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Pre-contractual objective Good Faith and information. Duties of information

Buena Fe e información objetiva precontractual. Deberes de información

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ABSTRACT: In the preliminary phase of contracting, the fundamental importance of information, and the information exchanged by the pre-contractual parties, is undoubted. Parties, by entering a contract, seek to pursue their interest, to maximise their welfare. Based on the information it possesses, a party decides to conclude or not to conclude the contract; if the party concludes the contract, the pre-contractual information spills over into the content of the contract, influencing the contractual agreements, the reciprocal performances established, the conditions under which the contract is concluded. This is not a work of economic analysis, but rather a legal work; economic analysis is used exclusively to highlight problems, to which the rules of the Civil Code provide a solution. The pre-contractual problems in the light of economic analysis, arising from the asymmetries of information between the parties at the time of the conclusion of the contract, and the solutions to them provided by the rules of the civil code, have already been examined by the writer in a fragmentary way during studies concerning representation and the insurance contract. The survey will briefly examine information, and especially pre-contractual information, and the problems connected with it, in the light of economic analysis; it will then focus on the rules of the Civil Code that deal with pre-contractual information and the problems connected with it and will try to find solutions to them.

KEYWORDS: contracts, information, legal systems, civil law, civil liability.

RESUMEN: En la fase previa a la contratación, no cabe duda de la importancia fundamental de la información, y de la información que intercambian las partes precontratantes. Las partes, al celebrar un contrato, buscan su propio interés, maximizar su propio bienestar. Sobre la base de la información que posee, una parte decide celebrar o no el contrato; si la parte celebra el contrato, la información precontractual se traslada al contenido del contrato, influyendo en los acuerdos contractuales, en las prestaciones recíprocas establecidas, en las condiciones en que se celebra el contrato. No se trata de una obra de análisis económico, sino de una obra jurídica; el análisis económico se utiliza exclusivamente para poner de manifiesto los problemas, a los que las normas del Código Civil dan solución. Los problemas precontractuales a la luz del análisis económico, derivados de las asimetrías de información entre las partes en el momento de la celebración del contrato, y las soluciones a los mismos que aportan las normas del código civil, ya han sido examinados por el autor de forma fragmentaria en el curso de los estudios relativos a la representación y al contrato de seguro. El estudio examinará brevemente la información, y especialmente la información precontractual, y los problemas relacionados con ella, a la luz del análisis económico; a continuación, se centrará en las normas del código civil que tratan de la información precontractual y los problemas relacionados con ella, intentando aportar soluciones a los mismos.

PALABRAS CLAVE: justicia, reforma legal, norma legal, constitución, sistema político.

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INTRODUCTION

There are various types of information[1], including technological information, information on production resources and opportunities, and market information.

In connection with the negotiation, market information on circumstances, characteristics, elements, terms, assumptions concerning the contract to be concluded (e.g., on market circumstances, on the expediency of the deal, on contractual terms, on the characteristics or quality of the goods, products, services, features or qualities of the persons of the contracting parties) becomes relevant.

In the preliminary phase of the negotiation, there are normally asymmetries of information between the parties, which are, moreover, reciprocal, on circumstances inherent to the negotiation; they may concern the characteristics of the parties *(of their goods, their services: hidden information),* or the conduct of the parties themselves *(hidden action).*

A party may have more information[2] than the other party on circumstances concerning the contract; and a party is presumed to have more information than the other party on circumstances relating to relevant assumptions, elements and essential features of the contract, which are within its sphere of influence or under its control, in particular relating to their characteristics (on its characteristics, its capacity, its qualities, its ability to perform; the characteristics, qualities of its performance, its goods, its property; the terms of the contract

1 Various distinctions are made concerning information; in particular, it is distinguished into technological information, about productive resources or opportunities, information about personal data, and market information, about market parameters (price, quality or other attributes of the goods or parties, of the terms on which potential contractors intend to conclude contracts) (Hirshleifer, 1973; Beales, Craswell and Salop, 1981; Mackaay, 1982).

2 There is asymmetry when one party has more information than the other, and when it is easier to get information at a lower cost than the other.

prepared, etc.). This information is likely to influence the other party's decision to conclude, or not to conclude, the contract and the conditions under which it will be concluded.

