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Abstract: This national report deals with some of the most significant developments in Italian contract law since 2005. It focuses on consumer contracts, public contracts, and financial contracts. As far as consumer contracts and public contracts are concerned, the recently adopted Codice del consumo *and* Codice dei contratti pubblici *are briefly discussed. Moreover, with respect to public contracts the discussion is also extended to case law dealing with precontractual liability of contracting authorities. As far as financial contracts are concerned, the report deals both with statutory law implementing the MiFID and case law dealing with remedies for breaches of rules of conduct by investment firms.*

I. Introduction

Since the first national report by Vincenzo Roppo in 2005,[1] Italian contract law has experienced some significant developments. These developments did not interest the general part of contract law, but rather some specific contracts. The focus of this report will be on the developments affecting (i) consumer contracts, brought about by the adoption of the Consumer code (*Codice del consumo*), (ii) public contracts, brought about by the adoption of the Code of public contracts (*Codice dei contratti pubblici*) and by case law dealing with precontractual liability of contracting authorities, and (iii) investment contracts, brought about by the implementation of Directives 2004/39 and 2006/73 on financial instruments (MiFID) and by case law dealing with remedies available to retail clients for violations of rule of conducts by investment firms.

II. Consumer code

1. Goals and general structure

Possibly the single most important innovation in Italian contract law in recent years, both from a general and a European point of view, consists in the adoption of the Consumer code with Act 206/2005 (*Codice del consumo*).[2] This code is openly inspired to the French equivalent *Code de la consommation*.[3] Its goal is to collect all statutory law dealing with consumers' protection in order to provide more clarity and coherence to this important area of the law. However, it is generally held that this goal has been accomplished only in part.[4]

As far as its structure is concerned, the Italian Consumer code is divided in six parts. Part I deals with general rules and principles, such as the enumeration of the rights of consumers (eg the right to health, the right to safety and quality of goods purchased) and the general definitions of consumer and professional. Part II deals with education and information of consumers, including the regulation of unfair commercial practices and of advertising. Part III deals with so-called consumption relations, ie consumer contracts. Part IV deals with safety and quality of products and services, including product liability and conformity of goods. Part V deals with consumers' associations and access to justice. Part VI deals with final provisions.

2. Rules dealing with consumer contracts

In this report only those rules of the code dealing with consumer contracts will be discussed. Almost all Italian statutory law implementing Community law relating to consumer contracts can now be found in this code.[5] This is certainly true with respect to the eight Directives subject to the review of the Consumer Acquis: (i) Directive 85/577 on contracts negotiated away from business premises, (ii) Directive 90/314 on package travel, package holidays and package tours, (iii) Directive 93/13 on unfair terms, (iv) Directive 94/47 on timeshares, (v) Directive 97/7 on distance contracts, (vi) Directive 98/6 on

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1 V. Roppo, 'Italy' (2005) *European Review of Contract Law* 273.

2 Cf G. Alpa, 'I diritti dei consumatori e il "Codice del consumo" nell'esperienza italiana' (2006) *Contratto e Impresa/Europa* 1; F. Galgano, 'Un codice per il consumo' (2007) *Vita Notarile* 50; G. De Cristofaro, 'Il "codice del consumo"' (2006) *La Nuove Leggi Civili Commentate* 747; F. Addis, 'Il "codice" del consumo, il codice civile e la parte generale del contratto' (2007) *Obbligazioni e contratti* 872.

3 Cf Ministero delle Attività Produttive, 'Relazione Illustrativa al Codice del consumo' 5 at http://www.attivitaproduttive.gov.it/organigramma/documento.php?id=3567&sezione=organigramma&tema_dir=temaWAI&gruppo=3 (last visited 30 May 2008).

4 Cf Addis, n 2 above, 874; L. Delogu, 'Leggendo il Codice di consumo alla ricerca della nozione di consumatore' (2006) *Contratto e Impresa/Europa* 87.

