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ITALIAN REPORT

ON

INSURANCE LAW BETWEEN BUSINESS LAW AND CONSUMER LAW

Questionnaire

18th International Congress on Comparative Law, Washington 2010

Subject III A., Commercial law

by

Prof. Onofrio Troiano (General editor), Prof. Diana Cerini,
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Abstract

This paper is the Italian report, sent to the 18th international congress on comparative law - Washington 2010, on the specific subject “Insurance law between business law and consumer law”. It consists of detailed answers to the questionnaire, on several topics among which economic aspects, academic perception of the field, procedural aspects, legislation, “consumer” and “commercial” risks, substantive aspects.

♦ Università degli Studi di Foggia – Facoltà di Giurisprudenza: §§ I, II, V

♦♦ Università Milano Bicocca – Facoltà di Giurisprudenza: §§ III, VI.2, VI.3

♦♦♦ Scuola Superiore Sant’Anna – Pisa: § IV

♦♦♦♦ Scuola Superiore Sant’Anna – Pisa: § VI.1

I. ECONOMIC ASPECTS

1. *What is the economic importance of consumer insurance as compared to business insurance in your country (e.g. France) and region (e.g. Europe)?*

If possible, please

- *state the overall amount of premiums earned by insurers in the respective fields*
- *specify your data for general commercial insurance and marine insurance separately*
- *specify your data for private indemnity insurance and life assurance separately*
- *indicate the development (increase/decrease of premiums) over time*

According to the most recent data (2007) - see the enclosed Table 1 of the ANIA (acronym of the Associazione Nazionale fra le Imprese Assicuratrici – National Association of the Insurance Companies) - the Italian insurance market shows a prevalence of premiums in the retail insurance (total amount for the year 2007: € 85.840.706.000,00) as compared to the business insurance (total amount for the year 2007: € 13.275.249.000,00).¹

This prevalence exists both in non-life insurance - where retail insurance has a share of premiums of 78,3%, for a value of € 29.500.549.000,00 and business insurance has a share of 21,7% for a value of € 8.175.759.000,00² - and in life insurance (retail insurance 91,7% for a value of € 56.340.157.000,00; business insurance 8,3%, for a value of € 5.099.490.000,00).

¹ In this Table „Retail insurance“ regards only private consumers and families: for this reason we can assume that it encompasses the entire spectrum of the consumer insurance.

² The percentage varies if we do not consider motor vehicle insurance: retail insurance 54,8% (€ 8.867.265.000,26); business insurance 45,2% (€7.313.875.000,73).

TABLE 1

ANIA - ASSOCIAZIONE NAZIONALE IMPRESE ASSICURATRICI

Non-life and life premiums

Insurance field	2007			2006		
	TOTAL of the premiums (in thousand euro)	PERCENTAGE of the business' premiums	PERCENTAGE of the retail premiums	TOTAL of the premiums (in thousand euro)	PERCENTAGE of the business' premiums	PERCENTAGE of the retail premiums
1	2	3	4	5	6	7
Accidents and disease	5.239.985	21,10%	78,90%	4.930.993	21,50%	78,50%
Terrestrial vehicle	3.287.279	7,40%	92,60%	3.205.159	8,20%	91,80%
Transport	703.545	95,70%	4,30%	745.597	96,20%	3,80%
Fire and other natural elements	2.345.063	50,50%	49,50%	2.359.217	50,60%	49,40%
Other kind of damages to goods	2.574.396	46,40%	53,60%	2.479.500	47,10%	52,90%
Terrestrial vehicle third liability	18.207.889	5,00%	95,00%	18.387.162	4,90%	95,10%
General third liability insurance	3.270.876	60,10%	39,90%	3.224.589	60,80%	39,20%
Credit and Security	821.525	88,70%	11,30%	759.182	88,80%	11,20%
Pecuniary losses	570.958	52,50%	47,50%	488.173	52,00%	48,00%
Legal protection	277.816	15,50%	84,50%	253.421	16,10%	83,90%
Assistance	376.977	4,50%	95,50%	350.718	3,40%	96,60%
TOTAL NON LIFE	37.676.309	21,70%	78,30%	37.183.711	21,50%	78,50%
TOTAL WITHOUT MOTOR VEHICLE INSURANCE	16.181.141	45,20%	54,80%	15.591.390	45,90%	54,10%
TOTAL LIFE	61.439.648	8,30%	91,70%	69.377.147	8,40%	91,60%

Unfortunately, we are not able to find specific data referred to marine insurance.³

³ In Table 1 "Transport" includes all kind of transport, also by sea.

Comparing these data with the data of the year 2006, it results a general trend towards an increase of the premiums in retail insurance and a (little) diminution in business insurance. Yet, the trend is opposite (increasing in business insurance and diminution in retail insurance) in the following particular fields: terrestrial vehicle third liability insurance; pecuniary loss insurance; assistance.

More recent data (2008) are also available, which show the effect of the economic crisis, with a diminution of both non-life insurance premiums (3,5%) and life insurance premiums (10,9%).⁴

2. *What are the expectations for further growth in each area of insurance?*

The economic crisis will play a role in the development of the insurance market in the year 2009. Data elaborated from the ANIA for the year 2009 provide evidence of a negative trend in the non-life insurance (-0,8%) but a positive trend in the life insurance (+ 10%) which had on the contrary shown a strong negative trend in the last years.

This positive trend is mostly explained with the crisis of the financial market and the certainty that life insurance gives to investors regarding the integral reimbursement of the capital invested, plus some (little) economic gain.⁵

II. ACADEMIC PERCEPTION OF THE FIELD

1. *Is insurance law taught and examined as a part of general private (contract) law or of commercial (contract) law?*

General Remarks.

The Italian legislator has chosen to unify the civil code with the commercial code: the 1942 civil code consolidated both the 1865 civil code and the 1882 commercial code.

The provisions related to insurance law (artt. 1882-1932 of the 1942 civil code) contain rules concerning almost exclusively insurance contracts, and are placed in the section which deals with the regulation of specific contracts, including both civil and commercial contracts.

⁴ See the document ANIA, *L'assicurazione italiana 2008/2009*, 36.

⁵ ANIA, *L'assicurazione ...*, 248-9.

Marine, air and rail insurance (ruled in the codice della navigazione) as well as social insurance, regulated by specific statutes are not dealt with in the civil code; yet, its provisions also apply in those fields, unless specific rules are provided elsewhere (see artt. 1885 and 1886 of the 1942 civil code).

Following the adoption of the code in 1942, many other laws in insurance matters were passed, but they were not included in the civil code (these laws are called „leggi speciali“, special laws, assuming that the general rule is the one set forth in the civil code) although they play sometimes an important role in the insurance field, as in the case of the law 24 dicembre 1969, n. 990 (and subsequent modifications) on the compulsory motor-vehicle third party liability insurance.

In the last two decades of the last Century, insurance law has become more and more voluminous, mainly for the implementing laws of EC directives. Also the EC rules were enacted in „leggi speciali“ and not in the civil code.

In 2005, the Italian legislator decided to unify rules dealing with insurance matter and enacted a code of private insurances (codice delle assicurazioni private, or c.a.p.: d. lgs. 7 settembre 2005, n. 209⁶), which has consolidated, with some new rules, all the laws (leggi speciali) on insurance, with few exceptions (e.g. maritime insurance, nuclear insurance).⁷

By and large, we can now assume that the civil code provides the general principles on insurance contracts and the code of private insurances contains more detailed rules on specific insurance contracts and the rules on insurance business.

Chapter 11 of the code of private insurances contains the rules related to insurance contracts („norme relative ai contratti di assicurazione“) and states (art. 165 c.a.p.) that, as long as this code does not provide different rules, „insurance, coinsurance and reinsurance contracts are governed by the rules of the civil code“.

The statement about the content of the civil code and of the code of private insurances is a very general one.

There could be some disagreement on the above mentioned reading of the interplay between the civil code and the code of private insurances, as we can find in the civil code rules concerning specific insurance contracts (damage insurance, art. 1904 ff.; third party liability insurance, art. 1917; life insurance, art. 1919 ff.). In addition, in the code of private insurances we can also find general principles (as in the case of the rules concerning transparency in insurance contracts).

On this problems see below this questionnaire, under IV.1.

⁶ In Gazzetta Ufficiale 13 ottobre 2005, n. 239, modified by decreto legge 31 gennaio 2007, n. 7, converted in Act 2 aprile 2007, n. 40, by decreto legislativo 6 novembre 2007, n. 198, and by decreto legislativo 29 febbraio 2008, n. 56, and by decreto legge 3 giugno 2008, n. 97.

⁷ A.D. CANDIAN, *Il nuovo codice delle assicurazioni e la disciplina civilistica del contratto di assicurazione: tendenze e „resistenze“*, in *Contratto e impresa* 2006, 1289.

The perception of the insurance contract.

The general remarks above support the idea that in Italy the question if the insurance contracts are perceived as a part of general private (contract) law or commercial contract law cannot have a clear answer.

Generally speaking, insurance contract is the prototype of the „contratto aleatorio“ (aleatory contract):⁸ for this reason many of the discourse about aleatory contracts are developed and focused on the basis of the insurance contract. But more and more, the insurance sector and insurance contracts are perceived as very peculiar and specialized fields of law, which are studied and taught at the University, under different courses.

In the teaching of Private Law (Istituzioni di diritto privato) some references to the insurance contracts are made just to explain the particular legal regime of aleatory contracts.

The Handbooks of Private Law (Manuali di Istituzioni di diritto privato) deal with insurance contracts, even if in Italy the study of specific contracts (which are in a very large number regulated in the civil code) is traditionally divided between the main course of Private Law (where civil contracts are also studied) and the main course of Commercial Law (where commercial contracts are also studied).

For this reason, insurance contracts are taught more deeply in the general course of Commercial Law (and more deeply developed in the Handbooks of Commercial Law).

But the main course of Commercial Law in the last decades has expanded more and more its content. Therefore there is not enough time to teach all the matters treated in the handbooks. This last change explain why Commercial Law professors are de facto requested to make a choice, and mainly they will prefer to devote more attention to matters (like company law) other than commercial contracts. More and more frequently a dedicated course is offered on Insurance Law (Diritto delle Assicurazioni).

2. Are the leading textbooks/commentaries/etc. published by Professors of general private (contract) law or of commercial (contract) law? (Or by practitioners, and , if so, do they participate in university law courses.)

The above depicted trend is reflected also in the leading books on insurance law and insurance contracts. These are mainly written by professors of commercial law (who also very often teach courses on Insurance Law).⁹

⁸ The classification of a contract as aleatory means that, differently from other bilateral contracts, the performance of one party (the insurer party) depends on the fact that the insured risk takes place, or not. A legal relevance of this classification is the inapplicability of the hardship rules to aleatory contracts (art. 1469 c.c.).

