Hard Cases

The Worthiness of Claims Made Clauses in Liability Insurance Contracts

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Abstract

The Italian Supreme Court has ruled on the worthiness control of clauses in insurance contracts and particularly of the claims made clauses contained in insurance policies against professional liability. This essay examines the conclusions of the Court with some considerations about the issue of the adequacy of the insurance products in respect to the needs of policyholders.

I. The Decision of the United Sections of the Court of Cassation

The Italian Supreme Court of Cassation in a nine-judge panel known as the 'united sections'[1] has ruled on the validity of claims made clauses in liability insurance contracts.[2]

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[1] Cases brought to the Italian Supreme Court are normally heard by a panel of five judges. In more complex cases, especially those concerning compounded matters of interpretation, an extended panel of nine judges ('united sections' of the Supreme Court) decides the case.

[2] Corte di Cassazione-Sezioni Unite 6 May 2016 no 9140, with the comment of E. Cosconati, 'La clausola c.d. *claims made* mista o impura: valida, non vessatoria, ma a rischio nullità per difetto di meritevolezza' *La Rivista Nel diritto*, 844 (2016); with the comment of R. Pardolesi, 'Le sezioni unite sulla clausola *claims made*: a capofitto nella tempesta perfetta' *Foro italiano*, I, 2026 (2016); A. Palmieri, 'Polizze *claims made*: bandito il controllo di vessatorietà ex art. 1341 c.c.' *Foro italiano*, I, 2032 (2016) and B. Tassone, 'Le clausole *claims made* al vaglio delle sezioni unite: gran finale di stagione o prodromo di una nuova serie?' *Foro italiano*, I, 2036 (2016).

On the worthiness of claims made clauses, taking in to account the concrete interest of the insured party, G. Volpe Putzolu, 'Assicurazione r.c. dei professionisti e clausola claims made' *Diritto del mercato assicurativo e finanziario*, forthcoming (2016); Id, 'La clausola *claims made* – Rischio e sinistro nell'assicurazione r.c.' *Assicurazioni*, 3 (2010). On the validity of claims made clauses see also M. Gazzara, 'L'assicurazione di responsabilità civile professionale' (Napoli: Edizioni Scientifiche Italiane, 2016), 88; P. Gaggero, 'Validità ed efficacia dell'assicurazione della responsabilità civile *claims made*' *Contratto e impresa*, 401 (2013); S. Monticelli, 'Responsabilità dei professionisti: la clausola *claims made* tra abuso del diritto ed immeritevolezza' *Danno e responsabilità*, 701 (2013); G. Volpe Putzolu, 'La clausola *claims made* – Rischio e sinistro nell'assicurazione r.c.' *Assicurazioni*, 3 (2010).

The principle affirmed by Corte di Cassazione-Sezioni Unite has been applied by Tribunale di Milano 17 June 2016, *Redazione Giuffré* (2016).

In civil liability insurance there are essentially two pricing models: The loss occurrence formula, where the covered event is verification of the damaging event, or the claims made formula, where the covered event is the victim's claim. In the case of policies with a claims made clause, the insurance coverage includes all claims that occurred during the duration of the policy; in the case of policies with a loss occurrence clause the coverage includes all the claims for compensation of the damages that occurred during the duration of the policy.

These two models are based on the different liability insurance needs: if there could be a significant lapse of time between the occurrence of the damaging event and the claim (as in case of medical malpractice), it is preferable to use the claims made formula; otherwise (as in cases of general liability insurance) the loss occurrence formula will be preferable. The two models are not always clearly distinct, as it is possible to have a so called impure claims made clause; pure claims made clauses provide for compensation of all damage claims received during the duration of the contract, regardless of the time of verification of the damaging event, while impure claims made clauses provide for compensation of all damage claims received during the duration of the contract, provided that the time of verification of the damaging event is in some earlier period with respect to the conclusion of the contract.[3]

The Court affirmed that Art 1917 of the Civil Code on liability insurance recognizes the loss occurrence formula as the legal formula. This article provides that:

A judgment after the Cassation Court 2016 on claims made has been held by the Tribunale di Bologna 18 August 2016, *Foro italiano*, 1605 (2016), affirming that the clause is valid. The discipline on unfair condition in consumers contract is not applicable because the actor is a professional; the clause doesn't derogate to an imperative norm nor to the principle of good faith. This judgement seems to follow past judgements of the Supreme Court: Corte di Cassazione 10 November 2015 no 22891, *Responsabilità civile e previdenza*, 528 (2016); Corte di Cassazione 17 February 2014 no 3622, *Giustizia Civile Massimario* (2014); Corte di Cassazione 22 March 2013 no 7273, *Guida al diritto* 22, 57 (2013). Moreover, the Tribunal of Bologna affirms that the nullity profiles are not attached and proved, especially in the light of the amount of the premium, in relation to the insurance coverage limit (five hundred seventeen euros) and to the coverage including also events occurred before the stipulation.