5 For a list of Italian statutory law dealing with consumer contracts that was not included in the Code cf R. Calvo, 'Il Codice del consumo tra "consolidazione" di leggi e autonomia privata' (2006) *Contratto e Impresa/Europa* 74, 78–79; Delogu, n 4 above, 90.

the indication of prices, (vii) Directive 98/27 on injunctions, (viii) Directive 1999/44 on the sale of consumer goods.[6] The code mostly reproduces old statutory law, which has been repealed, making only minor, but sometimes significant, changes.

a) Definitions of consumer and professional

Article 3 of the Consumer code provides the general definitions of 'consumer' and 'professional'. Prior to the adoption of this code Italian statutory law displayed several definitions of these notions, following the same fragmented approach taken by Community law. The code now defines the consumer as the natural person acting for purposes which are outside its trade, business or profession, and the professional as the legal or natural person acting for purposes relating to its trade, business and profession, or an intermediary of the same.[7] It may be noticed that these definitions are equivalent to those suggested by the Commission in the Green paper on the Review of the Consumer Acquis.[8]

b) The right of withdrawal

The Consumer code provides, to a certain extent, common rules for the right of consumers to withdraw from certain contracts.[9] Originally, Article 6 of Act 50/1992 implementing Directive 85/577 on contracts negotiated away from business premises (doorstep selling) provided that consumers had the right to withdraw from such contracts within seven *calendar days* from the moment the order note was subscribed or the good was received depending on the circumstances of the case. Article 5 of Act 185/1999 implementing Directive 97/7 on distance contracts (distance selling), on the other hand, provided that consumers had the right to withdraw from such contracts within 10 *working days* from the moment the good was received (in the case of goods) or from the moment the contract was concluded (in the case of services). Today, Article 64 of the code generalises the 10 *working days* period to both doorstep and distance selling. On the other hand, the starting day of this period remains unchanged and is therefore still variable depending on several circumstances (Article 65 of the code).

6 Cf European Commission, 'Green paper on the Review of the Consumer Acquis' COM(2006) 744 final.

7 For a critical perspective cf G. De Cristofaro, 'Le disposizioni "generali" e "finali" del Codice di consumo: profili problematici' (2006) *Contratto e Impresa/Europa* 43, 48–53.

8 Cf European Commission, n 6 above, 15–16.

9 Cf De Cristofaro, n 2 above, 786–791.

The Consumer code did not change significantly the rules relating to the right of consumers to withdraw from contracts concerning the purchase of a right to use immovable properties on a timeshare basis (Directive 94/47). Article 5 of Act 427/1998 originally implementing Directive 94/47 provided that the consumer had the right to withdraw from such contracts within 10 days from the moment the contract was concluded without specifying whether they were calendar or working days. Article 73 of the code, which substantially reproduces the dispositions of Article 5 of Act 427/1998, specifies that the right to withdraw may be exercised within 10 *working days* from that moment.[10]

It may be noticed that, while the policy followed by the Italian legislator to provide a uniform rule, as far as the length of the period of time for exercising the right of withdrawal is concerned, is coherent with the view expressed by the European Commission in the Green Paper on the Review of the Consumer Acquis, the decision to calculate this period in *working days*, rather than *calendar days*, is not. The European Commission expressed itself in favour of calendar days, on the base of the argument that public holidays may change across the different Member States.[11] Therefore, in hindsight, it would have been preferable that the Italian legislator adopted a longer period (perhaps 14 days), but inclusive of public holidays.

c) Unfair terms

Articles 33 to 38 of the Consumer code deal with unfair terms. At first sight, these articles merely reproduce the provisions foreseen by Articles 1469-*bis* seq of the Italian Civil code introduced by Act 52/1996 originally implementing Directive 93/13 on unfair terms in consumer contracts. There is in fact a small but significant difference. Article 36 now specifies that unfair terms are affected by nullity and that nullity on this ground may only be invoked by consumers (*nullità relativa* or *nullità di protezione*). Article 1469-*quinquies* of the Italian Civil code provided that unfair terms were merely ineffective (*inefficaci*). Most scholars are in favour of this new qualification. They argue that the term nullity better describes the consequences of the remedy foreseen by the law.[12] Other scholars on the other hand expressed themselves in favour of the old description, since the term *inefficacia* is still used in Article

10 Cf De Cristofaro, n 2 above, 792.

11 Cf European Commission, n 8 above, 20–22.

12 Cf De Cristofaro, n 2 above, 779. For an early critique of the qualification of the remedy as *inefficacia* see V. Roppo, 'Il contratto', in G. Iudica / P. Zatti (eds), *Trattato di diritto privato* (Milano: Giuffrè, 2001) 918–919.