In a situation of uncertainty as to the circumstances of the contract, in the presence of less information on essential features or elements of the contract, especially relating to the sphere of others, a party may fall into error and make a choice (to conclude the contract, not to conclude it, or of the terms on which to conclude it), which might later, with more information, prove to be wrong.

Information is expensive, to produce, give, buy, obtain, evaluate, verify, use (Stigler, 1961; Cooter and Ulen, 2016; Beales, Craswell and Salop, 1981; Chan and Leland, 1982; Darby and Karni, 1973; Mackaay, 1982; Cooter et al., 2006).

A party may decide to obtain information to improve its contractual choice; if it decides to obtain information, the party will assess the costs and benefits of the information and will, in principle, obtain information up to the point where the costs are, at the margin, equal to the related benefits.

The party with less information may ask the other party for information, on characteristics concerning its sphere; the other party may agree to give it (Jacobson et al., 2021).

A particular requirement for information is reliability, trustworthiness, truthfulness. The information obtained may be true or false (Nelson, 1973; Hirshleifer, 1973; Darby and Karni, 1973). The issue of false information is related to the circulation of information and is especially serious for quality information, which can be very expensive for the counterparty to obtain.

Information asymmetries between pre-contractual parties on each other's behaviour create favourable conditions for the party with an information advantage to engage in covert actions (moral hazard), which may take the form of negligent or dishonest behaviour of various kinds, including the giving of false information in the broad sense.

Moral hazard is the behaviour of a person who, being unobservable, engages in hidden action, which may consist of various forms of misconduct, whether negligent or malicious, carelessness, or dishonestly, to his advantage and the detriment of the other party; subspecies of moral hazard are deception, fraud, false information. Moral hazard is a phenomenon due to the presence of information asymmetries (hidden action), which was first found in the insurance market, and then extended to other markets, in which the quality of the goods and services that are exchanged can be influenced by the behaviour of the party, which cannot be observed by the counterparty (Saltari, 1990; Kotowitz, 1987; Rea jr., 1998). A moral hazard is a negative externality that causes other negative externalities, which must be corrected (Akerlof, 1970).

False information may consist in positive conduct, whether intentional or negligent, in a false statement in the strict sense, or a false statement in the broader sense, in a statement that is partially true but incomplete, thus equivocal, inaccurate, misleading, deceptive, or even in omissive conduct, whether intentional or negligent, in the failure to correct a previously given true statement, and sometimes also in the failure to disclose[3] information that one has. False information as to the quality of terms, elements or assumptions of the bargaining process results in bad characteristics of the terms, elements, or assumptions themselves (of the person, the goods, the performance, etc.). False information of the party with an informational advantage, if not discovered, may result in a mistake and a consequent wrong choice[4] by the other party.

3 In the presence of asymmetries, it is difficult to make a strict borderline distinction between false information and inadequate information, between false information and reticence (Beales, Craswell and Salop, 1981).

4 It is assumed that the other party wants to make the right choice. The wrong choice could also be autonomous; in the presence of asymmetries, however, it is difficult to distinguish the wrong choice caused by the bad behaviour, the false information of others, from the autonomous wrong choice (Beales, Craswell and Salop, 1981). Bad choice caused by the bad behaviour of others is a negative externality.

If the information costs (costs of procuring, of assessing) of the party with less information are high, it is difficult for the party with an information disadvantage to discover the hidden actions of others, to ascertain whether the information received is true or false, and thus the characteristics, the qualities of relevant essential elements and features of the bargain, relating to the sphere of others.

More precisely, the conduct undertaken by a party may be good or bad, the information given may be true or false, the quality (of the good, the performance, the party, etc.) may be good or bad, and it may be very costly for the other party at the time of the conclusion of the contract to find out whether such conduct is good or bad, whether such information is true or false, whether the quality (of the good, the performance, the other party, etc.) is good or bad (Emons, 1988; Leland, 1979; Magat, 1998).

The issue known as the Lemons problem, described by Akerlof (1970), could occur in a general way when information is very costly for the counterparty to obtain (which may be the case especially for quality information), in the absence of market correctives (conventional guarantee and reputation, see below in the text), or legal correctives (legal guarantee, fairness, see below in the text).

The party with less information may not be able to identify the type of party with whom it contracts, the characteristics (Akerlof, 1970; Wilson, 1987; Varian 1993) of the party (of the person, the goods, the performance, etc.); it may not be able to distinguish parties with bad characteristics from those with good characteristics.