[3] Claims made clauses are well diffused not only in case of professional liability insurance but also in other cases, like in hypothesis of coverage of environmental liability. In such case generally along the length of time between the occurrence of the cause of the damage and the occurrence of its consequences, the coverage is technically possible only with the claims made formula. Cf M.A. Clarke, *The Law of Insurance Contracts* (London-Hong Kong: Informa Law, 3rd ed, 1997), 429.

Even in Germany the introduction of such clauses, and then the *Festellungsprinzip* regarding identification of covered claims during the period of operation of the insurance coverage, is proposed with particular reference to *Umwelthaftpflichtversicherung*. See in particular P. Schimikowski, *Umwelthaftungsrecht und Umwelthaftpflichtversicherung* (Karlsruhe: Verlag Versicherungswirtsch, 1998), 231-234.

> 'In insurance of civil liability the insurer is obliged to indemnify the insured for the incidents during the insurance period he has to pay to a third party, depending on the responsibilities deduced in the contract'.

Following this principle the Cassation Court affirmed that:

1. Pure claims made clauses, covering damage claims received in the period of effectiveness of the guarantee, regardless of when the damaging event occurred, introduce a new model of insurance contract different from the one in Art 1917 of the Civil Code on liability insurance. The new model could be called insurance for 'claimed responsibility'.

2. Impure claims made clauses provide insurance coverage with a backdating of the guarantee. They do not affect the cause of the contract, but they are subject to the judgment of worthiness according to Art 1322.[4] This

[4] The word *meritevole* (worthy in English) comes from the Latin *mereri* which means 'to make himself worthy of something'. Control of 'worthiness' in Italian law is found in various regulatory assumptions. Recall the Art 1322 which provides that 'The parties may also enter into contracts that do not belong to the types having a particular discipline, provided they are intended to achieve the interests worthy of protection under the law', and the Art 2645-*ter* entitled 'Transcription of acts of destination for the realization of interests worthy of protection related to people with disabilities, to public authorities, or to other organizations or individuals.' The assessment of legal acts in Italy is subject both to the judgment of legality and to the judgment of worthiness of protection. This is accomplished on the basis of the fundamental principles of and values that characterize the legal system (P. Perlingieri and P. Femia, 'Nozioni introduttive e princípi fondamentali', in P. Perlingieri et al, *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2014), 73). It means that a lawful act may be invalid as not worthy of protection. According to Art 1322 the parties are free to conclude contracts belonging to different types from those indicated by the law, provided they are in pursuit of interest that deserve protection.

A past interpretation of the norm assumed that the control of worthiness take place only in case of atypical contracts (See R. Sacco, 'Interesse meritevole di tutela' *Digesto (discipline privatistiche) sezione civile* (Torino: Utet Giuridica 2010), 783). On the contrary, on the basis of an interpretation that seems to be followed also by the present United Section Cassation Court, worthiness control is a way to assess the social value of the content of the contract in concrete (E. La Rosa, *Percorsi della causa nel Sistema* (Torino: Giappichelli 2014), 74; M. Costanza, 'Meritevolezza degli interessi ed equilibrio contrattuale' *Contratto e Impresa,* 423 (2008); P. Perlingieri, 'In tema di tipicità e atipicità nei contratti', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 395; Id, *Il diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 1984), 235; M. Nuzzo, *Utilità sociale e autonomia privata* (Milano: Giuffrè, 1974), 105.

The question of the worthiness and proportionality of the contractual settlement lies on a different plane from the control of legality and regards the inclusion of the all private provisions included the Constitutional norms. See E. Scoditti, 'Il contratto tra legalità e ragionevolezza' *Foro italiano*, V, 417 (2015); N. Irti, 'La crisi della fattispecie' *Rivista di diritto processuale*, 43 (2014); Id, 'Un diritto incalcolabile' *Rivista di diritto civile*, I, 11 (2015); S. Pagliantini, 'I derivati tra meritevolezza dell'interesse ed effettività della tutela: *quid noctis*?' *Europa e diritto privato*, 383 (2015); M. Barcellona, 'I derivati e la causa negoziale – L'«azzardo» oltre la scommessa: i derivati speculativi, l'eccezione di gioco e il vaglio del giudizio di meritevolezza' *Contratto e impresa*, 571 and 588 (2015); G. De Nova, 'I singoli contratti: dal titolo terzo del libro quarto del codice civile alla disciplina attuale'

verification will be conducted by the lower courts (Judge of peace, Tribunal, Court of Appeal). If the clause is found not to be worthy, then the judge can replace the claims made clause with a loss occurrence clause that in the opinion of the court would correspond to the legal model outlined by Art 1917.