1341 of the Civil code dealing with unfair terms in standard form contracts between professionals.[13]

Unfortunately, the Consumer code did not remedy another linguistic inconsistency of the discipline on unfair terms. Article 1469-*bis* of the Civil code stated that a contractual term is considered unfair if, '*malgrado la buona fede*', it causes a significant imbalance in the parties' rights and obligations arising under the contract. The sentence '*malgrado la buona fede*' was taken literally, as the rest of the disposition, from Article 3 of Directive 93/13.[14] In Italian '*malgrado la buona fede*' means 'in spite of the good faith' and not 'contrary to the good faith', which was the correct expression that should have been translated into Italian with the equivalent expression '*in contrasto con la buona fede*'. The commission chaired by Guido Alpa that was charged to prepare a draft of the Consumer code proposed to change the former expression into the latter.[15] This proposal was not accepted with the argument that the original expression is more favourable to consumers.[16] This argument assumes that 'good faith' should be defined subjectively as 'ignorance of the fact of infringing someone else's right'. Therefore, under this definition the professional that made use of an unfair term in his standard form contract may not defend himself by arguing that he did not know that the term was unfair. However, this outcome is not entirely satisfactory because the objective definition of good faith is wiped off the discipline of unfair terms, while it could and should have played an important role in the selection of unfair terms and their distinction from terms that are not unfair given the circumstances.

II. Public contracts

1. Code of public contracts

Regulation of public contracts also experienced some major changes since 2005. On the one side, public contracts as well as consumer contracts were interested by the codification process. All most relevant rules on public contracts may now be found in the Code of public contracts (*Codice dei contratti pubblici*) implementing Directives 2004/17 and 2004/18 on public

13 Cf Galgano, n 2 above, 55.

14 For a critique of this expression cf Galgano, n 2 above, 54–55; V. Roppo, 'La nuova disciplina delle clausole vessatorie: spunti critici' (1998) *Europa e Diritto Privato* 65, 66.

15 Cf Alpa, n 2 above, 26–27.

16 Cf Ministero delle Attività Produttive, n 3 above, 9.

procurement procedures (Act 163/2006).[17] The structure and the content of this new code are too complex and specific to be summarized in this report. I will only mention one innovation that is significant both from the point of view of general contract theory and from the point of view of the case law on precontractual liability of contracting authorities that I will discuss in the next paragraph. Prior to the adoption of the code it was unclear when the public contract was concluded. Some courts held that the contract was concluded with the award decision, while other courts held that it was concluded only at a later stage.[18] Article 11 of the code now specifies that the contract may only be concluded after the expiration of a period of 30 days from the communication to interested parties of the award decision. It may be noticed that this provision largely fulfils the requirement foreseen by Article 2a of Directive 89/665 on remedies as emendated by Article 1 of Directive 2007/66 on review procedures, not yet implemented in Italian law, that requires that the contract is not concluded before the expiration of a period of at least 10 or 15 calendar days (depending on the communication method) from the communication of the decision to interested parties (the so-called 'stand still' period).

2. Precontractual liability in public contracts

Possibly the most interesting and significant development in recent years in Italian case law dealing with public contracts concerns the liability regime of contracting authorities for breaches of the duty to act in good faith during the procedures leading to the award of a public contract.[19] It is possible to identify at least three different stages in this development. Originally, contracting authorities were immune from liability for harm caused to private parties during award procedures. In the wake of the fundamental decision of the *Sezioni Unite* of the *Corte di Cassazione* that substantially deprived the State and other public bodies of the general immunity from civil liability,[20] adminis-

17 Cf M.A. Sandulli / R. De Nictolis / R. Garofoli, *Trattato sui Contratti Pubblici* (Milan: Giuffrè, 2008).

18 Cf A. Massera, 'Contratto e pubblica amministrazione', in V. Roppo (ed), *Trattato del Contratto VI* (Milan: Giuffrè, 2006) 947.