It might, therefore, act based on a statistical average, or its assessment (Akerlof, 1970; Leland 1979; Postlewaite, 1989) of the probability that the behaviour of the other party is good or bad, that the information received is true or false, that the characteristics relating to the other party's sphere are good or bad, and thus of the probability that its choice of contract and contractual conditions are right or wrong.

The party with an informational disadvantage (Akerlof, 1970) may therefore want to pay an average consideration, an average price; thus, contractors with bad characteristics would receive a price, a higher consideration than they should get, while contractors with good characteristics, on the other hand, would receive a price, a lower consideration.

Contractors with good characteristics might not conclude the contract (Akerlof, 1970), because the price is not convenient, and leave the market. The average price would fall further, and so on; in the end, only contractors with bad characteristics would remain in the market, with whom no one would be interested in negotiating.

An issue of adverse selection could arise. Adverse selection is a phenomenon due to the presence of hidden information asymmetries, which was first found in the insurance market, and later also in other markets, in which the goods and services traded are not homogeneous, and the quality of them is known only to one side of the bargaining (Saltari, 1990; Cooter et al., 2006; Akerlof, 1970). Adverse selection is a negative externality, which must be corrected.

Parties with better information, giving true information, may fail to enter contracts due to the presence in the market of parties with bad characteristics, giving false information; at the limit, the market may cease to exist.

For the solution of the general pre-contractual problems described above, due to information asymmetries between the parties at the time of the conclusion of the contract, there are market and legal remedies.

Market remedies consist primarily of the conventional guarantee, or similar instruments (signalling, licensing, certification, authentication in various forms), and repeated dealings in reputation. The legal correctives consist primarily of the legal guarantee, or equivalent (e.g., certification, written form); and above all, in the current code, of objective good faith or pre-contractual fairness, with the limit of the ordinary diligence of the counterparty (Articles 1337, 1338 of the Civil Code).

1. SOLUTIONS TO THE PROBLEMS OF THE PRE-CONTRACTUAL PHASE IN THE CIVIL CODE. THE LEGAL RULES OF CONDUCT AND LIABILITY OF OBJECTIVE GOOD FAITH AND ORDINARY PRE-CONTRACTUAL DILIGENCE.

The Civil Code of 1942 recognises the private contractual autonomy of individuals (Art. 1322 of the Civil Code), i.e., the freedom of individuals to pursue their interests, to increase their well-being, by entering contracts (Art. 1321 of the Civil Code) with other individuals.

The current Civil Code thus addresses and resolves the general problems examined[5] at the stage of concluding a contract, occasioned by the presence of information asymmetries between the parties (moral hazard, adverse selection on the side of the party with more information, error, and wrong choice on the side of the party with less information).

The Civil Code intervenes to reduce transaction costs, to reduce information asymmetries between the parties in the pre-contractual phase, the information costs of the party with an informational disadvantage, and in general to prevent or correct bad behaviour (moral hazard), false information of the party with an informational advantage, error and wrong choice of the party with an informational disadvantage (to conclude the contract that would not have been concluded, to conclude it under conditions other than those under which it would have been concluded, or not to conclude the contract that would have been concluded), to prevent or correct adverse selection. The goal (Posner, 1992, p. 89) is to encourage the conclusion of socially advantageous contracts, the proper functioning of the market.

To achieve these aims, the Civil Code imposes on the pre-contractual parties reciprocal duties (obligations, burdens) of objective good faith[6] or correctness, and of diligence (arts.

5 We only deal with the Civil Code contract.

6 Pre-contractual objective good faith and fairness are considered synonymous (Benatti, 2012; Bianca, 1990).

1337, 1338 Civil Code). (The rules of objective good faith or correctness and diligence are reciprocal, since the asymmetries of information may be mutual).

Objective good faith, an ethical rule of social behaviour that has become a legal rule, prescribes to subjects during the formation of a contract the duty to behave honestly, loyally, sincerely, to protect the contractual freedom (Bianca, 1990, p. 140) of others (the freedom to conclude a contract, not to conclude it, and the conditions under which to conclude it).