⁹ A.D. CANDIAN, S. PACI (eds.), *Manuale di tecnica delle assicurazioni*, Milano, Giuffrè, 2 vols., 2002; A. DONATI, G. VOLPE PUTZOLU, *Manuale di diritto delle assicurazioni*, Milano, Giuffrè, 2002; L. FARENGA, *Diritto delle assicurazioni private*,

Recently, in line with a general trend, publishers of law books, mainly for reasons due to budget, support the publication of works, which do not represent thorough studies on the matter and are thought exclusively for the public of the practitioners, whose need is to have a first, possibly accurate, legal „nutshell“ on a particular topic or about the last changes occurred. Because of this trend, there is an increasing number of works written by practitioners, judges and law experts, that do not come from the universities (and sometimes try to access to Academia).

For the largest part, these works do not have a scientific character, but they are useful for lawyers, who ask for simple and up-to-date (as concerns law, regulation, cases) publications in order to find a rapid solution to the problems of their clients.

These works become sometimes leading textbooks or commentaries just because they sell much more copies than those written by university professors and despite their lack of systemic order. The success of these publications reveals a strong demand by the large public. Yet, these publications are also subject to rapid obsolescence and do not play any role in the development of the law: they do not represent any doctrine.

3. Are professorships in insurance law considered chairs in general private (contract) law or of commercial (contract) law? If neither, what is their position?

Unlike in the past, the Italian university professor is no longer chaired, in the sense that, for example, if she or he teaches Transportation Law she or he cannot be sure to continue to teach that topic until retirement.

Every Italian professor belongs to a scientific sector (settore scientifico-disciplinare) and shall have a course belonging to its scientific sector.

Every academic year, the Consiglio di Corso di Laurea (a Committee made by the Faculty members who teach in the same curricular program - the Corso di Laurea - together with students representatives) chooses the courses which will be taught by any law professor: this choice is made on the basis of the needs of the Faculty with (some degree of) previous consultation with the interested professors.

Again, unlike in the past, there are not more lists of courses belonging to a specific scientific sector, but only a general description of the issues studied by any scientific sector. If a course conforms to the characteristic of the scientific sector, the professor of that sector can teach that course. The absence of a restricted list of topics opens the door to the possibility that some courses belong to more than one

Torino, Giappichelli, 2001; M. GAGLIARDI, *Il contratto di assicurazione*, Torino, Giappichelli, 2009. A. LA TORRE (ed.), *Le assicurazioni*, Milano, Giuffrè, 2000; A. SCARPA (ed.), *L'assicurazione*, Torino, Giappichelli, 2001.

scientific sector, especially if different sectors reveal some common aspects. For example “European Private Law” is nowadays taught in Italy by professors belonging to the scientific sector “Private Law” (settore IUS01 - Diritto Privato) and by professors belonging to the scientific sector “Comparative Private Law” (IUS02 – Diritto Privato Comparato).

Historically, the course on Insurance Law (“Diritto delle Assicurazioni”) was traditionally part of the scientific sector Commercial Law (IUS04 – Diritto Commerciale). Following the significant enlargement of the scientific sector “Commercial Law” during the last decades, a new scientific sector was created and named “Business Law” (IUS05 – Diritto dell’Economia). This happened according to a general national (Italian) trend towards the increase of the scientific sectors due to reasons not always related to sound scientific needs.¹⁰

As a consequence, some Commercial Law professors migrated in this new sector.

The new sector “Business Law” has some common areas with the sector of Commercial Law, and the insurance sector is one of these.

Very likely in few years the largest part of the teachers of Insurance Law courses will belong to the new sector “Business Law” (Diritto dell’Economia) rather than to the traditional sector “Commercial Law”.

III. PROCEDURAL ASPECTS

1. Are cases concerning commercial insurances heard in special commercial courts?

As an introduction to the question on procedural issues, one should point out that controversies between consumers and business clients, from one side, and insurance companies/intermediaries, on the other side, are increasing even in Italy. Until now, and not only in insurance matters, Italian law has not taken into proper consideration the issue of the distinguishing consumer litigation from commercial litigation. In fact, the distinction between commercial and non commercial (or consumer) insurance does not even exist in substantial matters if not for specific aspects provided for more recent legislations (i.e. unfair contract terms: see this questionnaire, above under § VI.1). We can consequently assume commercial insurance as merely opposed to insurance offered to consumers for specific matters, while the greater distinction by law is between large risks and mass risks (see art. 1, lett. R of the code of private insurance).

¹⁰ Very recently the Italy Ministry of University and Research announced the project to reduce „drastically“ the scientific sectors (also in the field of law). The probable solution will be a small reduction from 21 to 16 scientific law sectors.

Nevertheless, as a matter of fact in many cases contract terms included in commercial policies provide for arbitration clauses so that a considerable part of the “commercial cases” are decided outside the courts. In addition, one should say that several modifications of the actual regulation for consumer insurance on these issues are under discussion. In this reform process an active part is taken by professional associations in order to improve alternative ways to solve claims (ADR), having in mind the need to reduce the costs of arbitration.

Having clarified this point, one should note that cases concerning commercial insurances are not heard in special commercial courts. This is traditional in the Italian judicial system that does not provide generally for special courts unless in specific cases. Indeed, the traditional distinction is between administrative courts and civil courts; the latter divided into criminal and civil courts but there is no distinction between commercial courts and non commercial or consumer courts.

2. Are there special procedures for consumer claims ?

As there are no special courts for commercial insurance claims, equally there are no special state courts for consumer cases. Nevertheless, as anticipated, discussions and projects in order to enlarge the role of alternative dispute resolutions (ADR) are more at the centre of the debate.

One should also mention the role of ISVAP (Istituto di Vigilanza sulle Assicurazioni Private), the Italian Supervisory Authority for Private Insurance. One of the aim of ISVAP is to offer services to citizens. Among its activities, is to supervise transparency and fairness in insurance contracts. This activity spreads its effects both in a direct control over companies and in the collection of complaints by insured parties (see under point III. 4 herein). It should be highlighted the fact that this role is performed with reference to both complaints by consumers and by businessmen, as the law refers to “insured” parties in broad terms.

It is evident that this activity is not a judicial one in a technical sense, but it can have a role in the resolution of controversies arising between the parties or in order to postpone or reduce the claims actually going to court. In fact, even if it has no mediation role, when dealing with complaints ISVAP can play a strong “moral suasion” role towards the company in order to stimulate the insurers to find a solution to the claim.

3. *Is there a difference in commercial and consumer insurance litigation as to the availability of pre-emptive actions (injunctions) or class actions ?*

Pre-emptive actions.

For what concerns pre-emptive actions, they are provided only for the protection of consumers' interests: art. 37 and 139 of the consumer code (d.lgs. 6 settembre 2005, n. 206, so called codice del consumo).

While art. 139 of the consumer code provides for a general injunction, art. 37 provides for an injunction (*azione inibitoria collettiva*) prohibiting the use of unfair contract terms in consumer contracts.

This last action can be exercised against the professional or associations who use or suggest the use of these general contract terms. The action can be filed by consumer associations, by associations representing the categories of professionals in question (in pur cases, for example, the association of insurers, the association of brokers, etc.) and by the Chambers of Commerce.

The result of a positive action for injunction is the prohibition to use in all contracts on the market the clause declared unfair; the condemned party also has the duty to publish the sentence in national media (art. 37, paragraph 3, consumer code).

Lastly, it has to be pointed out that the European Parliament and the Council adopted the directive 2009/22/EC on injunction for the protection of consumers' interests.

The explicit scope of the directive is to harmonize the different laws of the member States on the protection of the collective interests of the consumers in the internal market. In order to pursue this objective, the directive provides some basic rules on the subject and in particular on the action for an injunction, on entities qualified to bring action, on intra-community infringements.

The directive shall enter into force on 29 December 2009: by that date we might expect correspondingly changes on art. 37 of the consumer code.

Class actions

The debate over the introduction of class actions in Italy is old enough to have recalled a lot of comments. Nevertheless, general class actions are not yet a reality in our legal system.

Of course, consumer associations can assist the filing claims on behalf of a single or groups of consumers to obtain judicial orders against corporations that cause injury or damage to consumers.

Indeed, these types of claims were increasing and Italian courts have recently allowed them against banks that continue to apply compound interest on retail clients' current account overdrafts. On these bases, the introduction of class actions was assumed on the new government's agenda. In 2004, the Italian parliament considered the introduction of a collective action for damages (rather than a class action lawsuit), specifically in the area of consumers' law, but only at the end of 2007 the Senato della Repubblica with the financial law for 2008 (a financial document of the government for the economic management of the national budget) introduced art. 140*bis* of the Italian consumers' code. Nevertheless, this rule has had a long and difficult life so far. In fact, it should have entered into force on 1st January 2008 but its effectiveness has been postponed by the Government for three times: on 29 June 2008, on 1st January 2009, on 29 June 2009.

Actually the rule is not yet in force, since the law has been once again emended and postponed. More precisely, only on July 2009 by way of art. 49 of law n. 99/2009, the Government seems to have emended another time art. 140*bis* (it has been completely rewritten¹¹) in order to introduce a class

¹¹ Actual text of art. 140 bis of the consumer code “Art. 140-bis. - (*Azione di classe*). - 1. I diritti individuali omogenei dei consumatori e degli utenti di cui al comma 2 sono tutelabili anche attraverso l'azione di classe, secondo le previsioni del presente articolo. A tal fine ciascun componente della classe, anche mediante associazioni cui dà mandato o comitati cui partecipa, può agire per l'accertamento della responsabilità e per la condanna al risarcimento del danno e alle restituzioni.

2. L'azione tutela:

a) i diritti contrattuali di una pluralità di consumatori e utenti che versano nei confronti di una stessa impresa in situazione identica, inclusi i diritti relativi a contratti stipulati ai sensi degli articoli 1341 e 1342 del codice civile;

b) i diritti identici spettanti ai consumatori finali di un determinato prodotto nei confronti del relativo produttore, anche a prescindere da un diretto rapporto contrattuale;

c) i diritti identici al ristoro del pregiudizio derivante agli stessi consumatori e utenti da pratiche commerciali scorrette o da comportamenti anticoncorrenziali.

3. I consumatori e utenti che intendono avvalersi della tutela di cui al presente articolo aderiscono all'azione di classe, senza ministero di difensore. L'adesione comporta rinuncia a ogni azione restitutoria o risarcitoria individuale fondata sul medesimo titolo, salvo quanto previsto dal comma 15. L'atto di adesione, contenente, oltre all'elezione di domicilio, l'indicazione degli elementi costitutivi del diritto fatto valere con la relativa documentazione probatoria, è depositato in cancelleria, anche tramite l'attore, nel termine di cui al comma 9, lettera b). Gli effetti sulla prescrizione ai sensi degli articoli 2943 e 2945 del codice civile decorrono dalla notificazione della domanda e, per coloro che hanno aderito successivamente, dal deposito dell'atto di adesione.