19 On precontractual liability of contracting authorities cf R. De Nictolis, *Il nuovo contenzioso in materia di appalti pubblici alla luce del codice dei contratti pubblici* (Milan: Giuffrè, 2007) 535; G. Afferni, 'La responsabilità precontrattuale della P.A. tra interesse negativo ed interesse positivo' (2006) *Danno e Responsabilità* 353; G. Afferni, 'La responsabilità precontrattuale della P.A. tra risarcimento e indennizzo' (2008) *Danno e Responsabilità* 633.

20 Corte di Cassazione, Sezioni Unite, 22 July 1999, n 500 (1999) *Danno e responsabilità* 965.

trative case law started to affirm the liability of contracting authorities for harm caused to candidates through the adoption of *unlawful* decisions. Finally, starting from another fundamental decision of the *Adunanza Plenaria* of the *Consiglio di Stato*,[21] administrative case law admitted the liability of contracting authorities for harm caused to candidates also through the adoption of *lawful* decisions, whenever such decisions were taken with negligence or in a manner contrary to good faith.[22] Following this case law, for example, contracting authorities may face liability for harm caused by lawfully deciding to cancel an award procedure, when this decision was communicated with a negligent delay,[23] or when this decision was caused by the fact that the contracting authority finally realized that it did not have the funds to perform the contract. In the latter case Italian courts would typically hold that the decision to cancel the award procedure was lawful but that the contracting authority acted negligently because it should never have started the procedure in the first place.[24]

The fundamental difference between these two kinds of liability (liability for the adoption of an unlawful decision and liability for the adoption of a lawful decision in a manner contrary to good faith) consists in the fact that in the former case expectation damages are compensated, while in the latter case only reliance damages are available. Therefore, the candidate that has been unlawfully excluded from a procedure (eg because of discrimination) may collect damages equal to the profit he would have made from the execution of the contract, which is generally presumed to be equal to 10 percent of its value. To this end he needs to prove that without the unlawful decision he would have won the competition.[25] On the other hand, where the plaintiff is only able to prove that without the unlawful decision he would only have had a certain probability of winning the competition, then he will only be able to collect damages equal to the profit he would have made with the execution of

21 Consiglio di Stato, Adunanza Plenaria, 5 September 2005, n 6 (2006) *Urbanistica e Appalti* 69.

22 Eg Consiglio di Stato, 4 October 2007, n 5179 (2007) *Diritto e Pratica Amministrativa* 11/68; Consiglio di Stato, 6 December 2006, n 7194 (2007) *Urbanistica e Appalti* 595; Consiglio di Stato, 16 January 2006, n 86 (2006) *Archivio Giuridico delle Opere Pubbliche* 251.

23 Eg Consiglio di Stato, 19 March 2003, n 1457 (2003) *Urbanistica e appalti* 943.

24 Eg Consiglio di Stato, 7 march 2005, n 920 (2005) *Urbanistica e appalti* 788.

25 Eg Consiglio di Stato, 25 January 2008, n 213; Consiglio di Stato, 9 March 2007, n 1114; Consiglio di Stato, 6 July 2004, n 5012; Consiglio di Stato, 27 October 2003, n 6666 (2004) *Foro Italiano* III, 1; Consiglio di Stato, 8 July 2002, n 3796 (2002) *Giustizia Amministrativa* 813. All Italian administrative case law including all cases cited in this report without other indication may be found at http://www.giustizia-amministrativa.it/ricerca2/index.asp.

the contract multiplied by the probability of winning the competition (under the loss of chance doctrine).[26] It is noteworthy that consistent case law requires to this end that the plaintiff is able to prove that without the unlawful decision he would have had a probability of at least 50 percent of winning.[27] Finally, where the plaintiff claims that he was damaged by the adoption of a lawful decision in a manner contrary to good faith, he may only collect damages equal to what he invested in the procedure and was not able to recover, including lost opportunities.[28] For example, a candidate that invested time and money in a procedure assuming that it was regular may sue for reliance damages when the procedure is cancelled because the contracting authority finally realizes that it does not have the funds to perform the contract.