Objective good faith, a rule of liability, represses conduct that differs from that prescribed (dishonest, unfair, deceptive), which damages the negotiating freedom of others by causing damage, provoking a wrong choice (to conclude the contract that would not have been concluded, to conclude it under conditions other than those under which it would have been concluded, or not to conclude the contract that would have been concluded), establishing the liability of the party that behaves incorrectly for the damage caused, i.e. for the wrong choice of the other party (arts. 1338, 1431, 1439, 1440, 1478, 1479, 1490, 1491, 1492, 1494, 1497 Civil Code; through the wrong choice, moral hazard and adverse selection are also corrected).

Pre-contractual objective good faith is limited by the duty of ordinary pre-contractual diligence, imposed on the counterparty. Ordinary diligence, a rule of conduct, prescribes to subjects, during negotiations, the duty to behave with normal care, caution, attention, and prudence; a rule of liability, calls negligent subjects to account for the damage resulting from their behaviour, i.e., from their own wrong choice (arts. 1338, 1398, 1491 Civil Code).

The pre-contractual rules of objective good faith or fairness and ordinary diligence together place on the pre-contractual parties the costs of information = precaution, or place on them the cost of the damage that may occur (wrong choice) with liability; they thus induce the pre-contractual parties to take precautions to prevent the expected damage, which they would otherwise bear.

2. THE RULE OF CONDUCT OF PRE-CONTRACTUAL OBJECTIVE GOOD FAITH, WITH THE LIMIT OF THE COUNTERPARTY'S ORDINARY DILIGENCE, CONCERNING INFORMATION. DUTIES OF INFORMATION

Objective good faith or pre-contractual fairness, as is unanimously recognised, is of particular importance concerning information (Betti, 1953; Benatti, 2012).

In the presence of information asymmetries between the parties at the contracting stage, objective good faith (art. 1337 Civil Code) controls the circulation of information; it aims at the truth of the information, prescribes the truth, prohibits falsehood, or otherwise corrects the consequences (the error and wrong choice of the party with an information disadvantage, and at the same time the moral hazard and adverse selection), through the liability that follows the falsehood of the information. Imposed liability is a deterrent against falsehood, and pushes pre-contractual parties, to tell the truth.

Pre-contractual objective good faith is a general clause; it is an elastic prescriptive rule of conduct, establishing only in principle what information must be given or not given, and does not establish how much information must be given.

In the presence of asymmetries of information between the parties on essential or non-essential circumstances of the contract, on circumstances relating to internal or external elements or characteristics of the contract to be concluded, concerning one's own or others' sphere, relevant to the choice of the other party, not easily observable, pre-contractual objective good faith in all contracts and relationships poses, for the party with an information advantage, the general prohibition of giving false information (arts. 1337, 1439, 1440 Civil Code) in the strict sense (Betti, 1953) (malicious deception) and in the broad sense (Visintini, 1972, p. 121), that is, equivocal,

deceptive, obscure, inexact, with the limit of ordinary diligence[7] on the part of the other party and places a duty on the party to give true information, when given, in the strict sense and the broad sense (exact, clear, comprehensible).

In the presence of asymmetries of institutional information between the parties on essential circumstances of the contract, relating to internal elements or prerequisites of the contract to be concluded, concerning important characteristics, qualities, attributes, which fall within their sphere or in the sphere under their control (of the person, the goods, the performance, the terms or elements of the contract, etc.), relevant to the choice of the counterparty, not easily observable by the same with ordinary diligence, pre-contractual objective good faith imposes, then, on the contracting party with an institutional information advantage, the duty to give the other party (true) information on the precise points themselves.

More precisely, objective good faith imposes on the party with an institutional information advantage the duty to inform the other party truthfully about important essential characteristics, not easily observable, of his person (identity, personal qualities, capacity, legitimation, ability to perform, etc.: arts. 1337, 1338, 1429, n. 3, Civil Code). The duty to inform the other party truthfully of important and not easily observable features of the elements of the contract (the party's intentions: Arts. 1337, 1338 Civil Code; the subject matter of the contract, identity, qualities, characteristics, attributes, possibilities, etc., of its goods, of its performance: Arts. 1337, 1338, 1429, n. 1, n. 2, Civil Code); imposes a duty to provide truthful information on characters and other relevant essential attributes, not easily observable, which relate to aspects of the contract to be concluded (nature or terms of the contract, or other elements or assumptions: Arts. 1337, 1338, 1429, n. 1, n. 4, Civil Code).

7 If the circumstances are readily observable using ordinary diligence, asymmetry, deception, false information, and consequences are overcome.