4. La domanda è proposta al tribunale ordinario avente sede nel capoluogo della regione in cui ha sede l'impresa, ma per la Valle d'Aosta è competente il tribunale di Torino, per il Trentino-Alto Adige e il Friuli-Venezia Giulia è competente il tribunale di Venezia, per le Marche, l'Umbria, l'Abruzzo e il Molise è competente il tribunale di Roma e per la Basilicata e la Calabria è competente il tribunale di Napoli. Il tribunale tratta la causa in composizione collegiale.

5. La domanda si propone con atto di citazione notificato anche all'ufficio del pubblico ministero presso il tribunale adito, il quale può intervenire limitatamente al giudizio di ammissibilità.

6. All'esito della prima udienza il tribunale decide con ordinanza sull'ammissibilità della domanda, ma può sospendere il giudizio quando sui fatti rilevanti ai fini del decidere è in corso un'istruttoria davanti a un'autorità indipendente ovvero un giudizio davanti al giudice amministrativo. La domanda è dichiarata inammissibile quando è manifestamente infondata, quando sussiste un conflitto di interessi ovvero quando il giudice non ravvisa l'identità dei diritti individuali tutelabili ai sensi del comma 2, nonché quando il proponente non appare in grado di curare adeguatamente l'interesse della classe.

7. L'ordinanza che decide sulla ammissibilità è reclamabile davanti alla corte d'appello nel termine perentorio di trenta giorni dalla sua comunicazione o notificazione se anteriore. Sul reclamo la corte d'appello decide con ordinanza in camera di consiglio non oltre quaranta giorni dal deposito del ricorso. Il reclamo dell'ordinanza ammissiva non sospende il procedimento davanti al tribunale.

8. Con l'ordinanza di inammissibilità, il giudice regola le spese, anche ai sensi dell'articolo 96 del codice di procedura civile, e ordina la più opportuna pubblicità a cura e spese del soccombente.

9. Con l'ordinanza con cui ammette l'azione il tribunale fissa termini e modalità della più opportuna pubblicità, ai fini della tempestiva adesione degli appartenenti alla classe. L'esecuzione della pubblicità è condizione di procedibilità della domanda. Con la stessa ordinanza il tribunale:

action (and not more a collective action for damages) postponing its entry into force on the 1st of January 2010.

The reasons of the delay of its entry into force are motivated, according to the consumer associations' opinion, by political issues: the continuous deferment of the rule allows the large companies affected by bankruptcy in the last years to avoid the risky consequences of any kind of class action.

In fact, as mentioned, only with the last deferment the Government introduced some important changes. One of the most qualifying new characteristic of the new Italian class action is that it can be filed either by consumer associations or committees and by individual consumers able to collect the interests of a class. Among others, the scope of the class action might be to act against a company for contractual liability or against the producer for product liability.

One important point solved by the new law deals with the retroactivity of it which is excluded.¹²

a) definisce i caratteri dei diritti individuali oggetto del giudizio, specificando i criteri in base ai quali i soggetti che chiedono di aderire sono inclusi nella classe o devono ritenersi esclusi dall'azione;

b) fissa un termine perentorio, non superiore a centoventi giorni dalla scadenza di quello per l'esecuzione della pubblicità, entro il quale gli atti di adesione, anche a mezzo dell'attore, sono depositati in cancelleria. Copia dell'ordinanza è trasmessa, a cura della cancelleria, al Ministero dello sviluppo economico che ne cura ulteriori forme di pubblicità, anche mediante la pubblicazione sul relativo sito *internet*.

10. È escluso l'intervento di terzi ai sensi dell'articolo 105 del codice di procedura civile.

11. Con l'ordinanza con cui ammette l'azione il tribunale determina altresì il corso della procedura assicurando, nel rispetto del contraddittorio, l'equa, efficace e sollecita gestione del processo. Con la stessa o con successiva ordinanza, modificabile o revocabile in ogni tempo, il tribunale prescrive le misure atte a evitare indebite ripetizioni o complicazioni nella presentazione di prove o argomenti; onera le parti della pubblicità ritenuta necessaria a tutela degli aderenti; regola nel modo che ritiene più opportuno l'istruzione probatoria e disciplina ogni altra questione di rito, omessa ogni formalità non essenziale

al

contraddittorio.

12. Se accoglie la domanda, il tribunale pronuncia sentenza di condanna con cui liquida, ai sensi dell'articolo 1226 del codice civile, le somme definitive dovute a coloro che hanno aderito all'azione o stabilisce il criterio omogeneo di calcolo per la liquidazione di dette somme. In caso di accoglimento di un'azione di classe proposta nei confronti di gestori di servizi pubblici o di pubblica utilità, il tribunale tiene conto di quanto riconosciuto in favore degli utenti e dei consumatori danneggiati nelle relative carte dei servizi eventualmente emanate. La sentenza diviene esecutiva decorsi centottanta giorni dalla pubblicazione. I pagamenti delle somme dovute effettuati durante tale periodo sono esenti da ogni diritto e incremento, anche per gli accessori di legge maturati dopo la pubblicazione della sentenza.

13. La corte d'appello, richiesta dei provvedimenti di cui all'articolo 283 del codice di procedura civile, tiene altresì conto dell'entità complessiva della somma gravante sul debitore, del numero dei creditori, nonché delle connesse difficoltà di ripetizione in caso di accoglimento del gravame. La corte può comunque disporre che, fino al passaggio in giudicato della sentenza, la somma complessivamente dovuta dal debitore sia depositata e resti vincolata nelle forme ritenute più opportune.

14. La sentenza che definisce il giudizio fa stato anche nei confronti degli aderenti. È fatta salva l'azione individuale dei soggetti che non aderiscono all'azione collettiva. Non sono proponibili ulteriori azioni di classe per i medesimi fatti e nei confronti della stessa impresa dopo la scadenza del termine per l'adesione assegnato dal giudice ai sensi del comma 9. Quelle proposte entro detto termine sono riunite d'ufficio se pendenti davanti allo stesso tribunale; altrimenti il giudice successivamente adito ordina la cancellazione della causa dal ruolo, assegnando un termine perentorio non superiore a sessanta giorni per la riassunzione davanti al primo giudice.

15. Le rinunce e le transazioni intervenute tra le parti non pregiudicano i diritti degli aderenti che non vi hanno espressamente consentito. Gli stessi diritti sono fatti salvi anche nei casi di estinzione del giudizio o di chiusura anticipata del processo».

2. Le disposizioni dell'articolo 140-*bis* del codice del consumo, di cui al decreto legislativo 6 settembre 2005, n. 206, come sostituito dal comma 1 del presente articolo, si applicano agli illeciti compiuti successivamente alla data di entrata in vigore della presente legge.”

¹² On the other hand, one should mention that the big issue left open is about the applicability of the law to the financial matter: as said before, the legislator regulated the class action as a discipline belonging to the consumer law; moreover, it never speaks about investors but always about consumers. In light of this kind of interpretation, the big financial scandals of the last few years might be partially out of the discipline.

4. Is there a difference between commercial and consumer insurance concerning the activity of the supervisory agency in protecting the policyholder or the insured ?

As anticipated, the Italian supervisory board for insurances is ISVAP.

The role of ISVAP is defined by the code of private insurances, art. 3 ff.

It has supervisory functions, sanctioning regulatory powers plus some additional services to citizens. More precisely, art. 3 provides that the purpose of supervision is the sound and prudent management of insurance and reinsurance undertakings and transparency and fairness in the behaviour of undertakings, intermediaries and the other insurance market participants with regard to stability, efficiency, competitiveness and the smooth operation of the insurance system, to the protection of policyholders and of those entitled to insurance benefits as well as to consumer information and protection.

As one can understand, the position of ISVAP towards citizens - insured and contracting parties - is mainly referred to two aspects: the first one is to protect policyholders also by receiving complaints towards insurance companies and intermediaries, and the second is connected to the regulatory and supervisory powers in order to assure proper information to consumers.

As per this rule, it should be clarified that the law refers to citizens. This includes both policyholders and insurance parties or beneficiaries irrespective to the fact that they are consumers or businessmen.

In particular, as for services to citizens, one should mention the fact that ISVAP is assigned the task of collecting complaints made by interested parties against undertaking and insurance intermediaries. The role of ISVAP is better clarified in the Regolamento 19 maggio 2008, n. 24, concernente la procedura di presentazione dei reclami all'Isvap di cui all'articolo 7 del decreto legislativo 7 settembre 2005, n. 209.

Once again, it should be clear that when dealing with supervisory powers and protection of policyholders, in many aspects the role of ISVAP does not differ towards insured and/or contracting parties whether or not they are consumer or business entities. I.e. as to the regulatory and supervisory powers, the Authority is in charge of assuring transparency in the relation between undertaking and policyholders, whereas this term (policyholder) generally refers both to consumer and non consumer client. In this role, most of the regulations provided by ISVAP tend to give the market provisions in the direction of assuring the right to information for policyholders and a better transparency in the language and terms of insurance policies.

This clarified, the 'law in action' shows that the role of ISVAP is much more penetrating when dealing for consumer contracts also when considering the mission set by art. 3 as completed by art. 5, paragraph 3, where the law states that ISVAP shall perform the activities necessary to promote an appropriate degree of consumer protection and to develop the knowledge of the insurance market,

including statistical and economic surveys and the gathering of input for the formulation of insurance policy lines.

This position has been used, in particular, in order to promote the information on web site (see for example www.isvap.it) where specific guidance for consumers are present. In other cases, the ISVAP prescriptions – e.g. on information duties in insurance contracts – do not really distinguish between contracts offered to consumers or to businessmen, as the relevant difference is between large risks and other risks (that is the case, for example, for pre-contractual duties and delivery of documents duties imposed to insurance intermediaries which apply only to all non large risks).

IV. LEGISLATION

1. Is “insurance law” regulated in a separate codification, such as an “Insurance (Contract) Act”, or as a part of a general Civil Code or a general Commercial Code ?

As anticipated, there is a separate codification but its role and its interplay with other legislation (including the civil code) requires several qualifications.

The Italian legal system provides for a separate codification in a consolidation statute officially named “codice delle assicurazioni private” (c.a.p.). This restatement like process, stimulated by law n. 229 of 2003 which delegated the Government to reorganize insurance law, was mainly aiming at the simplification of the fragmented insurance rules and regulations, which have been stratifying along the years and following the merger of the commerce code into a unified Italian civil code in 1942.¹³

As every sector code, the c.a.p. is not a systemic code opening the way to the problems both of its coordination with rules provided for outside its perimeter (being them in the civil code or in special legislations) and its coordination with other sector code (e.g. the consumer code) to build a system which does not find anymore its sole centre in the civil code.

Most of the stratifications in insurance law were due to the constant EC legislation on the subject matter. Indeed, an important role in the design of insurance law has been played by the European legislator by way of different directives. For instance, most of the legal rules which, overtime, have designed paths of protection for the insured and/or administrative controls are of EU origin.