The United Sections Court seems to focus on the existence of a legal model of liability insurance contract based on the loss occurrence formula.

Moreover the Court recognizes the integration power of a judicial order to cover the gap arising from the declaration of the nullity of the contract.

Upon finding a lack of worthiness, the lower court will apply the statutory scheme for insurance contract liabilities and substitute a loss occurrence formula for the claims made formula. According to the Court's opinion Art 1419 of the Civil Code and Art 2 of the Constitution allow the courts to 'intervene also in amending or integrative way on negotiating status when this is necessary to ensure fair balance between the interests of the parties'.

II. Some Past Judgments

The Supreme Court, in its judgment of 2005,[5] had already expressed

Cinquant'anni del codice civile, atti del convegno di Milano 4-6 giugno 1991 (Milano: Giuffrè, 1993), I, 236; P. Barcellona, 'Note critiche in tema di rapporti fra negozio e giusta causa dell'attribuzione' *Rivista trimestrale di diritto e procedura civile*, 56 (1965); Id, 'Sui controlli della libertà contrattuale' *Rivista di diritto civile,* II, 596 (1965); R. Scognamiglio, 'Fatto giuridico e fattispecie complessa - Considerazioni critiche intorno alla dinamica del diritto' *Rivista trimestrale di diritto e procedura civile*, 335 (1954).

After the introduction of Art 2645-*ter* the discussion on 'worthiness' has been huge. This norm provides the registration of acts of destination for the realization of interest worthy of protection according to Art 1322. See particularly G. Perlingieri, 'Il controllo di «meritevolezza» degli atti di destinazione *ex* art. 2645 *ter* c.c.' *Notariato*, 11 (2014); G. Guizzi, 'Le destinazioni patrimoniali e nuovi interessi: il problema della meritevolezza nell'esperienza privatistica' *Diritto e giurisprudenza*, 350 (2011); M. Bianca, 'Alcune riflessioni sul concetto di meritevolezza degli interessi' *Rivista di diritto civile*, I, 789 (2011).

[5] See Corte di Cassazione 15 March 2005 no 5624, with the comment of R. Simone, 'Assicurazione *claims made*, sinistro (latente) e dilatazione (temporale) della responsabilità civile' and C. Lanzani, 'Clausole *claims made*: legittime, ma vessatorie' *Danno e responsabilità*, 1071 (2005); with the comment of S. Landini, 'La clausola *claims made* è vessatoria?' *Assicurazioni*, 3 (2006). *Contra* Tribunale of Milano 18 March 2010, with the comment of I. Partenza, 'Assicurazione di rc delle aziende ospedaliere e clausole *claims made*: un equivoco senza fine' *Assicurazioni*, 673 (2010); with the comment of C. Lanzani, 'La travagliata storia delle clausole *claims made*: le incertezze continuano' *Nuova giurisprudenza civile commentata*, I, 857 (2010). In other cases judges considered insurance contract with claims made clause lacking of the typical function of liability insurance contract: Tribunale di Genova 8 April 2008, with the comment of I. Carassale , 'La nullità della clausola *claims made* nel contratto di assicurazione della responsabilità civile' *Danno e responsabilità*, 103 (2009); Tribunale di Genova 23 January 2012, *Assicurazioni*, 177 (2012): 'the inclusion in the process of insurance relationship of a claims-made clause implies a reduction of the guarantee: if such modification is not accompanied by a different equilibrium structure synallagmatic contract (eg reduced premium, waives the right of withdrawal, extension warranty on other bases, general extension of the time), it is causeless and so void.'

doubts about claims made clauses, both pure and impure. Taking up the notion of 'fact' as in Art 1917 the Supreme Court noted that a person who wants to be insured for his professional responsibilities normally takes into account his future ability to cause harm to others. In case of a claims made clause, given the variability of time that can elapse between the loss and the claim, it is difficult for the insured party to assess whether or not the contract covers all possible losses.

It is possible, as happened in the case in question in 2005, that damage caused by the policyholder in the insurance period may not be covered under the claims made formula because the third party claim is made outside of the period of coverage.

The Court declined to adopt the defensive argument assumed by the insurance company: that the claims made clause does not necessarily run contrary to the interests of the insured party, as when the damage occurs prior to the conclusion of the insurance contract, but the third party claim is made within the period of coverage.