Furthermore, in some typical contracts or relationships, in which there are peculiar information asymmetries on essential circumstances, relating to important features of the contract (content or assumptions), relevant to the choice of the counterparty, which is not easily observable, objective good faith imposes on the contracting party with an informational (institutional) advantage the duty to give the counterparty (true) information on the essential, specific points, which are the object of the asymmetry (e.g., for the seller in the sale (Betti, 1972, p. 86), arts. 1478, 1489, 1490, 1497 Civil Code; for the insured in the insurance (Betti, 1972, p. 86), arts. 1892, 1893 Civil Code; for the representative and the represented in representation, arts. 1392, 1393, 1396, paragraph 1, 1398 Civil Code).

Again, when during the negotiation an information asymmetry develops between the contracting parties, when, using the ordinary diligence prescribed (Art. 1431 Civil Code), one party discovers or may discover an error (Kronman, 1978; Bishop, 1983) on the part of the other party as to the essential circumstances of the contract to be entered, which are not easily observable, about its sphere or to the sphere under its control, on which it has an institutional information advantage (concerning characteristics or qualities of its person, its goods, its performance, etc.), objective good faith imposes an obligation on the party to inform the other party of the existence of such an error (arts. 1337, 1338, 1429 Civil Code and the other articles cited). Symmetrically, the pre-contractual rule of conduct of ordinary diligence, also a general clause, which is incumbent on the other party, concerning information requires it to procure, to ascertain, to evaluate the information received (truth or falsity) with ordinary care, caution, attention, prudence (arts. 1338, 1398, 1491 Civil Code).

3. FUNCTION AND LIMITS OF THE DUTY OF INFORMATION IMPOSED BY PRE-CONTRACTUAL OBJECTIVE GOOD FAITH.THE RETICENCE

The duty of information imposed by pre-contractual objective good faith operates in the presence of (institutional) information asymmetries between the parties. It is instrumental to the truthfulness of the information circulating between the pre-contractual parties themselves on the characteristics, elements, essential, relevant attributes of the contract.

The duty to inform implies information asymmetries, i.e., it implies that one party knows or can know more easily, at less cost than the other, essential relevant circumstances of the contract relating to its sphere; without asymmetries, i.e., with symmetrical information, there is no duty to inform, there is no false information, there is no induced error of the other party, there is no induced or incorrect choice of the other party, there is no adverse selection. Objective good faith or fairness is instrumental in correcting information asymmetries and the resulting problems.

The duty of information imposed on the party with an institutional information advantage is not so much a duty to give the other party (true) information about essential, relevant, positive features, requirements and attributes of its sphere (of its person, its goods, its performance, terms or elements of the contract, etc.), which are object of asymmetry, that the contracting party with an information advantage has an interest in giving, and would give, true because such information is favourable to its bargaining position (thus, it obtains a consideration corresponding to its good features).

The duty of information imposed on the party with an institutional information advantage translates, rather, into the duty to give the other party true information on essential,

relevant, negative characters, requirements and attributes (Arrow, 1996) of its sphere (of its person, its goods, its performance, the terms or elements of the contract, etc.), which are object of asymmetry, and which the contracting party with an information advantage would not be interested in giving, or would be interested in giving false, because unfavorable to its contractual position (since it would obtain a lower consideration or might not succeed in concluding the contract).

The misinformation of the party with an institutional information advantage may consist in positive, intentional, or negligent conduct, in a false, misleading, obscure, inexact, incomprehensible statement, or even in omissive, intentional or negligent conduct, in a reticence. In the presence of asymmetries of information between the pre-contractual parties on essential relevant features of the contract, the reticence of the party with an institutional information advantage on these essential, specific, negative points, relating to its sphere, which is the object of the asymmetry, amounts to false information. (And intentional reticence by the party with an institutional information advantage is willful misinformation).

Pre-contractual objective good faith does not impose on the party with an informational advantage a general duty to inform. It does not require the party to inform the other party of essential circumstances relating to its sphere, which the party neither knows nor can easily know since there is no information asymmetry. It does not require the party to inform the other party of essential circumstances relating to its sphere, which the other party can easily observe with ordinary care since there is no asymmetry of information. It does not require the party to inform of positive essential circumstances in the other party's sphere which are favourable to the other party's bargaining position.