¹³ On the insufficiency of the rules provided in the civil code for dealing with a modern insurance market and with the new exigencies contemplated by modern insurance techniques see A. BALZANO, *Il contratto di assicurazione*, in *Tratt. dir. priv. europeo*, N. LIPARI (edt.), vol. IV, Padova, 2003, 99-237 and 176-185. More recently for a complete reconstruction of the mosaic, see M. GAGLIARDI, *Il contratto di assicurazione. Spunti di atipicità ed evoluzione del tipo*, Torino, Giappichelli, 2009.

Upon the unification of the commercial code and the civil code in the Italian civil code of 1942¹⁴, the entering into force of the 1948 Constitution and the continuous interventions of EC legislation it seems to some scholars¹⁵ that the civil code has been losing some centrality. We will investigate further on this point¹⁶.

As anticipated, the aim of consolidating insurance rules in the c.a.p. was the rationalization and simplification of the rules with the scope of increasing efficiency and competitiveness of the insurance market while strengthening the protection of the insured.

Yet, as anticipated, the c.a.p. does not provide for all the norms related to insurance law despite this would have been its first scope¹⁷. For instance, and as we will see it is an important issue, it does not encompass the rules related to insurance contracts which remain regulated by the Italian civil code (capo XX of Titolo III, Libro IV, artt. 1882-1932 civil code)¹⁸. The c.a.p. only offers a referral article (art. 165) to the rules in the civil code. Art. 165 c.a.p. gives prevalence to the regulation of the c.a.p. over the specific rules on insurance, coinsurance and reinsurance contracts in the civil code¹⁹ and therefore a systemic role of special legislation.

Moreover, the c.a.p. offers a wide span of powers to the controlling authority (ISVAP) to regulate the market²⁰. Several of those regulations, though technically secondary legislation²¹, do have an impact also on insurance contract law rules contributing to add another layer to an already multilayer system of sources of law which do not have necessarily the c.a.p. at the top of it and in which the civil code is not anymore in a clear way the sole centre of reference not even for insurance contract.

The Capo XII of the c.a.p. ("Norme relative ai contratti di assicurazione") contains several rules related to insurance contracts in addition to the mentioned specific article (165) which gives priority to

¹⁴ For an historical synthesis see G. PORTALE, *Il diritto commerciale italiano alle soglie del XXI secolo*, in *Riv. soc.*, 2008, 1; F. GALGANO, *Storia del diritto commerciale*, Bologna, 1976, 69ff.; G. COTTINO, *Introduzione al trattato*, in G. BONFANTE- G. COTTINO, *L'imprenditore*, in *Trattato di diritto commerciale*, diretto da G. COTTINO, I, Padova, 2001, 343ff. Note that already in the 30s of last century Italian scholars were questioning the utility of maintaining separate a set of insurance rules dealing with the public aspects\interests and one dealing with contractual rules. See A. ASQUINI, *Verso l'unificazione delle leggi sulle assicurazioni*, in *Assicurazioni* 1934, I, 5 ff.

¹⁵ See G. PORTALE, *Il diritto commerciale italiano ...*, cited, 1.

¹⁶ Yet on the fact that topography does not offer a final word on the creation of principles see G. OPPO, *I contratti d'impresa tra codice civile e legislazione speciale*, in *Riv. dir. civ.*, 2004, I, 841ff.

¹⁷ For all see A. D. CANDIAN, *Il nuovo codice delle assicurazioni e la disciplina civilistica del contratto di assicurazione: tendenze e "resistenze"*, in *Contratto e Impr.*, 2006, 1289-1313.

¹⁸ For a critique to the original intent to incorporate insurance contract rules in the c.a.p. see A. GAMBINO, *Note critiche sulla bozza del codice delle assicurazioni private*, in *Giur. comm.*, 2004, 1035; G. VOLPE PUTZOLU, *Capo I -Definizioni e classificazioni generali*, in *Il codice delle assicurazioni private (Commentario al d. lgs. 7 settembre 2005, n. 209)*, F. CAPRIGLIONE (edt.), I, 1, Padova, 2007, 12. *Contra*, A. D. CANDIAN, *Il nuovo codice ...*, cited, 1306ff.

¹⁹ It is important to note that the drafting commission for the c.a.p. originally proposed to move the prescriptions under the civil code to the c.a.p. The Consiglio di stato itself, in its consultative opinion of March 14th, 2005, does not see any problem in moving the article in the civil code to the c.a.p. while advising to put (in the case of transfer from the civil code) a clause restating that insurance contract would remain still subject to the general principles which can be abstracted by the civil code as whole. *Contra*, on the potential shift from the civil code to the c.a.p. see A.D. CANDIAN, *Il nuovo codice ...*, cited, 1289-1313, especially 1306ff.

²⁰ For a full list of those rules see G. MORBIDELLI, *I regolamenti dell'ISVAP*, in *Il nuovo codice delle assicurazioni*, S. AMOROSINO – L. DESIDERIO (edts), Milano, 2006, 38.

²¹ P. CORRIAS, *In tema di prodotti finanziari delle imprese di assicurazione e di trasparenza nel settore assicurativo alla luce dei regolamenti di attuazione dell'ISVAP*, in *Resp. civ. e prev.*, 2008, 997.

the c.a.p. over specific insurance contract norms in the civil code. Those rules, among others, either deal with void insurance contracts, the destiny of contracts concluded with unauthorized companies or dictates regulations for the redaction of insurance policies. Capo II of the same title XII prescribes rules for the specific contract for accident liability and regulates some contracts (legal protection 173-174, assistance 175, life insurance 176-178, contracts of “capitalizzazione” (capitalization) 179)²².

This mentioned interplay between different sources of law is made more complicated by art. 178 c.a.p. which provides for an inversion of the burden of the proof in those contracts in which a life insurance claim is at stake. In fact, this inversion must be coordinated both with insurance contract rules in the civil code and in the consumer code.

In addition, there should be coordination between the c.a.p. and rules for welfare pension benefit contracts (“contratti di assicurazione previdenziali”) provided for by d.d. 5 dicembre 2005, n. 252, on the complementary pension system.

Last but not least, there is an interplay provided for by the law between the rules on the protection of savings and insurance contract.²³

In short, the rules for insurance law are contained in a multiplicity of sources which, in the end, makes more difficult the coordination among the several legal texts and to assess the legal risks²⁴.

The fact that actually there is a so called insurance code does not alter the traditional mechanisms of coordinating the legal rules and their interplay. For sure, it does make simple the search of the texts and flags some general points (e.g. a number of contracts permissible to insurance companies larger than the one encompassed by the civil code and a relational attitude to protect the weaker party).

One more point should be made to complete our answer to the question: the issue of the coordination of insurance contract regulations.

It is worth noticing that most insurance contracts - at national and international level - are so heavily drafted, trying to cover all possible occurrences, that the relevance of both special (insurance) and general contract rules fades away. Somehow, general principles of protection remain on the fore front²⁵ but disperse in different set of rules. Note also that, contrary to the ongoing mantra of deregulation,

²² Scholars are in doubt on the insurance nature of some of these contracts. For example, on the “contratto di capitalizzazione” see P. CORRIAS, *Art. 179, in Il codice delle assicurazioni private (Commentario al d.lgs. 7 settembre 2005, n. 209)*, F. CAPRIGLIONE ed., II, 2, Padova, 2007, 175ff. More generally P. CORRIAS, *Garanzia pura e contratti di rischio*, Milano, 2006, passim.

²³ See M. SIRI, *Trasparenza delle obbligazioni e tutela dell'assicurato nel codice delle assicurazioni e nella legge sulla tutela del risparmio*, in *Il nuovo codice delle assicurazioni*, a cura di S. AMOROSINO e L. DESIDERIO, Milano, 2006, 392ff.

²⁴ L. ROSSI CARLEO, *Diritto Comunitario, “Legislazione speciale” e “Codici di settore”*, in *Riv. notariato*, 2009, 11.

²⁵ See, referring in general to contracts drafted by Anglo-American law firms and in a common law context, S. PATII, *Parte generale del contratto e norme di settore nelle codificazioni*, in *Riv. trim. dir. proc. civ.*, 2008, 735. But see for an emphasis on the role of the general part on contract also in relation to the setting of a general part on contracts among enterprises P. SIRENA (ed.), *Il diritto europeo dei contratti d'impresa. Autonomia negoziale dei privati e regolazione del mercato*, Milano, 2006, passim; A. FALZEA, *Il diritto europeo dei contratti d'impresa*, in *Riv. dir. civ.*, 2005, I, 1ff.; E. NAVARRETTA, *Buona fede oggettiva, contratti di impresa e diritto europeo*, in *Riv. dir. civ.*, 2005, I, 507 ff. On the general part of contract and its significance today see the contributions gathered by F. MACARIO - M.N. MILETTI (eds.), *Tradizione civilistica e complessità del sistema. Valutazioni storiche e prospettive della parte generale del contratto*, Milano, 2006.

contract law in general, including insurance contracts, is facing an increase and diversification of regulation in which a significant part is played by regulating or supervising authorities²⁶. The problem of coordination, then, moves beyond traditional hermeneutic criteria and requires more multifaceted tools for governing regulatory complexity also in this area²⁷.

The c.a.p. is the meeting point for insurance law originating in EC law, in special legislation (such as those dealing with traffic accident insurance) and in sector specific codifications. Yet, c.a.p. does not acquire a prevalent role with reference to insurance contract despite the general declarations of its parts devoted to contract (art. 165).

In principle, the fact that there is a code for the sector, instead of just special legislation, paves the way to simplification and easier access to the legal rules. On the one hand, it offers a more complete and systemic knowledge basis. In this sense the c.a.p. is not a special legislation meaning it requires simplistically a general rule to deviate from.

On the other hand, the traditional relationships between the civil code and special legislation are not overcome by the mere fact that there is a c.a.p. since it is not a self-sufficient regulation. Indeed, the convergence of the rules contained in the civil code, the c.a.p., the controlling authority regulations and other sector general rules (e.g. consumer code) build a system which needs more efforts in coordination for each actual case.

2. To what degree does the codification of insurance law cover both, commercial and consumer insurance?

Please specify

- whether commercial and consumer insurance are both regulated in the same statute

In the c.a.p. there is not such a distinction with reference to the insurance contract. The c.a.p. covers both commercial and consumer insurance. Yet consumers and clients which are not consumers might enjoy different levels of protection due to the interplay of various layers of rules.

For instance the individual will be taken into account as a contractual party (e.g. insurer, insured), as a consumer, as a special kind of consumer (e.g. the insured), as a special individual (e.g. third party beneficiary) and the single pieces of the normative puzzle will come into the picture under different orders of interpretative coordination techniques.

²⁶ See on these issues for a first information F. CAFAGGI, *Il diritto dei contratti nei mercati regolati: ripensare il rapporto tra parte generale e parte speciale*, in *Riv. trim. dir. proc. civ.*, 2008, 95.