A special case arises when the procedure is cancelled after the public contract has been awarded but before its conclusion (ie during the standstill period). In such cases Italian statutory law requires the contracting authority to compensate certain expenses incurred by the candidate to whom the contract has been awarded between the award decision and its cancellation.[29] These expenses may be significant where the contracting authority required the candidate to start performance of the contracts before its conclusion. This kind of liability is strict because the contracting authority is required to compensate such expenses (and not lost opportunities) for the mere fact of having retroacted from the decision to conclude the contract, which may be perfectly reasonable given the circumstances.

It may be noticed then that in Italian law contracting authorities dealing with contract award procedures may face several kinds of precontractual liability (broadly speaking): (i) a liability for the adoption of an unlawful decision that extends to expectation damages; (ii) a liability for the adoption of a lawful decision in a manner contrary to good faith that is limited to reliance damages; and finally (iii) a strict liability for the mere adoption of a lawful decision that is limited to a part only of reliance damages. Two comments may be made as far as the desirability of these multiple differentiations is concerned. On the one side, this system may be very difficult to administer. For example, it may be difficult to distinguish cases were the contracting authority lawfully cancelling an award decision acted negligently from cases where the contracting authority was not negligent and therefore damages should be limited only to expenses incurred between the decision to award the contract and the

26 Eg Consiglio di Stato, 27 December 2004, n 8244.

27 Eg Consiglio di Stato, 4 October 2007, n 5179; Consiglio di Stato, 6 December 2006, n 7194; Consiglio di Stato, 7 February 2002, n 686.

28 Cf case law cited at n 22 above.

29 Art 21-*quinquies* § 1 Act 241/1990. And cf also Art 11 § 9 Code of public contracts.

decision to cancel the procedure. Very significantly, there is no case law so far limiting damages to only these expenses by applying statutory law on strict liability.[30] On the other side, this system seems to be perfectly coherent with the rules on causation and damages. Where the decision should not have been taken (because it was unlawful) the plaintiff may claim to be put in the position he would have found himself in without that decision (expectation interest). Where the decision should have been taken in a different manner (because it was taken negligently or in a manner contrary to good faith) the plaintiff may claim to be put in the position he would have found himself if the decision had been taken as it should (reliance interest). Finally, where liability is affirmed simply because the plaintiff relied on the fact that the contracting authority would not have retroacted from its decision to conclude the contract, he may only claim compensation of expenses he would have avoided if he had not relied in this way, ie the expenses he incurred after the decision to award the contract was taken and until this same decision was cancelled.[31]

III. Financial services contracts

Financial services contracts have also been interested by some significant developments in the last few years. On the one side, Directive 2004/39 and Directive 2006/73 on markets in financial instruments (MiFID) have been implemented into Italian law through the amendment of Act 58/1998, so-called *Testo Unico della Finanza* (TUF), and the adoption of CONSOB Regulation 16190/2007, so-called *Regolamento Intermediari*.[32] On the other side, there has been a very significant case law on the remedies available to retail clients for violations of rules of conduct by investment firms.

30 Cf Tribunale Amministrativo Regionale Lazio, 13 July 2007, n 6369 (2008) *Danno e Responsabilità* 636; Tribunale Amministrativo Regionale Lazio, 16 January 2007, n 255; Tribunale Amministrativo Regionale Lazio, 10 January 2007, n 76 (2007) *Foro amministrativo – Tar* 135; Tribunale Amministrativo Regionale Lazio, 3 August 2006, n 6911. All these decisions excluded the applicability of Art 21-*quinquies* § 1 Act 241/1990 in favour of precontractual liability on the base of the argument that the contracting authority acted negligently or contrary to good faith.