Objective good faith does not require disclosure of non-essential circumstances of the negotiation. Objective good faith does not require disclosure of circumstances, even if essential,

relating to elements or purposes external to the bargaining (i.e., market trends, the convenience of the deal, one's speculative purposes); it does not require disclosure of information of a technological or productive nature.

Not everything has to be told to the other party, nor would that be desirable. Pre-contractual objective good faith means fairness: it does not impose altruism, it does not aim at redistribution of income, at solidarity between the parties, at social solidarity; the contracting parties are opposing parties, each pursuing its interest, and each is free to procure information, facing the costs and keeping the relative benefits.

Information is, in fact, expensive (to produce, acquire, obtain, evaluate, etc.); moreover, information as an economic good has characteristics that make it like public goods. The imposition of an unlimited duty to provide information would, on the one hand, deprive those (Posner, 2011, p. 109) who have obtained information and paid for it of the associated benefits and, on the other, could also lead to serious inefficiencies[8].

Objective good faith prescribes to the party with an institutional information advantage only a circumscribed duty of information, instrumental to the truth of the information circulating between the parties. True information, which must be given by the party with an institutional information advantage to the other party, is only some information on market parameters, on characteristics, qualities, requirements, important essential attributes of internal elements or prerequisites of the contract to be concluded, which concern its sphere or the sphere under its control (the person, the goods, the performance, terms or elements of the contract, etc.), not easily observable, relevant to the contractual choice of the other party.

8 They point out that placing a general duty of information could lead to serious inefficiencies (Bishop, 1981, p. 167).

The corrective action of objective good faith on information asymmetries is limited to information concerning important characteristics, qualities, essential attributes relating to the sphere of the contracting parties, which are the object of the asymmetry, inherent in the contract to be concluded, and relevant to the conclusion of the contract; objective good faith seeks to correct false information circulating between the pre-contracting parties.

Pre-contractual objective good faith increases the reliability, the truthfulness of the information exchanged by the parties in the pre-contractual phase on circumstances, elements, or characteristics inherent in the contract. It facilitates the identification of the characteristics of subjects, goods, and services; it makes it easier to distinguish individuals with good characteristics from those with bad characteristics. Objective good faith improves the decision-making process of the pre-contractual parties (not to conclude, to conclude the contract and the conditions under which to conclude it); it facilitates the correct attribution of the consideration, the price, the correct correspondence of the services. It is in favour of the party with an informational disadvantage and is also in favour of the party with an informational advantage, which has good characteristics. Objective good faith favours the conclusion of socially advantageous contracts, the proper functioning of the market.

The information costs imposed by objective good faith on the burdened party do not seem high. The information costs imposed by ordinary diligence[9] on the other party do not seem high either.

9 Due diligence is also imposed on both parties to the contract. The costs imposed by ordinary diligence on the party with less information do not appear to be high (it must procure, evaluate the information received with ordinary care, attention, prudence).

Objective good faith or pre-contractual fairness, however, rests on both pre-contractual parties. The information that objective good faith or correctness requires one party to give to the other is market information, on the characteristics and essential elements of the contract, relating to its sphere or the sphere under its control, the object of asymmetry; it is information that a contracting party has, or can obtain at a low cost, less than that of the other party; it is information that is not so expensive for the party to provide (Kronman, 1978).

4. THE LIABILITY RULE OF PRE-CONTRACTUAL OBJECTIVE GOOD FAITH, WITH THE LIMITATION OF THE COUNTERPARTY'S ORDINARY DILIGENCE, CONCERNING INFORMATION. VARIETY OF REMEDIES.

The violation of the pre-contractual rule of objective good faith or information correctness, the most relevant hypothesis of incorrectness, is followed by the liability of the author of the incorrectness, of the false information, for the damage caused to the other party (the wrong choice to conclude the contract that otherwise would not have been concluded, of not concluding it when it would have been concluded, of concluding it on terms other than those on which it would have been concluded), liability through which the harmful consequences of the misinformation are corrected (the mistake and wrong choice of the party itself, the moral hazard of the party with more information, and adverse selection).

The remedies that follow a violation of objective good faith are varied and articulated and consider the damage caused (wrong choice), the interest of the damaged party, and the general interest. The parties' conduct is considered as a whole, in the light of the rules of objective good faith and diligence.