²⁷ For this trends and in general see U. BRECCIA, *La parte generale fra disgregazione del sistema e prospettive di armonizzazione*, in E. NAVARRETTA, *Il diritto europeo dei contratti fra parte generale e norme di settore*, Giuffrè, 2007, 31 ss.

We can use two metaphors to describe the interplay among the described set of rules. One is the image of concentric circles. The larger circle encompasses the civil code, a smaller circle included in the former encompasses the specific protective rules aggregated in the consumer code or other special legislations, an even smaller and specific circle aggregate the special rules for insurance operations and contract.

Nevertheless, this metaphor would depict only the traditional relationships of strict interpretation and specialty among general, specific and special legislation and would even go against the fact that insurance operations and contracts refer to a larger group than the one embraced by the notion of consumer originating in EC law (as a physical person acting outside the scope of one's professional activity).

- *whether consumer law has priority over insurance law codification (lex specialis)*

No. Consumer law and insurance law codification must be read in a coordinated manner. The c.a.p. does not provide an area in which it deals with consumer law (but see above and below).

In reality the interplay among the described rules looks more like a Kubrik's cube in which each part is in a multiplicity of relations with the other parts; relations which respond to traditional hierarchies and methods (e.g. traditional general-special, general-specific) but that can be operated according to the actual relational interplay among the pieces of regulation as well.

This way, for instance, the civil code provisions on contract cannot be interpreted without the principles emerging from the consumer code or from the protective relational attitude of the c.a.p. In short the different layers of regulation, stratified over time, are not anymore bi-dimensional but interoperate in a sort of tri-dimensional way²⁸ like in a Kubrik's cube. After all, the description of the contractual relationships (related to insurance products) which can be concluded by insurance companies and which emerges from the different rules contained in the c.a.p. is much wider than the definitions encompassed in articles 1882 and following of the civil code. We refer mainly to rules of general applicability or devoted to specific type of products (artt. 165-181, art. 182-187 on information transparency and clarity, art. 242, section 3, and art. 240, section 5, on the right of withdrawal in case of revocation of the authorization).

²⁸ On the interplay between the general part of contract law and specific nominated contracts see for an effective synthesis M. GORGONI, *Regole generali e regole speciali nella disciplina del contratto*, Torino, 2005, passim. See also G. DENOVA, *I contratti atipici e i contratti disciplinati da leggi speciali: verso una riforma?*, in *Atti del convegno per il cinquantenario della rivista*, in *Riv. dir. civ.*, 2006, 345ff.; G. VETTORI, *La disciplina generale del contratto nel tempo presente*, in *Riv. dir. priv.*, 2004, 324ff.; E. LUCCHINI GUASTALLA, *Sul rapporto tra parte generale e parte speciale della disciplina del contratto*, *Riv. trim. dir. proc. civ.*, 2004, 379ff., 821ff.; G. DENOVA, *Sul rapporto tra disciplina generale dei contratti e disciplina dei singoli contratti*, in *Contr. e impr.*, 1988, 327ff.; P. VITUCCI, *Parte generale e parte speciale nella disciplina dei contratti*, in *La civilistica italiana degli anni '50 ad oggi tra crisi dogmatica e riforme legislative*, Padova, 1991, ivi, 441 ff.

The scheme provided by the c.a.p. ratifies the fact that insurance companies may conclude contracts which might lack one or more of the elements encompassed by the civil code definitions²⁹ and even just for this reason it assumes an important role in the normative puzzle we described and in the aim of equilibrating involved actors powers in this specific market.

As anticipated, things are made more complicated to coordinate when secondary legislation (by ISVAP) is contemplated, especially under the form of so called “regolamenti” (regulations). This is the case of title XIII c.a.p. on transparency³⁰.

For life insurance contract, coordination must be made as well also with law 28 dicembre 2005, n. 262 on the protection of savings and financial markets.

With reference to the consumer code, the c.a.p. does not provide for an explicit coordination.

In the c.a.p. there are several provisions which in a sense govern the insurance contract from the “external” (beyond parties’ will) integrating or superseding parties’ will to protect the weaker party of the contract³¹.

A tentative survey of these rules can be easily made. It shows they are mainly located in the parts dealing with controls. For instance, control aims also at maintaining consumer information and protection;³² art. 119 provides for the principle of solidarity in dealing with insurers and intermediaries’ liability in line with case law; art. 131 in providing for auto accident insurance names the consumer expressly as addressee of specific information to enable a fair and clear comparison; similarly and for the same insurance contract article 170 ban tying practices (including with bank and financial contracts). Several other articles in the c.a.p. are indicators of the spirit which pervades the c.a.p. itself: art. 174, on legal protection insurance; art. 177 on *ius poenitendi*; art 182, on clarity and transparency of information for all advertising regarding any insurance contract. Indeed, the latter provision in its subsection shows the deep interplay between the insurance code and the consumer code with reference to comparative advertising for instance.

Art. 183 (on behavioural rules and information), art. 185 (compulsory information attachment), art. 186 (preventive inquiry on the information attachment), art. 187 (integration of information attachment)

²⁹ See M. GAGLIARDI, *Il contratto di assicurazione. Spunti di atipicità ed evoluzione del tipo*, Torino, Giappichelli, 2009, 261 ff., and before M. BIN, *Artt. 1 e 2*, in *Commentario al codice delle assicurazioni*, M. BIN (edt.), Padova, 2006, 15; A. GAMBINO, *Linee di frontiera tra operazioni di assicurazioni e bancarie e nuove forme tecniche dell'assicurazione mista sulla vita a premio unico*, in *Ass.*, 1993, I, 157ff.

³⁰ Scholars are today more prone to include rules for transparency among those aiming to protect the weaker party. See M.C. CHERUBINI, *Tutela del contraente debole nella formazione del consenso*, Torino, 2005; V. ROPPO, *Il contratto del duemila²*, Torino, 2005, 52.

³¹ It has been written that there are so many rules which moves along the lines mentioned in the text that the all text in its most innovative parts could appear inspired by this weaker part protection aim. See M. ROMA, *Codice delle assicurazioni. Novità e prospettive in tema di tutela dell'assicurato-consumatore*, in *Dir. economia assicur.*, 2007, 107.

³² See art. 3 c.a.p.: “(Finalità della vigilanza) La vigilanza ha per scopo la sana e prudente gestione delle imprese di assicurazione e di riassicurazione e la trasparenza e la correttezza dei comportamenti delle imprese, degli intermediari e degli altri operatori del settore assicurativo, avendo riguardo alla stabilità, all'efficienza, alla competitività ed al buon funzionamento del sistema assicurativo, alla tutela degli assicurati e degli altri aventi diritto a prestazioni assicurative, all'informazione ed alla protezione dei consumatori.”

offer other instances of the weaker party protection spirit we mentioned earlier drawing directly legal rules or empowering the controlling authority (ISVAP) to define the behavioural rules which, by way of an effective transparency, fulfill the protective scope of the weaker party while satisfying the need of a sustainable, fair and competitive insurance market.

In a sense the c.a.p. has inherited those weaker party protection rules which were drafted after the EU directives n. 92/96/Ce and n. 92/94/Ce, enacted in Italy by legislative decrees 174 and 175 of 1995.

The civil code and, today, the consumer code refer to the insured as a sort of regular contractual party to which, where it is the case, the specific rules of the c.a.p. also apply³³. Once again, the risk is that the insurance rules might create a puzzle difficult to sort out.

- whether and to what extent the insurance codification distinguishes between consumers and non-consumers.

The insurance codification does not distinguish as such between consumers (as a physical persons acting outside the scope of ones professional activity) and non consumers. Yet, we must reflect on the potential distinction between client (notion introduced by the legislator as well) and consumer. An insurance client might be the addressee of the protective rules in the c.a.p. but not of those in the consumer protection legislation or, alternatively, the client might be the addressee of both. In this latter case the interplay among the rules (the Kubrik's cube metaphor) might lead to either integrate or limit or even exclude one or the other³⁴. Indeed the insurance protective rules tend to adjust the protection to the actual weaknesses of the counterpart and the client-consumer can profit also of the protection offered by the consumer code (e.g. against unfair terms) as clearly emerging from the consumer code (art. 127, section 1, art. 135, section 1) which prevent the limitation of rights endowed by other norms.

- whether there are separate codifications for commercial insurance and consumer insurance (for example: consumer insurance is governed only by the Civil Code whereas commercial insurance is governed by the Commercial Code) and what the relationship of both codifications is.

This is not applicable, due to what we have said before.

³³ On the insured as a special kind of consumer see A.D. CANDIAN, *Contratto di assicurazione e clausole vessatorie. Lineamenti generali*, 955 ss.; V. PETRONE, *Clausole vessatorie e contratti di assicurazione sulla vita*, parte II, 1013 ss.; D. CERINI, *Clausole vessatorie e contratti di assicurazione danni*, parte III, 1047 ss., in Aa.Vv., *Le clausole vessatorie nei contratti con I consumatori commentario agli artt. 1469 bis -1469 sexies del codice civile*, a cura di G. ALPA e S. PATTI, tomo II, Torino, 1997.

³⁴ See P. CORRIAS, *La disciplina del contratto di assicurazione tra codice civile, codice delle assicurazioni e codice del consumo*, in *Resp. civ. e prev.*, 2007, 1749ff.

V. “CONSUMER” AND “COMMERCIAL” RISKS.

1. How does the legal system distinguish “consumer” from “commercial” risks ?

The distinction between consumer and commercial risks does not exist in the Italian civil code, which also does not speak of „consumers“ in the rules dedicated to the insurance contracts. The Italian legislator has recently enacted the consumer code choosing - alike other legislators, such as the French one - to convey all the rules of consumer law in a „code“ different from the civil code.

As a consequence, even the few articles, that had been inserted in the civil code, in order to address consumer problems (e.g.: artt. 1469*bis* ff., about unfair terms in consumer contracts; artt. 1519*bis* ff., about the sale of consumer goods) were moved in the consumer code.

Yet, the consumer code does not provide for rules about insurance law (and insurance contracts), which remain dealt with in the civil code and in the code of private insurances.

For this reason, we can conclude that there is just one case in which the distinction between consumer and commercial risks has some direct legal relevance: art. 33 ff. of the consumer Code, which regulates the unfair terms in consumer contracts, following EC Directive 93/13.

These rules applies only to consumers. As a consequence, in the drafting of a consumer insurance contract (consumer risk) attention has to be paid on the balance of the contractual risks between the contractual parties and particularly on the attribution to the consumer party of contractual risks which could cause „a significant imbalance in the parties’ rights and obligation“ to his detriment.

The rule concerning the protection of consumers in general can naturally play some role in creating some different regime (see above in this questionnaire, under VI.1), but it will not depend on an explicit law distinction between „consumer“ and „commercial“ risks.

2. Does the legal system award protection for

- large risks,*
- mass risks,*
- policyholders who are natural persons,*
- private consumers?*

The distinction between large risks and mass risks.