The Supreme Court noted in 2005 that in any case the coverage of previous accidents is excluded because the insured has to declare that he is not aware of compensable claims that have already occurred. In the case of intentional or reckless reticence (or false declaration) according to Art 1892, the insurance contract is voidable.[6] In the case of mild negligence the contract is valid but the insurer has the right to withdraw the contract as stated by Art 1893 of the Civil Code.

The Supreme Court in 2005 seemed to re-examine the old question of the retroactivity of the policy against civil liability in which a claims made clause is inserted. If the 'fact', as referenced in Art 1917, is the harmful event, then the provision of coverage for 'facts' prior to the conclusion of the contract constitutes retroactive coverage, in violation of Art 1895, which states that an insurance contract lacking the existence of a risk at the time of conclusion is void. A retroactive insurance contract is void because, there are no risks related to an event that has not yet occurred.[7]

[6] Art 1892 of the Italian Civil Code (*codice civile*) – named Misrepresentations or fraudulent or grossly negligent failure in disclose – provides that 'If the contracting party, fraudulently or through gross negligence, misrepresents or fails to disclose circumstances which, if known to the insurer, would have caused him to withhold his consent to the contract, or to withhold his consent on the same conditions, the insurer can annul the contract. The insurer is entitled to the premiums covering the period of insurance running at the time when he petitioned for annulment of the contract, and in all cases to the premiums agreed upon for the first year. If the loss occurs before the expiration of the period indicated in the preceding paragraph, the insurer is not bound to pay the sum insured.' See M. Bin 'Informazione e contratto di assicurazione' *Rivista trimestrale di diritto e procedura civile*, 726 (1993); A. De Cupis, 'Precisazioni sulla buona fede nell'assicurazione' *Diritto e giurisprudenza*, 625 (1971).

[7] G. Scalfi, 'I contratti di assicurazione: l'assicurazione danni', in Id et al, *Il diritto delle assicurazioni* (Torino: Giappichelli, 1991), 52; G. De Gregorio and A. Fanelli, *Diritto delle assicurazioni: il contratto di assicurazione* (Milano: Giuffrè, 1987), II, 80.

However, if the 'fact' in question is the term identified in the policy by the contracting parties on the basis of their private autonomy, the fact could be either the claim or the harmful act.[8] On this reading there is no legal formula and the 'fact' could be either the loss or the claim.

III. A Comparative View

This is not only an Italian problem. The French Court of Cassation has also examined the idea that the covered fact in liability insurance is identified with the loss or damage, and in 1990 declared unlawful and therefore void the clause in liability insurance contracts limiting the time of the insurance guarantee according to the claims made formula.[9]

Recently the claims made clause was rehabilitated in France in professional liability insurance by the law of 30 December 2002.[10] In addition, the new Art L 124-5 of the Code des Assurances recognizes the right of the parties to choose compensation '*par le fait dommageable*' or '*par la réclamation de la victime*'. Thus now in France, contrary to the French Supreme Court's 1990 decision, the loss occurrence model is no longer the only legal model.

Under German law the covered fact in liability insurance can be identified according to one of the following methods: *Schadensereignis Prinzip*, *Manifestazions Prinzip* or *Anspruch,* respectively translated in English as: the harmful fact, the loss occurrence or the claim for damages.

The German Supreme Court (*BGH*) in its recent judgment of 26 March 2014 ruled that in Germany there is no legal definition of covered fact in the case of insurance against civil liability.[11] Instead the German Court focuses on the adequacy of the contract. A contract is inadequate when the temporal delimitation of the risk does not meet the policyholder's insurance needs, particularly in terms of retroactivity.

[8] G. Volpe Putzolu, *Le assicurazioni. Produzione e distribuzione. Problemi giuridici* (Bologna: Il Mulino, 1992), 142.

The Supreme Court reopens the debate preceding the 1942 Civil Code on the identification of the covered event in civil liability insurance, a debate that saw opposing two theories: on one hand those identifying the insured fact with a claim for damages issued by the third (C. Viterbo, *Assicurazione della responsabilità civile* (Milano: Giuffrè, 1936)), because only the claim determines the detriment of the insured property, on the other hand those identifing the insured fact with the harmful act, because it is cause of the claim covered by the insurance guarantee (T. Ascarelli, 'Sul momento iniziale nella decorrenza della prescrizione nella assicurazione responsabilità civile' *Assicurazioni*, II, 194 (1934)).

[9] Cour de Cassation 19 December 1990, available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007025478 (last visited 6 December 2016).

[10] See M. Fontaine and F. De Ly, *The drafting of international contracts* (Brill: Transnational Publishers Inc, 2006), 771.