When the false information, whether intentional or negligent, originates from the other party to the contract and has determined the choice of the other party to conclude a contract which it would not otherwise have concluded, where possible,

provided that the interest of that party so requires, the remedy may consist in the validity and effectiveness of the contract concluded, as a means of removing the harm suffered by the victim and founding the right to the expected performance, or its equivalent, the positive contractual interest (a kind of specific performance, and application of the prohibition of venire contra factum proprium). Thus, for example, the civil code provides for the validity and effectiveness in all cases of the contract on the seller in the discipline of the sale of things belonging to another person (Art. 1478 Civil Code); on the minor who has concealed by deception his minor age (Art. 1426 Civil Code); for example, case law establishes the validity and effectiveness of the contract in the event of the original impossibility of performance, of which the contracting party is aware.

Sometimes the remedy may give rise to the effectiveness of the contract concluded; for example, in the Civil Code the effectiveness of the contract on the principal is established in the event of false information coming from the principal (De Lorenzi, 2002, p. 359) concerning the representative's powers (Arts. 1392, 1396(1) Civil Code); then in case law, the effectiveness of the contract on the principal is established in the event of negligent creation by the principal of a false appearance of representation.

At other times, the remedy may involve the inclusion of the false information given in the contractual promise (e.g., in cases of fraud, or of recognizable mistake, where the other contracting party chooses performance; in defects of the sale, where the other party requests performance or asserts liability for non-performance; or, again, the cases reported (Graziadei, 1994, p. 587) in the case-law of absorption of false information into the contractual promise).

The victim is thus placed in the same position as he or she would be in if the information based on which he or she concluded the contract had been true if the contract concluded was valid, effective, and performed.

In the event of false information coming from the other party, the remedy may also consist in the invalidity and ineffectiveness of the contract: for example, annulment for fraudulent intent (Art. 1439 Civil Code), for a recognisable essential mistake (Art. 1428 Civil Code); in insurance, annulment at the request of the insurer, in the event of fraudulent or grossly negligent false information on the part of the insured (Art. 1892 Civil Code); in case law, annulment for fraudulent reticence. (Compensation for damages, negative interest, is always allowed if damage remains). The victim is placed in the same position as if the contract had not been concluded if he had not relied on the validity of the contract.

The interference between rules of conduct and rules of liability, on the one hand, and rules of validity and invalidity, effectiveness, and ineffectiveness, on the other, is present in some rules, is present in case law (original impossibility, negligent appearance of representation, fraudulent reticence), and is recognised by much of the doctrine. The rule of validity penalizes misconduct, makes the act effective and protects the victim. The rule of invalidity penalizes misconduct, removes the act, protects the victim.

Many authors and judges, on the other hand, support the clear distinction between rules of conduct and liability, on the one hand, and rules of validity and invalidity, on the other, i.e. they consider that the violation of the rule of conduct of objective good faith or pre-contractual correctness (art. 1337 Civil Code) cannot lead to the validity or invalidity of the contract, but only to compensation for damages; the interference between the rules themselves, sometimes recognised upstream in the ratio of the rules, is denied that it can exist subsequently, in the force of the rules themselves. (The rules of conduct concern the morality of business, the rules of validity concern the structure of the act, the binding nature of agreements, the certainty of legal relations) (Benatti, 2002).

The validity or invalidity of the contract (effectiveness or ineffectiveness) is not the only remedy that follows from a breach of objective pre-contractual good faith. Sometimes, where there is decisive false information conveyed by the other party, there is provision for the removal of the transaction at the request of the aggrieved party, with withdrawal-resolution; e.g, in the sale of property belonging to another person, for the purchaser who is unaware that the seller is not the owner (Art. 1479 Civil Code); in the guarantee for defects in the sale, for the purchaser (Art. 1492, para. 1 Civil Code); in insurance, for the insurer in the event of false information by the insured without willful misconduct or gross negligence (Art. 1893, para. 1 Civil Code). (Compensation for residual damage, negative contractual interest, must be added if the damage is still present). The victim is thus placed in the same position as he would be in if he had not entered the contract.