The distinction between large and mass risks is unknown in the Civil code, but not in the code of private insurances.

Art. 1, r), of the code of private insurances, gives the definition of large risks in reference to some (not to all the) risks indicated in art. 2, section 3. These risks are the following:

- 1) risks regarding railway vehicles or air vehicles or sea-, lake-, river-vehicles; transported goods; air-vehicles third party liability; sea-, lake-, river-vehicles third party liability with exclusion of the craft subject to the compulsory insurance on the basis of art. 123 c.a.p.;
- 2) risks in the credit and security sector, when the insured party regularly (literally as a professional: “professionalmente”) run an industrial, commercial or intellectual business and the risks pertain to that business;
- 3) risks regarding terrestrial vehicles, with exclusion of railway vehicles; or regarding fire or natural elements; other kind of damages to goods; motor-vehicle third party liability; sea-, lake-, river-vehicles third party liability for craft subject to the compulsory insurance on the basis of art. 123 c.a.p.; civil liability; pecuniary loss liability.

All risks contemplated under 3) are qualified large risks only if the insured party exceeds at least two of the three following thresholds (referred, if it is the case, to the consolidated financial statement: total assets of the balance sheet exceeding € 6.200.000,00; business volume exceeding € 12.800.000,00; average number of employee during the financial year exceeding 250 units.

The Italian legislator does not give an explicit definition of mass risks: it could be argued that mass risks are all the risks which do not fit in the definition of large risks.

The distinction between large and mass risks has some important legal consequence³⁵:

- a) Art. 120, section 5, of the code of private insurances exempt from the disclosure duties rules those insurance intermediaries operating in the field of the large risks;
- b) The communitarian coinsurance (art. 161 of the code of private insurances) is possible in case of damage insurance for risks located in Italy only for the large risks contemplated in art. 1, section 1, r), of the code of private insurances.

³⁵ The communitarian legislator (directive 92/49/EEC, art. 27) has given the contractual parties the choice of applicable law only for the large risks in the non-life sector. This rule does not appear in the Italian legislation, which rules the choice of law in art. 180 and 181 of the code of private insurances. According to art. 180, in non-life insurance for risks located in Italy, the contractual parties could agree to choose a foreign law, but they cannot contract out the national compulsory law. This article - which makes no difference between large and mass risks - seems more restrictive than the communitarian rule as to the freedom of the choice of law in large risks. But see now the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), art. 7.2.

Policyholders who are natural persons

The Italian civil code does not give any relevance to „policyholders who are natural persons“. And also the code of private insurances does not offer any definition to such words. There are some rules which refer only to natural persons, but not in order to give them special protection.³⁶ Only art. 134, section 4*bis*, of the code of private insurances gives some relevance to the policyholder – natural person.

According to this article, which applies to the motor-vehicle third party liability insurance, in case of an insured policyholder, who asks for the conclusion of another contract for another motor-vehicle of the same category, the insurer cannot offer a tariff worse than the existing one if the policyholder is a natural person or a component of his family, who lives with her or him.

Private consumers

As written above, in the year 2005, the term “consumer” has migrated from the Italian civil code (which mentioned it in few, recently enacted, articles) into the consumer code. As already specified, such code does not regulate the insurance field, to which is dedicated another “code”: the code of private insurances.

The latter does not contemplate the term “consumer” in its “Definitions”; but the term consumer is used in some (very few) articles.

³⁶ Many articles speak about „natural person“ but not in order to give special protection to the policyholder. See e.g.:

- 1) Articles relating to the start up of the insurance business. If an Italian firm, which operates in freedom of establishment regime, will open a secondary seat in another member state, it shall appoint a general agent, that, if it is a legal person (*persona giuridica*), shall appoint a natural person as agent (art. 16, section 3, of the code of private insurances; and see also the same rule, codified in art. 23, section 2, of the code of private insurances, as to the opposite case: enterprise, located in another member state, which aims at opening a secondary seat in Italy). A similar rule is written also in art. 60, section 2, of the code of private insurances, relating to the start up of the reinsurance business by a reinsurance company, which has its seat in another member state. Further, art. 110 of the code of private insurances, which regulates the start up of the insurance intermediation business and the integrity requirements which a natural person shall meet in order to get the registration in the compulsory registers.
- 2) Art. 96, section 2, c), which requires a consolidated financial statement in case of insurance or reinsurance firms under the control of just one person, if it is a natural person.
- 3) Rules which regulate the insurance intermediation (artt. 112, sections 2 and 3; art. 113, section 2).
- 4) Rules which regulate the activities of experts.
- 5) Rules which regulate the insurance surveillance, stating that the authorities competent to authorize the insurance or the reinsurance business (art. 203, section 1, c) or the Authorities which have the power to oversee the credit or investment firms, which operate in another member State, must be consulted before the issuance of the authorization to run an insurance or reinsurance business to a firm controlled by the same natural person or legal person, which controls an insurance or reinsurance firm or, respectively, a bank or investment firm, authorized by another member State.
- 6) Rules which regulate the issuance of the authorization to control an insurance or reinsurance company if the purchaser becomes a parent corporation and is a natural person (or a legal person) (art. 204, section 1, c).
- 7) Rules which regulate the material intra-group transactions (art. 215, section 1).
- 8) Rules which regulate the breach of disclosure duties by a natural person, which will be compelled to pay the fine (art. 311, section 4).

Art. 131, section *2bis*, provides that insurance intermediaries, when offering motor-vehicle third party insurance contracts, shall give to the „consumer“ preventive information on the gains which they will receive from the insurance company. This same section adds also that this information shall be contained in the documents given to the „contracting party“: it is remarkable that this last specification seems contradictory because it does not refer more to the „consumer“, but to the „contracting party“, which is a wider term.

Art. 136, section *3bis*, provides for an information service by the Ministry of Economy (also in its website), in order to enable consumers to compare the insurance rates offered from the insurance companies for her/his own profile. This provision will probably extend its benefit to any natural person (not only consumer) in need for an insurance coverage.

Finally, art. 5, section 3, of the code of private insurances gives ISVAP the role of promoting an appropriate degree of consumer protection.

As already mentioned (see above § V.1) the EC directive on unfair terms in consumer contracts applies also to the insurance field and offers a special protection to the consumer (but not to non-consumers) against the risk that in the drafting of an insurance contract will be put terms which produce a significant imbalance of her/his rights and obligations.

VI. SUBSTANTIVE ASPECTS.

1. In what areas do consumers enjoy special protection ?

Preliminary remarks: Consumers, private insured and the weaker party. Distinction between consumer protection policy and special rules in contract law

The code of private insurances, and the civil code in the articles on contract and on insurance contract provide no special protection for consumers as such (even if in most cases private insured parties are also consumers). Anyway, the weaker party of an insurance relationship enjoys some protection in different ways, as it will be specified for each issue.

In few specific cases, the consumer code provides rules and tools useful also in insurance contracts. The main legal tool, establishing a very special protection for consumers, is the regulation of unfair contract terms, which nevertheless has not been applied to insurance contracts in meaningful ways³⁷.

Article 3 of the code of private insurances states that the control on insurance activities aims, among other goals, at policyholders' protection and at information and protection of consumers. As specified by article 5, the control on insurance activities and all useful acts in order to obtain consumers protection are exercised by the ISVAP, the Italian Insurance Authority. ISVAP is entitled to enact regulations (Regolamenti) and to use a wide range of powers (for instance, see *infra*, about premium).

The inspiration of the code of private insurances and of the ISVAP's powers for consumer protection policy are very important in order to understand many rules introduced both in the civil code and in the c.a.p. In fact, as we will explain, many of these rules have to be applied to every insured party and not only to consumers. Nevertheless, many of them are typical consumer protection tools (for instance, cooling off periods, *ius poenitendi*, information duties, etc.), even if they apply to the parties of an insurance contract despite of the qualification of the weaker one as consumer. For that reason, in the following answers all tools will be highlighted, even if distinguishing between areas in which consumers enjoy special protection and areas in which policyholders or insured parties enjoy protection by means of rules inspired by consumer protection policy.

(Pre- and post-contractual) information

In the area of information duties (and rights), consumer protection is given above all by the consumer code. The consumer code provides general rules, which must be applied in all activities, and contracts, involving a consumer. The most important provisions are:

- Art. 2, par. 2, which recognizes to consumers and users some fundamental rights, such as the right to adequate information and to fair advertising (sub c)), the right to the exercise of commercial practices with good faith, fairness, and loyalty (sub c-bis)), and the right to fairness, transparency and equity in contractual relationships (sub e));

- Art. 5, par. 3, providing that all information to consumer have to be adequate to the kind of communication used and expressed in understandable way, also keeping into consideration the way to conclude the contract and the specific features of the field, in order to obtain the awareness of the consumer;

³⁷ The first, very important, applications of the unfair contract terms directive in insurance contracts were the actions conducted by the associations of consumer in order to ban some clauses from the general conditions of insurance. They were pre-emptive actions, for which, please, refer to the present report, par. III.3.

- Articles 20 ff., forbidding unfair commercial practices, among which unfair or misleading advertising. For instance, some cases decided by the *Autorità Garante per la Concorrenza ed il Mercato*, the Italian antitrust authority, concerned advertising of life insurance products, and advertising of benefits promised to consumers buying motor liability insurance³⁸.

- Articles 67-bis ff., fixing specific rules about information to be given to consumers, in cases of distance-selling of financial services.

Apart from the consumer code, under the Italian civil code, no special rules are provided in order to ensure consumers with proper information before and after the conclusion of the contract of insurance.

On the contrary, under insurance contract law, the insured underwrites a proposal (which the insurer considers for acceptance), and therefore is supposed to have knowledge of the terms and conditions of the policy. This is the traditional assumption underlying the qualification of the contract of insurance as a contract of utmost good faith in most legal systems.³⁹ Nevertheless, the matter of information asymmetries in insurance contracts has been recently read with more attention to the real knowledge and to the contractual power of the applicant.⁴⁰ In fact, and among many other provisions, in order to keep in balance the positions of the parties, both the civil code and the code of private insurances contain some rules requiring some kind of information which the insured party ought to receive before or after the conclusion of the contract. As said before, many of these rules are certainly inspired by a consumer protection policy, but they apply to applicants and insured parties as such, thus not only to consumers. However, article 120, par. 5, c.a.p. states that intermediaries' duties of information do not apply to policies covering large risks and to contracts of reinsurance, thus excluding from general protection (only) professionals and undertakers.

Information concerned are:

- (a) pre-contractual information about the insurer and/or about intermediaries involved;⁴¹
- (b) pre-contractual advise about the kind of policy needed, balanced with reference to specific personal features of the insured person;⁴²

³⁸ Provvedimento AGCM, respectively, nr. 18586, in *Bollettino AGCM* nr. 26 of 14 august 2008, and nr. 20007, in *Bollettino AGCM* nr. 26 of 25 june 2009.