[11] BGH 26 March 2014, *De jure,* available at https://dejure.org/dienste/ vernetzung/rechtsprechung?Gericht=BGH&Datum=26.03.2014&Aktenzeichen=IV%20ZR%20422/12 (last visited 6 December 2016).

IV. Worthiness Control and Conduct Rules

Perhaps now, it is also doubtful whether a legal model exists in Italian law, since the term 'fact' can be interpreted both as the harmful act and the claim. The protection of the insured party is accomplished through information and the obligation of insurers and insurance intermediaries to provide appropriate products. It is therefore a problem of product governance.[12]

The concept of product governance was introduced by MiFID 2 (Markets in Financial Instruments Directive)[13] in the context of financial markets and can be defined as an organizational structure and rules of conduct relating to the creation, supply and distribution of financial products in the interests of investors.

When considering policyholders' protection in terms of product governance, it is important to consider the value of the insurance contract with respect to the interest of the insured parties, from its creation to its distribution.

This dynamic is now part of insurance intermediation after IDD2 (Insurance Distribution Directive) focusing on the 'best interest of the customer'.[14] The Directive (EU) 2016/97 of the European Parliament and of

[12] See R. Natoli, *Il contratto "adeguato". La protezione del cliente nei servizi di credito, di investimento e di assicurazione* (Milano: Giuffrè, 2012), 87.

Generally speaking with regard to information in financial markets and information asymmetry S. Amorosino, 'Principi "costituzionali", poteri pubblici e fonti normative in tema di mercati finanziari', in S. Amorosino ed, *Manuale di diritto del mercato finanzario* (Milano: Giuffrè, 3rd ed, 2014), 3; M.C. Cherubini, 'Tutela del "contraente debole" nella formazione del consenso' (Torino: Giappichelli, 2005), 43; L. Rossi Carleo, 'Il diritto all'informazione: dalla conoscibilità al documento informativo' *Rivista di Diritto Privato,* 363 (2004); A. Gentili, 'Informazione contrattuale e regole dello scambio' *Rivista di Diritto Privato,* 578 (2004); G. Alpa, 'Quando il segno diventa comando: la "trasparenza" dei contratti bancari, assicurativi e dell'intermediazione finanziaria', in M. Paradiso ed, *I mobili confini dell'autonomia privata* (Milano: Giuffrè, 2005), 475; S. Grundmann, 'L'autonomia privata nel mercato interno: le regole d'informazione come strumento' *Europa e diritto privato*, 257 (2001); A.C. Nazzaro, *Obblighi d'informare e procedimenti contrattuali* (Napoli: Edizioni Scientifiche Italiane, 2000), 193; L. Lonardo, *Informazione e persona. Conflitti di interesse e concorso di valori* (Napoli: Edizioni Scientifiche Italiane, 1999), 202; D. Valentino, *Obblighi di informazione, contenuto e forma negoziale* (Napoli: Edizioni Scientifiche Italiane, 1999), 9, 67; Id, 'Obblighi di informazione e vendite a distanza' *Rassegna di diritto civile,* 394 (1998); G. De Nova, 'Informazione e contratto: il regolamento contrattuale' *Rivista trimestrale di diritto processuale civile*, 705 (1993).

[13] MiFID is the Markets in Financial Instruments Directive (Directive 2004/39/EC). In force since November 2007, it governs the provision of investment services in financial instruments by banks and investment firms and the operation of traditional stock exchanges and alternative trading venues.

In October 2011, the European Commission tabled proposals to revise the Markets in Financial Instruments Directive (MiFID 2) with the aim of making financial markets more efficient, resilient and transparent, and to strengthen the protection of investors.

[14] The Insurance Distribution Directive or IDD (Directive 2016/97/EU) regulates the activities of all distributors of insurance products: intermediaries, insurance companies, their employees, bank-assurance, ancillary insurance intermediaries (eg travel agents or car

the Council of 20 January 2016 will replace the insurance mediation directive (2002/92/EC). Member States will have two years to transpose the IDD into national law. Art 20 says that,

> 'Prior to the conclusion of an insurance contract, the insurance distributor shall specify, on the basis of information obtained from the customer, the demands and the needs of that customer and shall provide the customer with objective information about the insurance product in a comprehensible form to allow that customer to make an informed decision. *Any contract proposed shall be consistent with the customer's insurance demands and needs*'.

The concept of adequacy was, in some ways, already present in the Italian Insurance Code (decreto legislativo 7 September 2005 no 209), in Art 183, which states that:

> 'in the offer and performance of contracts companies and intermediaries must:
> a) act diligently, fairly and transparently towards policyholders and insured persons; (and)
> b) acquire from contracting parties the information necessary to assess the insurance companies or pension needs and operate so that they are always adequately informed'.