31 Cf Afferni (2008), n 19 above, 647–650.

32 On the relevance of the MiFID to contract law see G. Ferrarini, 'Contract Standards and the Markets in Financial Instruments Directive (MiFID)' (2005) *European Review of Contract Law* 19; S. Grundmann / J. Hollering, 'EC Financial Services and Contract Law – Developments 2005–2007' (2008) *European Review of Contract Law* 45, 58–64. On its implementation in Italian law (with particular reference to contract law) see V. Sangiovanni, 'La nuova disciplina dei contratti di investimento dopo l'attuazione della MIFID' (2008) *I Contratti* 177.

1. Implementation of the MiFID

While formally the Directives on financial instruments do not require full harmonisation, Article 4 of Directive 2006/73 restricts severely the ability of Member States to impose additional requirements to those foreseen by Community law. Moreover, it is foreseen that such additional requirements may not be imposed on investment firms authorized and supervised by the competent authority of another Member State, therefore putting national investment firms, subject to those additional requirements, in a position of competitive disadvantage. Article 6.02 of the TUF reproduces the disposition of Article 4 of Directive 2006/73 passing on to the CONSOB (the *Commissione Nazionale per la Società e la Borsa*) the responsibility of introducing where appropriate additional requirements to those foreseen by the Directive. Wisely, the CONSOB in adopting Regulation 16190/2007 did not make use of this possibility.[33]

a) Form of the basic agreement

Limiting our brief discussion to the dispositions that are more relevant to contract law, it may be mentioned first that Article 23 of the TUF, implementing Article 39 of Directive 2006/73, requires that investment contracts are made in writing, with the only exception of contracts relating to investment advice.[34] Apparently, this requirement, which in Community Law is limited to basic agreements with retail clients, has been generalized to investment contracts with all kinds of clients. The same provision is reproduced for the sake of clarity in Article 37 of Regulation 16190/2007 that specifies that a copy of the contract must be given to the client. Investment contracts concluded only orally are void and null. However, only clients and not investment firms may invoke nullity of the contract on this ground (Article 23 § 3 TUF).

b) Suitability and appropriateness

Article 21 § 1 of the TUF, implementing Article 19 § 1 of Directive 2004/39, requires that investment firms act honestly, fairly and professionally. Articles 39 to 44 of Regulation 16190/2007, implementing Articles 35 to 38 of Directive 2006/73, specify this general rule of conduct requiring that investment decisions are *suitable* or *appropriate* for the particular retail client. The new regulation implementing the MiFID provides different levels of protection to

33 Cf CONSOB, 'Il nuovo regolamento intermediari tra disciplina comunitaria e scelte nazionali/Documento di consultazione' (20 July 2007) 5–9 at http://www.consob.it/main/regolamentazione/consultazioni/index.html (last visited 30 May 2008).

34 Cf Sangiovanni, n 32 above, 178–179.

retail clients depending on the kind of service. With respect to the services of investment advice and portfolio management, Articles 39 and 40 of Regulation 16190/2007 require that the investment is *suitable*. To this end investment firms are required to acquire certain information from clients, including personal information such as wealth and level of income. When clients do not disclose all relevant information investment firms must refrain from providing the service requested. With respect to services different from investment advice and portfolio management, Articles 41 and 42 of the same regulation only require that the investment firm evaluate weather the investment is *appropriate* for the client and eventually warn the client that the investment is not so. To this end the investment firm must acquire from clients a more limited amount of information. Moreover, if the client refuses to provide this information the investment firm is only required to inform him that it will not be able to evaluate whether the investment is appropriate. Finally, with respect to so-called 'execution only' services, Articles 43 and 44 provide that investment firms requested from their clients to execute a certain order are not required to collect specific information from them, provided that certain conditions are met (eg the service relates to certain non-complex financial instruments, the client has been informed of the fact that the intermediary will not evaluate the appropriateness of the investment).