³⁹ Please, see: V. SALANDRA, *Assicurazione*, in *Commentario al Codice Civile*, a cura di A. SCIALOJA e G. BRANCA, sub artt. 1861-1932, Capo XX, Bologna-Roma, 1966, III ed., 172-441; and G. FANELLI, *Le assicurazioni*, in *Trattato di diritto civile e commerciale*, diretto da A. CICU e F. MESSINEO, vol. XXXVI, t. 1, Milano, Giuffrè, 1973; A. GAMBINO, *La neutralizzazione dei rischi nella struttura e nella funzione giuridica unitaria del contratto di assicurazione*, in *Riv. dir. comm.*, 1985, II, 209-221; A. ANTONUCCI, *L'assicurazione fra impresa e contratto*, Bari, 2000; C. RUSSO, *Trasparenza ed informazione nel contratto di assicurazione*, Padova, 2001; V. DE LORENZI, *Contratto di assicurazione. Disciplina giuridica e analisi economica*, Padova, 2008.

⁴⁰ A.D.CANDIAN, *Contratto di assicurazione e clausole vessatorie*, in *Le clausole vessatorie nei contratti con i consumatori*, a cura di G. ALPA e S. PATTI, Milano, 1997, t. II, 955; A. MONTI, *Buona fede e assicurazione*, Milano, 2002; M. GAGLIARDI, *Il contratto di assicurazione. Spunti di atipicità ed evoluzione del tipo*, Torino, Giappichelli, 2009.

⁴¹ Articles 185 and 120 of the code of private insurances, as specified in the Regolamento Isvap nr. 5/2006. In particular, art. 120, par. 2, c.a.p.: insurance intermediaries ought to declare whether they have any duty to offer products of one or more insurers or if they give independent advise.

⁴² Article 120, parr. 3 and 4, of the code of private insurances, as specified in the Regolamento ISVAP nr. 5/2006.

(c) pre-contractual information related to the main features of the policy (including both explanation from the intermediary and the provision of copy of all the conditions of insurance);⁴³

(d) contractual information embodied in the contract, i.e.: the contract and all documents ought to be clear, understandable and complete; moreover, in the contract, terms and conditions imposing on the insured specific duties or warranties must be highlighted and specifically underwritten;⁴⁴

(e) post-contractual (during contract execution) information, particularly in motor liability insurance, concerning the procedure and the evaluations of the insurer in order to pay the insured indemnity to the policyholder;⁴⁵

(f) pre-contractual information, in life insurance, about the financial value of the contract, the costs and risks of the contract and, more particularly, in financial insurance products (such as index-linked policies), for which information provided must include (during all the time of contract validity) also the results of managed investments;⁴⁶

(g) specific rules are provided for pre-contractual information in distance-selling (article 121 of code of private insurances);

(h) pre-contractual information about the right to withdrawal (*ius poenitendi*) in life insurance contracts.⁴⁷

All information duties just listed apply to every insurance contracts even if their inspiration could be found also in consumer protection policy. As said before (in the present report, par. IV), the interaction among different codes is not clear. In particular, in insurance contracts the coordination of the rules contained in the c.a.p. with the ones expressed by the consumer code and by the civil code is both difficult and of fundamental importance.

In this perspective, it is possible to read the abovementioned information duties together with the provisions of articles 2 and 3 of the consumer code. This way, the distinction between consumers and non consumer insured parties could be drawn in the sense of a stricter interpretation of the duties when a consumer is involved. However, the real existence and scope of such a distinction depends on the interpretation given to the issue of interaction and coordination among codes.⁴⁸

⁴³ Article 120, par. 3 and 4, of the code of private insurances, as specified in the Regolamento ISVAP nr. 5/2006 and article 185 c.a.p. on the so called “nota informativa” (information brief document).

⁴⁴ Article 166 of the code of private insurances, and articles 1341 and 1342 of the civil code.

⁴⁵ Articles 148 and 149 of the code of private insurances, and d.p.r. 18 luglio 2006, n. 254, particularly art. 9.

⁴⁶ Article 1925 of the civil code and Article 185, par. 4, of the code of private insurances.

⁴⁷ Article 177, par. 2, of the code of private insurances.

⁴⁸ The matter of interaction and of systematic coordination among codes is studied in the same light of the relationship between civil code and special legislation. See F.D. BUSNELLI, *Il diritto civile tra codice e legislazione speciale*, Napoli, 1984 and, with specific attention to insurance contracts, F.D. BUSNELLI, *Prefazione a Le assicurazioni private*, a cura di G. ALPA, Torino, 2006, I.

Premium

A particular form of consumer protection consists in transparency and comparability of premiums and tariffs, with specific applications in the field of motor liability insurance. The code of private insurances (articles 131 and 133) requires insurers of motor liability insurance, as far as policies constructed on an experience-rate basis (bonus-malus policies) are concerned, to give notice on their websites and in the premises of their intermediaries (agents) of the premiums applied for each of the categories of insured party.

Moreover, the ISVAP, even if it is not allowed by EC law to require insurers a systematic and preventive communication of the tariffs applied, is allowed to investigate on the rationales used by insurers in calculating premiums and in fixing the tariffs. The compatibility of this power with EC law, together with the utility of the tool in order to protect consumers, has been stated and recognized recently by the European Court of Justice in the decision of April 28th, 2009, case *European Commission v. Italy*.

Terms and conditions imposing on the other party specific duties or warranties (warranties and exclusion clauses).

The several “codes” governing insurance law provide no special protection in the field of warranties or of exclusion clauses in insurance contracts.

However, the civil code, at articles 1341 and 1342, as mentioned, ensure that in every contract written by one party (as insurance contracts), terms and conditions imposing on the other party (the insured, and not only the consumer) specific duties or warranties must be highlighted and specifically subscribed. Otherwise, the clauses are void. This is the case for exclusion clauses, specifically mentioned in the articles, despite of the difficulty to distinguish them from clauses describing the subject of the contract (core terms), i.e. policies’ clauses describing the risk covered.

Terms and conditions imposing on the other party specific duties or warranties are mentioned also in the consumer code, in the rules implementing the EC directive nr. 93/13/CE on unfair contract terms in consumers contracts. Article 33 (together with the articles which follows it) contains a definition of unfair term in business-to-consumer contracts which, under Italian law and its systematic interpretation⁴⁹, focuses on the clause of good faith, in its objective meaning. Terms, warranties and other clauses, have to be interpreted having regard to their weight in the complexity of the contract:

⁴⁹ F.D. BUSNELLI, *Una possibile traccia per una analisi sistematica della disciplina delle clausole abusive*, in *Commentario al capo XIV bis del codice civile: dei contratti del consumatore*, a cura di C.M. BIANCA e F.D. BUSNELLI, in *NLCC*, 1997, II, 757.

when causing an alteration in the normative equilibrium of the contract, in contrast with the clause of good faith, the single term can be declared void.

This provision has a particular meaning in insurance contracts. In fact, terms describing the risk covered are excluded from the judicial scrutiny (article 34, par. 2), when clearly and transparently expressed.

The real problem in insurance contracts is that many terms, warranties in particular, are neither clearly clauses describing the risk, nor exclusion clauses⁵⁰. Therefore, the role of judges in interpreting several clauses is pivotal both in clarifying the distinction between exclusion clauses and clauses describing the risk, and in stating how the entire contract ought to be constructed in order to be clear enough.

Furthermore, the clause of good faith, whether in consumer contracts or not, has been applied to give “old” civil code rules a new interpretation, more “friendly” to the insured party⁵¹.

For instance, the policyholder (and insured)’s duty of disclosure has been mitigated imposing another duty on insurers. Because of the rule of good faith, insurers or their intermediaries, when requiring answers to specific questions, should include all the questions and information they need. Information not provided by the insured, if not clearly included in the questionnaire, cannot give way to cancellation of the contract or to the denial to pay the indemnity⁵².

The rules on unfair contract terms in business-to-consumer contracts are provided in order to protect consumers. However, their effective scope is wider. In fact, insurers use to write contracts on the basis of general conditions of insurance, thus making a set of contractual clauses, which is the same for all subscribed policies. When a clause is judged unfair by a court, it is easy to foresee that the clause will not appear anymore in the general conditions. The result, due to consumer protection, is extended to all insured parties. Even if in this case it consists of two steps (the court’s decision in a business-to-consumer case, and the following insurer’s choice to drop the clause from general conditions of insurance), the mechanism is the same of the pre-emptive action of consumers associations introduced by the same statute (see, in the present report, par. III.3).

⁵⁰ A.D.CANDIAN, *Contratto di assicurazione e clausole vessatorie*, in *Le clausole vessatorie nei contratti con i consumatori*, a cura di G. ALPA e S. PATTI, Milano, 1997, t. II, 955; F. DI GIOVANNI, *Difetto di trasparenza e valutazione di vessatorietà delle clausole predisposte nei contratti del consumatore*, in *Clausole “vessatorie” e “abusiva”* a cura di U. RUFFOLO, Milano, 1997, 183; N. GRASSANI, *Sulla natura delle clausole delimitative del rischio assicurato inserite in condizioni generali di contratto di assicurazione*, in *Commentario al capo XIV bis del codice civile: dei contratti del consumatore*, a cura di C.M. BIANCA e F.D. BUSNELLI, in *NLCC*, 1997, II, 751-1293, 1020; G. VOLPE PUTZOLU, *Clausole vessatorie e rischio assicurativo*, in *Dir. econ. assic.*, 1997, 773; V. RICCIUTO, *Note in tema di clausole abusive e rischio assicurato*, in *Europa e dir. priv.*, 1998, 51.

⁵¹ A. MONTI, *Buona fede e assicurazione*, Milano, Giuffrè, 2002; M. GAGLIARDI, *Il ruolo della buona fede oggettiva nel contratto di assicurazione: il vecchio contratto uberrimae fidei dialoga con il codice civile*, in *Il diritto civile tra principi e regole – Liber Amicorum per Francesco D. Busnelli*, a cura di G. COMANDÉ – F. GIARDINA – E. NAVARRETTA – G. PONZANELLI, Vol. I, Milano, Giuffrè, 2008, 593-604.

⁵² Cass. 20 novembre 1990, n. 11206, in *Giur. it.*, 1991, I, 1, 1029; Cass. 25 marzo 1999, n. 2815, in *Resp. civ. prev.*, 2000, 341; Cass. 12 maggio 1999, n. 4682, in *Danno e resp.*, 1999, 1118. See C. CAVALIERE, *Privacy e contratto di assicurazione*, in *Contr. Impresa / Europa*, 1998, 1, 346, 350 ff..

Duration, withdrawal and *ius poenitendi*.

Article 1899 of the civil code, recently modified⁵³, gives the insured party under long term (more than five years) non life policies the right to withdrawal at the end of the first five years. This rule has been introduced in order to ensure policyholders the chance to change insurer and, thus, to enhance competition in insurance market. Under this perspective, the modification has been presented and intended as a tool to enhance consumer protection.