However under Art 183 the distributor of insurance policies has to acquire information on an insured's needs only to determine the information and the counselling he or she needs.[15]

With the transposition of IDD2 directive the law will provide a stronger protection for policyholders in terms of adequacy.[16] Additionally, Art 120, para 3 Insurance Code requires insurers and intermediaries to propose or recommend to customers products that are 'suited to (their) needs', taking

rental companies), including online distribution. The Directive determines the information that should be given to consumers before they sign an insurance contract, imposes certain conduct of business and transparency rules for distributors, clarifies the rules for cross-border business and addresses the supervision and sanctioning of insurance distributors if they breach the provisions of the Directive. It also includes additional requirements for the sale of insurance products with investment elements to ensure that insurance policyholders get a similar level of protection as buyers of other investment products regulated under MiFID2. The IDD was adopted on 20 January 2016. Member States will need to transpose it into national legislation by 23 February 2018.

[15] The concept of insurance counselling raises from French Jurisprudence interpreting Art L 112-4 Insurance Code. The intermediary must be '*un guide sur et un conseiller expérimenté*': Cour de Cassation, 10 november 1964, *Revue general des assurances terrestres*, 176 (1965) with comment by A. Besson.

[16] See Corte di Cassazione 22 November 2000 no 15101, *Contratti*, 785 (2001), contrary to the direct horizontal application of EU Directive also in lack of timely transposition.

into account the risk inclination of the person concerned (Art 52 regolamento ISVAP 16 October 2006 no 5).[17] Moreover it is also possible to consider such a duty as an element of the general duty of good faith in the pre-contractual relationships according to Art 1337 of the Civil Code.

Under these rules, an insurance contract for professional liability sold to a professional that contains the claims made formula and a very short retroactivity, as well as a general declaration of the insured party that 'for the effect of Art 1892, I declare to be not aware of facts that could cause my responsibility', is not adequate, because as a result of such declaration, in cases where the claims occurred during the insurance period regarding damage that occurred outside the coverage period, the insurer can refuse to pay indemnification according to Art 1892, assuming that the insured is in breach of an obligation to declare any awareness of the harmful fact causing

[17] 'Art 120 (Pre-contractual information and rules of conduct).

1. Insurance intermediaries recorded in the register referred to in Art 109 (2) and those under Art 116 shall furnish policyholders with the information laid down by ISVAP's Regolamento, before concluding the contract and in case of subsequent significant changes or renewal, in compliance with the provisions of this article.

2. In relation to the contract offered insurance intermediaries shall declare to the policyholder: a) whether they give their advice on the basis of a fair analysis – in that case they are obliged to give that advice on the basis of an analysis of a sufficiently large number of contracts available on the market, so that they recommend an adequate product to meet the policyholder's needs; b) whether they offer certain products under a contractual obligation with one or more insurance undertakings - in that case they shall provide the names of those undertakings; c) whether they offer certain products under no contractual obligation with any insurance undertakings – in that case they shall, at the customer's request, provide the names of the insurance undertakings with which they do or may conduct business, without prejudice to the obligation to inform policyholders of their right to request such information.

3. In any case prior to the conclusion of the contract the insurance intermediary referred to in para 1 shall offer or recommend a product which is adequate to meet the policyholder's needs, in particular on the basis of information provided by the latter, and shall previously illustrate the main features of the contract as well as the benefits that the insurance undertaking is obliged to provide.

4. On account of the different policyholders' protection needs, of the different types of risks, as well as of the knowledge and ability of the staff involved in mediation ISVAP shall, by its own regulation, lay down:

a) The rules on the way intermediaries shall introduce themselves and behave in relation to policyholders, with regard to the information requirements relating to intermediaries themselves and their relations, also of corporate nature, with the insurance undertaking, and to the features of the contract offered in relation to the advice they could possibly give on the basis of a fair analysis or to the existence of an obligation, involving promotion and mediation, with one or more insurance undertakings. b) the way how information shall be provided to policyholders, and envisage the cases in which it may be provided upon request, it being understood that the need for protection usually calls for the use of the Italian language and the communication on a durable and accessible medium, soon after the contract has been concluded at the latest; c) how records shall be kept of the business activity; d) the violations for which the disciplinary sanctions envisaged by Art 329 shall apply.

5. Insurance intermediaries dealing with large risks and reinsurance intermediaries shall be exempted from information requirements'.

the claim before the conclusion of the contract.

As the German Court ruled, the problem is not to identify the abstract legal model for liability insurance, but the appropriate product for the insured party in the concrete case at hand. It is a question of adequacy.

