996, II, p. 513 ff.; G. Romagnoli, Clausole vessatorie e contratti d'impresa, Padova, 1997, p. 156.

[48] See, further, G. Cassano, Professionista debole e clausole vessatorie (a proposito dell'azione di regresso di cui all'art. 1469-quinquies, 4° comma, c.c.), in Danno e resp., 2000, p. 587 ff.

[49] See M.G. Falzone Calvisi, Garanzie legali della vendita: quale riforma?, op. cit., p. 453; A. Colombi Ciacchi, Art. 1519-quinquies, in Commentario sulla vendita dei beni di consumo, a cura di S. Patti, op. cit., p. 328.

[50] See G. De Nova (a cura di), La subfornitura, Milano, 1998; M. Granieri, Subfornitura industriale: rilfessi in ambito distributivo e concorrenziale, in Discipl. comm., 1999, p. 61 ff.; G. Alpa, R. Leccese, La disciplina della subfornitura di cui alla l. 18 giugno 1998, n. 192¸ in Obbligazioni e contratti, in Trattato di diritto privato, diretto da P. Rescigno, Torino, 2000, p. 213, where the subfornitura is considered as a «[…] strumento di riequilibrio contrattuale da applicarsi in situazioni di relativa debolezza di un'impresa rispetto ad un'altra […]».The discipline of subfornitura has thus represented an important innovation in the Italian legal system, especially in an economic perspective. Indeed, it has transformed in regulation a phenomenon that already characterized the Italian organization and that was worth to protect and valorise.
[51] See IV.A. – 6:101 DCFR, which, defining the «consumer goods guarantee», seems to extend its application to the subsequent professional in the distributive chain. This rules provides, indeeed, that such a kind of guarantee is applicable both «(a) by a producer or a person in later links of the business chain», and «(b) by the seller in addition to the seller's obligations as seller of the goods». The last hypothesis, therefore, could also be considered as if the previous professional of the distributional chain (seller) guarantees the subsequent professional of the same distribution chain (buyers, although not formally consumer), who could consequently enjoys the rights provided in a contractual clause shaped, originally and formally, in favour of the consumer.
[52] Because the Italian Consumer Code has adopted an approach that enhances the act of consumption, it helps to resolve the uncertainties related to the applicability of the rules concerning the protection of consumers in favour of the same professional-consumer. The expression "per scopi estranei all'attività imprenditoriale o eventualmente svolta" – not surprisingly – could be considered either as if the act of consumption should not involve a specific knowledge of the self-employed, or as if it should not be contemplated among those that are included in the business risk.
[53] Cass. 3ème, 4 novembre 1971, in Bull. civ., III, n. 535; Cass. com., 19 mars 1974, in Bull. civ., IV, n. 102, and in Dalloz, 1975, p. 628, with note of P. Malinvaude, in JCP, 1975, II, n. 17941, with note of J. Ghestin.
[54] See, ex alii, Calvo R., L'attuazione della direttiva n. 44 del 1999: una chance per la revisione in senso unitario della disciplina sulle garanzie e rimedi nella vendita, op. cit., p. 475 ff.; A. Pinna, I termini nella disciplina delle garanzie e la direttiva 1999/44/CE sulla vendita dei beni di consumo, op. cit., 2000, p. 532 ff.; A. Zaccaria, G. De Cristofaro, La vendita dei beni di consumo, op. cit., p. 109; G. De Cristofaro, La nuova disciplina codicistica dei contratti per la fornitura dei beni mobili conclusi da consumatori con professionisti, op. cit., p. 1184, note 46; E. Bilotti, Art. 1519-quinquies, in Commentario alla disciplina della vendita dei beni di consumo, a cura di L. Garofalo, V. Mannino, E. Moscati e P.M. Vecchi, op. cit., p. 508, where the A. underlines that «Una simile scelta, del resto, è pienamente conforme ai principi (art. 2935 c.c.) ed è l'unica coerente con la qualificazione del regresso del venditore finale quale pretesa autonoma di rimborso. Una pretesa di rimborso, infatti, può essere fatta valere soltanto dopo che le somme di cui si chiede la restituzione siano state effettivamente spese; prima di quel momento, invece, la decorrenza del termine di prescrizione sarebbe priva di qualsiasi significato»; finally, F. Bocchini, La vendita di cose mobili, op. cit., p. 516 ff.
[55] To consider the moment in which the final seller has fulfilled the remedies invoked by the consumer as the starting point of the prescription period of the right of recourse means that the previous links in the distribution chain can not objectively and clearly forecast a reasonable time after which they can not be accountable to the final seller anymore. These professionals, in fact,