As far as life insurance is concerned, the code of private insurances contains two very important rules.⁵⁴ The first, embodied in article 176, gives the applicant the right to dismiss his/her proposal before insurer's acceptance. This rule seems to be a tool for consumer protection because it introduces a (very large) exception to the general rule in insurance contract law: the proposal cannot be changed or dismissed until 15 or 30 days (article 1887 of the civil code).

The second rule, fixed by article 177, gives the insured party the chance to withdraw the contract in 30 days from the day of acceptance. This right to withdrawal is also called *ius poenitendi*, and it is a typical tool of consumer protection, as enhanced by European Community law.

Unfair Commercial Practices

Articles 20 ff. of the consumer code, implementing the European Directive nr. 2005/29/CE concerning unfair business-to-consumer commercial practices ("Unfair Commercial Practices Directive")⁵⁵, forbid unfair commercial practices. Besides the above mentioned unfair or misleading advertising, the Autorità Garante per la Concorrenza ed il Mercato has decided some insurance cases in which the insurers (or their intermediaries) acted without due diligence in managing the termination of the contract by the insured parties⁵⁶.

⁵³ The first modification was introduced by article 5, par. 4, of d. l. 31 gennaio 2007, n. 7. The right of the insured party was extended at all long term non life contracts, and was actionable at the end of each year. The present formulation is due to article 21, par. 3, of the l. 23 luglio 2009, n. 99.

⁵⁴ These rules were in fact already provided by d.lgs. 194/1995 implementing the third life directive.

⁵⁵ European Directive 2005/29/CE of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market "Unfair Commercial Practices Directive", in OJEU L 149 of 11 June 2005, 22-39.

⁵⁶ Provvedimenti AGCM nr. 19655, in *Bollettino AGCM* nr. 12 of 14 April 2009, and nr. 20158, in *Bollettino AGCM* nr. 30 of 29 July 2009.

2. *What are the instruments of protection in consumer insurance law ?*

Protections of consumers in insurance law derives by specific rules set by the civil code, by special legislation and regulations and also by activities of the control authorities as described above.

Some aspects have been dealt with above. Nevertheless, let us clarify that in most cases the general rules on insurance - set both by legislations and/or regulations - do not distinguish the kind or level of protection according to the status of the policyholder or beneficiary of the policy. In fact, in most cases, the law encompasses all counterparts of the insurer. We will try to clarify the exceptions to that rules; let also explain that these exceptions merely refer to solution coming from general contract law, which on the contrary distinguish quite more often between consumers' transactions and B2B contracts.

For what concerning legal rules, a lot of mandatory rules are present both in the civil code and in the code of private insurances.

Mandatory rules

The insurance contract is defined and regulated by article 1882 to article 1932 of Book Four of the civil code. Most of the rules provided in the civil code are mandatory as they cannot be derogated but for in favour of the insured party. Such rules are identified in art. 1932 itself.⁵⁷

Other mandatory rules are to be found in special legislation and now in the code of private insurances. These rules apply notwithstanding the status (professional/consumer) of the party in question. Consequently the term policyholder refers to both of them.

Cooling off periods.

Cooling off periods are provided for:

- a) life insurance
- b) non life insurance and life insurance in case of distance selling.

More in details, in case of supply of life assurance policies the policyholder (both consumer and non consumer) is entitled to cancel the contract as provided by article 177 c.a.p. In order to ensure the concrete possibility of exercising such fundamental right, the information brochure must clearly state the first day from which it is possible to exercise it and the procedures to follow.

⁵⁷ Comments can be read in A.D. CANDIAN, D. CERINI, V. PETRONE, *Clausole vessatorie e contratti di assicurazione*, in G. ALPA and S. PATTI, *Le clausole vessatorie nei contratti con i consumatori. Commentario agli articoli 1469-bis – 1469-sexsies del Codice Civile*, Milan, 1997; F. ROMEO, *La tutela del consumatore nel contratto di assicurazione danni*, Milan, 2004.

Under the above regulation, the undertaking, within 30 days of receiving the notification of cancellation, must reimburse the policyholder any paid-up premiums net of the portion relating to the period in which the contract was effective and of any costs incurred for issuing it, provided that such costs were determined and quantified according to the same article 177 c.a.p.

In accordance with article 176 c.a.p., in life insurance a right to revoke the proposal is allowed to all parties contracting with an insurance company.

The right of cancellation or cooling off period is not provided for non-life insurance contracts.

For all distance contracts sold, the cooling off period applies according to Directive 2002/65/CE as implemented by the Italian law.⁵⁸

Information and advice duties.

The chapter referring to information and advice duties is long enough and here can be only summarized in its principal steps. Moreover, one should consider that information duties are set for the insurers and the insurance intermediaries so that in the end the set of information to be provided to insured parties is wide enough.

In fact, information and advice duties have been progressively enlarged during the last decades. While the 19th century and the first half of the 20th century have focused onto the duties of information of the insured parties, from the second half of the 20th century, until today, the opposite flows of information have been protagonists of the debate.

Such an alteration of perspective is due to a change of perception about the asymmetric relationship between the insured party and the insurers. The original idea that the insured was the one that best appreciated the risk has not disappeared; nonetheless, when we talk about imbalance of information in contracts with consumers, we take a realistic view, accepting that the contractor does not read the contractual content and therefore does not know it. Even if she read the clauses, she would not be able to appreciate their content in the way the other party would. Therefore the insured party subscribes behind a “veil of ignorance”.

The persuasive strength of this assumption is noticeable. In the content of the contractual text, it has highlighted the role of disclosure duties of companies as those of intermediaries.

The importance of the duty to inform the insured party is clearly testified by the code of private insurances where a entire part (Titolo XIII) deals with the duties to inform and of transparency towards the insured.

⁵⁸ See E. FERRANTE, *Commento artt. 176-178*, in M. BIN (Eds.), *Commentario al codice delle assicurazioni. Decreto legislativo 7 settembre 2005, n. 209*, Padova, Cedam, 2006, 511 ff.; D. CERINI, *Insurance Law*, in *International Encyclopedia of Law*, Kluwer international, 2006, 163 ff.

The need of protection of the consumer through transparency and information finds an answer in the duty to give the maximum of information before the conclusion of the contract. In particular, a first level of transparency in consumer contracts (as well as in all contracts also concluded by non-consumers) not classified as large risks is granted by the duty to give the information notice (so called “nota informativa”).

The information notice is a document that the insurer is obliged to give to the policyholder before the conclusion of the contract according to article 185 c.a.p.

The specific content of the information notice is integrated, in life and non-life insurance, by specific regulations set by ISVAP and it provides for information useful in order to identify the insurance company, the basic elements of the contract, the clauses of exclusion, etc.

The information duties also include the duty to give all contractual documents before the conclusion of the contract.

As anticipated, important information duties and duty to advice is also set on the insurance intermediaries. It is up to them, in fact, to deliver pre-contractual documents disclosing their role and position in the transactions. In addition they have a duty to assist the client in the choice of the proper contract (see art.120 of code of private insurances).

Specific and additional information duties are provided for life insurance contracts where they also are identified as financial services or submitted to the rules approved by control authorities other than ISVAP.

Control of general conditions of insurance.

The protection of consumers is also granted by way of the provision referring to general conditions in contracts.

The protection of consumers against unfair contract terms represents a fundamental step in the direction of promoting a higher standard of fairness in business to consumers relations.

In the Italian legal system such protection is built on two different sets of rules.

The first one coincides with the ‘general rules’ for standard form contract in all types of contract notwithstanding the status (consumers or not consumers) of the adherent party: this regulation is to be found in article 1341 c.c., first and second paragraphs; consumers may benefit from additional protection deriving originally from articles 1469-bis c.c. and now included in articles 33–38 of the consumer code).

More precisely, article 1341 c.c. provides a basic protection of all contracting parties (both consumers and professionals) who adhere to a standardized contract.

In its first paragraph, the article establishes the principle of knowledge (so called “*principio di conoscibilità*”) according to which standard conditions prepared by one of the parties are binding on the other party if, at the time of formation the contract, the latter knew or should have known of them by using ordinary diligence.

Article 1341, c.c., second paragraph, strengthens this rule by stating that, in any case, some conditions and terms are ineffective unless specifically approved in writing if they provide - in favour of the person who has prepared them - limitations of liability, the power of withdrawing from the contract, the suspending of the performance and other onerous clauses.

It is clear that the article provides ‘formal’ protection to all contracting parties under the requirement of a double signature as a proof of specific approval of these clauses.

There is no doubt that, at the time of approval of the civil code (1942) this rule represented a truly innovative discipline. After more than 67 years, the need for a special protection of consumers has nonetheless proved the insufficiency of such a formal protection. That is the reason why article 1341 c.c. is still in force and continues to be applied, even though in the particular area of consumer contracts its practical utility has been bypassed by the implementation of Directive EC/93/13 and the following adoption of articles 1469-bis ff. c.c. (new rule articles 33ff. consumer code).

Insurance contracts are most often standard or adhesion contracts. The rule of *in dubio interpretatio contra proferentem* established by article 1370 c.c. is consequently often applied.

According to the above-mentioned rule (also abbreviated as the *in contra proferentem* rule) provisions contained in the standard conditions of a contract or in forms of formularies which have been prepared by one of the contracting parties, are interpreted, in case of doubt, in favour of the other party. If there is any ambiguity in the language used, the *contra proferentem* rule results in the adoption of the construction most favourable to the insured.

It should be clarified that the notion of ‘ambiguity’ is applied by the courts in a very wide sense and may derive not only from the language of a single clause but also from a systematic reading of a number of clauses.

3. *What role does consumer policy play ?*

General policies

One should summarize the matter by saying that there is an explicit policy or principle set in order to clearly inform the consumers about contract terms and their rights in the contract.

This result ensues also by the reference to the duty to inform and to “educate” the consumers set by the consumer code as provided in art. 4.⁵⁹

Centers advising consumers

They are included in the functioning of consumer associations. In addition, ISVAP, when performing its role under artt. 3-5 of the code of private insurances, can provide for general information to consumers.

Consumer organisations

As said above, consumer organisations and associations play an important role in promoting collective injunctions; they will perform an even more important role in the (forthcoming) class action suits. They often sign agreements with insurance companies on specific matters (i.e. motor insurance).

⁵⁹ See consumer code, „*Article 4 – Consumer education*”:

- (1) Education of consumers and users is designed to encourage awareness of their rights and interests, the development of associations, participation in administrative procedures and their presence in representative bodies.
- (2) Activities designed to educate consumers carried out by public or private bodies are not for promotional purposes. They are intended to explain clearly the characteristics of goods and services and to make the costs and benefit of choosing such goods or services clearly evident. They shall also give special consideration to those categories of consumers that are most vulnerable”

For a comment see R.M. PELLEGRINI, *Educazione del consumatore*, in *Codice del consumo. Commento al d. lgs. 6 settembre 2005, n. 206*, Milan, Giuffrè, 2006, 37 ff.