Given these considerations, it is important to identify the juridical consequences in case of the distribution of an inadequate insurance product. Of course the insurer will be subject to administrative sanctions of IVASS (the Italian insurance market regulator), but what about the contract and the private relationship between insurer and insured?

In the interest of policyholders, the solution could be civil liability and the obligation to pay damage (included the lost indemnification) on the part of the distributor (Insurers, Banks, Agents, Brokers …).[18]

Another solution could be the nullification of the contract concluded in violation of mandatory conduct rules like those contained in the law of insurance products distribution (see Arts 120, 182 and regolamenti ISVAP 16 October 2006 no 5 and 26 May 2010 no 35). But such a solution could be contrary to the interest of the party to be covered. A void contract does not produce any effect.[19]

A third option could be the nullification of the single clause which makes the contract inadequate in its protection of the insured party's interests. According to Art 183 Insurance Code undertakings and intermediaries shall acquire from policyholders information to evaluate their insurance risk. Art 120, para 3, Insurance Code requires insurers and intermediaries to propose or recommend to customers products that are 'suited to (their) needs'. These are imperative norms taking into account the terminology used by the legislator and the general interest of policyholders. Thus a clause that is

[18] See Corte di Cassazione-Sezioni Unite 19 December 2007 no 26724 and 26725, with comment by E. Scoditti, 'La violazione delle regole di comportamento dell'intermediario finanziario e le sezioni unite' *Foro Italiano*, I, 784 (2008); Corte di Cassazione 17 February 2009 no 3778, with the comment of V. Sangiovanni, 'Informativa precontrattuale e norme di comportamento degli intermediari assicurativi' *Danno e responsabilità*, 503 (2009); Corte di Cassazione 19 October 2012 no 18039, *Massimario del Foro italiano* (2012).

[19] Cf E. Scoditti, 'Regole di validità e principio di correttezza nei contratti del consumatore' *Rivista di diritto civile*, II, 119 (2006); G. Amadio, 'Nullità del contratto e conformazione del contratto (note minime in tema di 'abuso dell'autonomia contrattuale')' *Rivista di diritto civile*, I, 299 (2005); E. Navarretta, 'Buona fede oggettiva, contratti di impresa e diritto europeo' *Rivista di diritto civile*, I, 521 (2005); P.M. Putti, 'L'invalidità dei contratti' *Trattato di diritto privato europeo. L'attività e il contratto* (Padova: Cedam, 2003), III, 603; V. Roppo, 'La tutela del risparmiatore tra nullità e risoluzione (a proposito di Cirio bond & tango bond)' *Danno e responsabilità*, 627 (2005); G. D'Amico, *Regole di validità e principio di correttezza nella formazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 1996), 99; Id, 'Regole di validità e regole di comportamento nella formazione del contratto' *Rivista di diritto civile*, I, 39 (2002); F.D. Busnelli, 'Itinerari europei nella terra di nessuno tra contratto e fatto illecito: la responsabilità per informazioni inesatte' *Contratto e impresa*, 556 (1991); G. Vettori, *Anomalie e tutele nei rapporti di distribuzione fra imprese. Diritto dei contratti e regole di concorrenza* (Milano: Giuffrè, 1983), 83.

contrary to the expressed insurance needs of the policyholders could be considered void because it is contrary to imperative norms as stated in Art 1418 Civil Code. This method substitutes a worthiness control with an adequacy control, requiring the judge to take into account the interests of the policyholder based on the information given to the insurer or to the intermediaries, and on that basis the judge will be able to integrate the contract.

In the case of total violation of Art 183, where the insurer and the intermediary have failed to acquire the necessary information from the policyholder, such a control of adequacy will not be possible, and the judge will be required to conduct a general control of worthiness with the discretional integration affirmed by United Sections Supreme Court 6 May 2016 no 9140.

A policyholder's declaration affirming that he or she does not want to give information to the intermediary or to the insurer would render it impossible to sell adequate insurance contracts. In this case, especially according to the new rules contained in the above-mentioned IDD2 directive, the insurer and the intermediaries are likely to refuse the stipulation of any contract, much as a shopkeeper might be unable to sell a dress to a customer without knowing what kind of dress in the shop he or she wants. Adequacy is not only a matter of correct information and of counselling, it is also a matter of selling the product that meets the interest of the client.