may not know either if or when the final seller will sell consumers the purchased goods and, therefore, when the latter will be able to eventually enforce the remedies for lack of conformity towards their assignor. As a consequence the condition of subjection to the claim for reimbursement of the final seller will persist for a period whose duration is practically not predictable by the debtors of the claim of recourse. Unlike the Italian one, the German legislature has considered such a problem, setting a term of five years "from the moment in which the supplier has delivered the thing to the entrepreneur" (§ 479 , II , BGB), and, thus , avoiding the risk, which would be poorly tolerated by the market, to make absolutely uncertain prescription period of the right of recourse. See F. Bortolotti, Azione di regresso e vendite a catena, in Le garanzie nella vendita dei beni d consumo, a cura di M. Bin e A. Luminoso, in Tratt. di dir. comm. e di dir. pubbl. dell'econ., diretto da F. Galgano, XXXI, Padova, 2003, p. 484.
[56] See, on the consequences of the short-termism previewed art. 1495 Italian Civil Code, Cass, 21 novembre 1979, n. 6063, in Giur. it., 1980, I, 1, c. 1068 ff., with note of M. Garutti, and in Giust. civ., 1980, I, p. 324 ff.

[57] See E. Bilotti, Art. 1519-quinquies, in Commentario alla disciplina della vendita dei beni di consumo, a cura di L. Garofalo, V. Mannino, E. Moscati e P.M. Vecchi, op. cit., p. 485 ff.
[58] See, in this sense, DCFR, where the Contents of the DCFR, point 18, Promotion of solidarity and social responsibility, affirms that «[…] the promotion of solidarity and social responsibility is not absent from the private rules in the DFCR. In the contractual context the world "solidarity" is often used to mean loyalty or security».
[59] Reference is made the «nesso eziologico tra condotta attiva od omissiva del produttore o fornitore e difetto di conformità trascinantesi nei vari passaggi intermedia della filiera distributiva». R. Calvo, Vendita e responsabilità per vizi materiali. II. Il regime delle «garanzie» nelle vendite al consumo, op. cit., p. 344.
[60] See, in this sense, A. Zaccaria, G. De Cristofaro, La vendita dei beni di consumo, cit., 107; A. Luminoso, Chiose in chiaroscuro in margine al d. legisl. n. 24 del 2002, cit., p. 47; P. Paganelli, Art. 1519-quinquies, in La vendita dei beni di consumo. Commentario breve agli artt. 1519-bis ss. c.c., a cura di C. Berti, cit., p. 68.
[61] See E. Gabrielli, Il contratto e le sue classificazioni, in Riv. dir. civ., 1997, p. 716, where the A. affrims that «Le variazioni dello schema legale […] non sembrano rappresentare altro che i riflessi riportati sulla delineazione formale dello schema, delle modificazioni della funzione. Quando queste modificazioni non assumono un'entità tale da produrre una vera e propria alterazione causale dell'atto di autonomia, esse saranno compatibili con l'originario schema tipico e non determineranno, di conseguenza, una deroga dalla sua disciplina. Non altrettanto potrà, invece, avvenire per le ipotesi in cui, rispetto allo schema tipico, non sia ravvisabile una variazione, ma una vera e propria alterazione. […] Il limite, oltre il quale la disciplina del contratto non può essere derogata senza alterare il tipo legale, può essere appurato e segnato solo con riferimento al significato dell'operazione economica espressa dal contratto tipico». See, further, C.M. Bianca, Diritto civile. 3. Il contratto, Milano, 2000, p. 476 ff.; G. De Nova, La scelta sistematica del legislatore italiano, in L'acquisto di beni di consumo. D. lgs. 2 febbraio 2002, n. 24, a cura di G. De Nova, Milano, 2002, p. 5; A. Luminoso, Chiose in chiaroscuro in margine al d. legisl. n. 24 del 2002, in Le garanzie nella vendita dei beni di consumo, a cura di M. Bin e A. Luminoso, in Trattato dir. comm. e dir. pubbl. dell'economia, diretto da F. Galgano, XXXI, Padova, 2003, p. 17 ff.; R. Calvo, Vendita e responsabilità per vizi materiali. II. Il regime delle «garanzie» nelle vendite al consumo, Napoli, 2007, p. 12, where the A., making direct reference to the consumer sale, affirms that «[…]

la nuova disciplina informante di sé il "sottotipo" non solo non è d'ostacolo all'applicazione delle regole – in quanto compatibili – plasmanti il soprastante tipo contrattuale, ma negli stessi termini presuppone la disciplina di diritto comune valendo qui il principio di specialità».

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