Prior to the implementation of the MiFID, Italian statutory law did not distinguish between different levels of protection of retail clients depending on the kind of service provided by the investment firm. Statutes dealing over time with investor protection foresaw only the general rule requiring that investment firms acted honestly, fairly and professionally.[35] It was left to judges, where appropriate, to interpret this general provision differently also as a function of the kind of investment service provided by the defendant. It may be argued then that while the old approach had the advantage of being more flexible, enabling law to adjust over time to the development of new financial services, the new approach has the advantage of legal certainty.[36]

c) Conflict of interests

As far as conflict of interests is concerned, Article 21 § 1-*bis* TUF implementing Article 18 of Directive 2004/39 foresees different levels of actions that should be undertaken by investment firms. First, they are required to identify conflict of interests between themselves and their clients and between clients. Second, they are required to make organisational and administrative arrangements to prevent risk of damage to clients. Third, where such measures are not sufficient, they are required to inform clients of the existence of the conflict of interest. Finally, while undertaking business on behalf of their clients in the presence of a conflict of interests, they are required to act in the best interests of their clients.

35 Cf R. Rordorf, 'La tutela del risparmiatore: norme nuove, problemi vecchi' (2008) *Le Società* 269.

36 Cf Rordorf, n 35 above, 270–272.

It is generally accepted that under this new discipline the investment firm is not required to refrain from undertaking business on behalf of its client for the mere fact of the existence of a conflict of interests.[37] The investment firm is only required to disclose the conflict of interests to the client and to act in his best interest. Prior to the implementation of the MiFID, on the other hand, Article 27 of CONSOB Regulation 11522/1998 (the old *Regolamento Intermediari*) required investment firms in conflict of interests with its client to refrain from undertaking business on his behalf, unless the client was informed in writing of the existence of the conflict of interests and authorized in writing the transaction.[38] It may be argued then that the implementation of the MiFID has reduced the level of protection of retail clients against conflict of interests.[39]

2. Italian case law on remedies

Italian case law experienced a very lively debate concerning the remedies available to clients for certain violations of rules of conduct by investment firms, most notably rules on suitability and conflict of interests. This case law developed from some very well-known scandals that interested Italian financial markets in the last years, eg the placement among retail clients of Argentina, Parmalat and Cirio bonds.[40] In some cases retail clients claimed

37 Cf Rordorf, n 35 above, 272; L. Enriques, 'L'intermediario in conflitto d'interessi nella nuova disciplina comunitaria dei servizi di investimento' (2005) *Giurisprudenza Commerciale* II, 844, 854–855.

38 Cf R. Costi / L. Enriques, 'Il Mercato mobiliare', in G. Cottino (ed), *Trattato di Diritto Commerciale* (Turin: CEDAM, 2004) 345; A. Luminoso, 'Il conflitto di interessi nel rapporto di gestione' (2007) *Rivista di Diritto Civile* I, 739, 764; D. Maffeis, 'Conflitto di interessi nella prestazione di servizi di investimento: la prima sentenza sulla vendita a risparmiatori di obbligazioni argentine' (2004) *Banca Borsa Titoli di Credito* II, 452, 455–458.

39 Cf Rordorf, n 35 above, 272; Enriques, n 37 above, 855.

40 Cf G. Ferrarini / P. Giudici, 'Financial Scandals and the Role of Private Enforcement: The Parmalat Case' (European Corporate Governance Institute, Law Working Paper no. 40, 2005) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=730403 (last visited 30 May 2008); M. Onado, 'I risparmiatori e la Cirio: ovvero, pelati alla meta' (2003) *Mercato Concorrenza Regole* 499.

that investment firms providing investment advice or portfolio management violated the suitability rule by investing (or advising to invest) an excessive amount of wealth on very risky instruments without proper diversification. In other cases (eg Cirio cases) clients claimed that investment firms placing or advising certain instruments were acting in conflict of interests, because they were creditors of the issuer, had private information on its (in)ability to repay the debts, and used the placement of new bonds to shift the risk of its insolvency on retail clients.