V. From the Consumer's Protection to the Customer's Protection

The norms protecting policyholders do not contain a distinction between consumers and professionals.[20] The above-mentioned Arts 120 and 182 Insurance Code refer to policyholders in general.[21]

[20] About the problem of the application of consumers protection discipline in case of contracts between professionals see R. Pardolesi, 'Clausole abusive (nei contratti con i consumatori). Una direttiva abusata?' *Foro Italiano*, V, 137 (1994); L. Patroni Griffi, 'Le clausole abusive nei contratti conclusi con i consumatori (direttiva 13/1993)' *Rassegna di diritto civile*, 356 (1995); F.D. Busnelli, 'Una traccia per una analisi sistematica della disciplina delle clausole abusive' *Commentario al capo 14* bis *del Codice civile: Dei contratti del consumatore: art. 1469* bis-*1469* sexies, in C.M. Bianca, F.D. Busnelli and L. Bigliazzi Geri eds, *Nuove leggi civili commentate*, 758 (1997); L. Gatt, 'Ambito soggettivo di applicazione della disciplina. Il consumatore ed il professionista' *Commentario al capo 14* bis *del Codice civile: Dei contratti del consumatore: art. 1469* bis-*1469* sexies, in C.M. Bianca, F.D. Busnelli and L. Bigliazzi Geri eds, *Nuove leggi civili commentate*, 832 (1997); G. Furgiuele, 'Problemas jurisprudenciales en Italia entorno a la prohibición de cláusulas abusivas' *Derecho privado*, 141 (2001); Corte costituzionale 23 June 1999 no 252, *Foro italiano*, 3125 (1999) with comment by A. Palmieri, 'L'ibrida definizione di consumatore e i beneficiari (talvolta pretermessi) degli strumenti di riequilibrio contrattuale'.

[21] About the problem of coordination of consumers code and sectorial codes see L. Rossi Carleo, 'Consumatore, consumatore medio, investitore e cliente: frazionamento e sintesi nella

In the judgment 6 May 2016 no 9140 on claims made clauses the Court underlined that in the case of professional liability insurance there is evidently

> 'the existence of a context of strong asymmetry of the parties' power and where the policyholder, even though in theory qualified as "professional", is, in fact, more often unprotected by comprehensive information in order to understand the complex legal mechanisms that govern the system of civil liability insurance'.

It is a matter of fact that professionals need information and counsel regarding the selection of an insurance product that meets their interest. The question of the weakness of the contracting parties must be addressed by distinguishing socio-economic weakness from contractual weakness, which is mainly linked to information asymmetry that can also exist for professional parties. With regard to professional contracts it is also necessary to distinguish the acts of the profession from acts relating to the profession. The former concern contracts concluded for the exercise of the profession with their clients, for example, while the latter are related to contracts entered in connection with the performance of the profession, such as contracts for the purchase of goods or services to facilitate the profession or required for its operation, including policies covering professional liability.[22]

Moreover it is necessary to remember the basic norm of the Italian Constitution in financial market matters: Art 43 says that

> 'For the purposes of the common good, the law may establish that an enterprise or a category thereof be, through a pre-emptive decision or compulsory purchase authority with provision of compensation, reserved to the Government, a public agency, a workers' or users' association, provided that such enterprise operates in the field of essential public services, energy sources or monopolies and are of general public interest'.[23]

This norm recognizes the rights of users in the financial market, not only of consumers as in Art 3 of Italian Consumers Code (decreto legislativo 6

disciplina delle pratiche commerciali scorrette' *Europa e diritto privato*, 688 (2010); P. Corrias, 'La disciplina del contratto di assicurazione tra codice civile, codice delle assicurazioni e codice del consumo', in F. Addis et al eds, *Studi in onore di Nicolò Lipari* (Milano: Giuffrè, 2008), I, 543 (and *Responsabilità civile e previdenza*, 1749 (2007)).

[22] For those distinctions see E. Gabrielli, 'Sulla nozione di consumatore', in F. Addis et al eds, *Studi in onore di Cesare Massimo Bianca* (Milano: Giuffrè, 2006), 227.

[23] P. Perlingieri, 'La tutela del consumatore nella Costituzione e nel Trattato di Amsterdam', in P. Perlingieri and E. Caterini eds, *Il diritto dei consumi* (Napoli: Edizioni Scientifiche Italiane, 2004), I, 20; P. Corrias, 'Le aree di interferenza delle attività bancaria e assicurativa tra tutela dell'utente e esigenze di armonizzazione del mercato finanziario' *Giustizia Civile*, 617 (2015).

September 2005 no 206), who are physical persons purchasing goods and service for personal use. Also at the community level (we must remember that the Italian norms on consumers' protection derive from an EU Directive), the notion of 'consumer' is a key concept delimiting the application of consumer-protection rules. In any case, there is no consistent and uniform definition in EU law and there are also divergences amongst the Member States.[24]

[24] R. Manko, 'The notion of "consumer" in Eu law', available at http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf (last visited 6 December 2016).