In these cases, several remedies were made available to retail clients by Italian courts. Some courts held that investment contracts affected by violations of the rules on suitability or conflict of interests were void and condemned the investment firm to return to the client the entire capital invested.[41] This remedy was very popular with courts because it was very easy to administer. The courts had the burden of evaluating the conduct of the defendant, but not the consequences of the same conduct on the outcome of the investment.[42] Other courts held that for the same or similar violations clients were only entitled to collect damages either on the base of precontractual liability or on the base of liability for breach of contract, depending on whether the blameworthy conduct of the defendant took place before or after the conclusion of the investment contract.[43] Where it was held that the conduct of the defendant amounted to a breach of contract, the remedy of termination of the investment contract was also made available to retail clients, under the condition that the breach was material (ie sufficiently serious under Italian law).[44]

Finally, the *Sezioni Unite* of the *Corte di Cassazione* stepped in to put some order in this mess of remedies[45]. The *Sezioni Unite* held that the remedy of nullity is not generally available in case of a violation of a rule of conduct by

41 Eg Tribunale di Mantova, 1 December 2004 (2005) *Danno e responsabilità* 614; Tribunale di Venezia, 22 November 2004 (2005) *Danno e Responsabilità* 618; Tribunale di venezia, 11 July 2005 (2005) *Danno e Responsabilità* 1231.

42 Cf V. Roppo / G. Afferni, 'Dai contratti finanziari al contratto in genere: punti fermi della Cassazione su nullità virtuale e responsabilità precontrattuale' (2006) *Danno e Responsabilità* 29, 31.

43 Eg Tribunale di Genova, 2 August 2005 (2005) *Danno e Responsabilità* 1225.

44 Eg Tribunale di Genova, 15 March 2005 (2005) *Danno e Responsabilità* 609.

45 Which has been described as the 'ambaradan' (typical expression of the Italian spoken language that roughly means 'great confusion') of contractual remedies: V. Roppo, 'La tutela del risparmiatore fra nullità e risoluzione (a proposito di Cirio bond & tango bond)' (2005) *Danno e Responsabilità* 624, 625. Cf also M. Dellacasa, 'Collocamento di prodotti finanziari e regole di informazione: la scelta del rimedio applicabile' (2005) *Danno e Responsabilità* 1241.

the investment firm.[46] Depending on the circumstances of the case the client may claim compensation of damages, either on the base of precontractual liability or on the base of liability for breach of contract. Moreover, when the violation of the investment firm has been sufficiently serious with respect to all circumstances of the case, arising to material breach of contract, the client may claim termination of the contract and restitution of the capital invested together with compensation of damages.

While the arguments used by the *Sezioni Unite* against the remedy of nullity are not entirely satisfactory from the point of view of contract law theory, the outcome of the decision is certainly to be welcomed.[47] The remedy of nullity does not seem to be appropriate in the cases we are discussing because it enables the investor to shift on the investment firm all negative consequences of the investment decision and not only those consequences that have been caused by the blameworthy conduct of the investment firm. This outcome depends on the fact that because of nullity the client may claim restitution of the money invested in the transaction against restitution of the financial instruments.[48] To be sure the same outcome is also a consequence of the remedy of termination of contract. However, in this latter case Italian law requires breach of contract to be material and therefore enables the judge to decide whether the breach is serious enough to justify that all risk of the investment is shifted to the investment firms through restitutions. The remedy of damages (either on the base of precontractual liability or on the base of contractual liability) seems to be superior from this point of view because it enables the judge by correctly calculating the level of damages to disentangle the negative consequences of the investment decisions that should stay on the investors from those consequences that should the shifted through the obligation to compensate damages to the investment firms.

46 Corte di Cassazione, Sezioni Unite, 19 December 2007, n 26724 (2008) *Danno e Responsabilità* 525.

47 Cf V. Roppo, 'La nullità virtuale del contratto dopo la sentenza Rordorf' (2008) *Danno e responsabilità* 536.

48 Cf A. Perrone, 'Servizi di investimento e violazione delle regole di condotta' (2005) *Rivista delle Società* 1012, 1015–1016.