If the false information received from the other party is only incidental, i.e. if it has affected only the conditions under which the contract was concluded (e.g. incidental fraud, incidental "essential" mistake recognisable, false information incidental to the insured, defect in the thing incidental, etc.), the remedy may consist (in addition to avoidance of the contract, Art. 1892 cc) in withdrawal-resolution, as a means of renegotiating the contract and the correct balance[10] between the performances (e.g. in the case of false incidental information of the seller in the warranty for defects in the sale, Art. 1492(1) cc; or in the case of false incidental information of the insured without fraud or gross negligence in insurance, Art. 1893(1) cc). Alternatively, remedies may take the form of a reduction of the counter-performance (e.g., reduction of the price, in the warranty for defects in the sale, Art. 1492(1); reduction of

10 Our civil code does not deal with the relationship between performance and counter-performance: the relationship is freely established by the parties; the code deals with it only if it is altered by unfairness. The incorrect relationship between performance and counter-performance harms the counterparties, and harms all contractors with good characteristics (performance, quality, goods, etc.), distorts the functioning of the market.

the indemnity due by the insurer, Art. 1893(2)); or they may consist in compensation for damages (variously, of the negative interest, or of the damage assessed according to the rules on non-contractual liability, or of the partial positive interest).

One author has argued that, in the event of an "incomplete defect" in the contract, the violation of the rule of conduct of objective good faith or pre-contractual correctness, while leaving the contract valid, in the autonomy of the rules of liability and validity, may give rise to subsequent pre-contractual liability (Mantovani, 1995).

Jurisprudence, accepting the thesis of incomplete defects, has transformed it in the maxims into "pre-contractual liability for the conclusion of a valid but unsuitable contract". The expression is equivocal because it seems to evoke a duty to inform the party with more information on the convenience of the bargain, which is normally not the case (except in the case of contracts concluded by financial intermediaries, and more generally of contracts and relationships of trust, where the duty to inform is more intense).

The thesis of so-called incomplete defects is to be accepted. In the writer's opinion, it may cover an area of negligent misconduct arising from the violation of objective pre-contractual information good faith, which causes damage that must be compensated, but for which no specific remedies are provided for in the code, or no other remedies are granted by established case law; more precisely, it may cover the area of culpable false information, determining or incidental, which has affected the conclusion or the content of the contract, for example, the area of culpable deceit, determining or incidental; of culpable reticence, determining or incidental, as in the case of an incidental "essential" error which is recognisable.

The thesis of incomplete defects, however, although it has arisen (Mantovani, 1995), in the acceptance of the postulate of non-interference between rules of conduct and liability,

and validity-invalidity, does not appear to be in contradiction with the acceptance of the possible interference between rules of conduct and liability, on the one hand, and rules of validity-invalidity on the other. The violation of objective pre-contractual good faith does not always entail the invalidity-validity, the effectiveness-ineffectiveness of the contract, but may entail it in certain cases. “Incomplete defects” cover a different area.

If then, the false information comes from a person who is not a party to the contract and a contract has been concluded, the remedy is always damages. (Compensation concerns the negative contractual interest if the contract concluded is ineffective or is removed, e.g., Arts. 1398, 1439(2); otherwise, it concerns the harm suffered, assessed according to the rules of non-contractual liability).

Finally, if the false information (whether coming from the other party or a third party) has caused the party with an informational disadvantage not to conclude a contract, which would otherwise have been concluded, the remedy is damages (negative interest, if negotiation costs have been incurred, or damages are calculated according to the rules of non-contractual liability). The victim is placed in the same position as he would be if the tort, the false information, had not occurred.

An articulate and varied range of remedies follows, therefore, from the violation of the rule of objective pre-contractual good faith, including, in addition to damages (the positive or negative contractual interest, or the damage assessed under non-contractual liability), reduction of the counter-performance, withdrawal-resolution, validity or invalidity, effectiveness or ineffectiveness of the contract.

Liability for breach of good faith information meets the limit of the ordinary diligence of the party with less information; the latter, if it does not use ordinary diligence concerning the information, suffers the costs of its own wrong choice (Arts. 1338, 1398, 1491, etc., Civil Code).

5. THE DUTY TO PROVIDE PRE-CONTRACTUAL INFORMATION IN THE SENATE BILL FOR THE REVISION OF THE CIVIL CODE, NO. 1151/2019. CRITICS

A recent draft law delegated by the Senate to the Government for the revision of the Civil Code (No. 1151/2019) sets out principles and guidelines on pre-contractual liability and states in Art. 1(1)(f) that the new legislation shall "provide that, during the negotiations for the conclusion of the contract, the party who is aware of information of decisive importance for the consent shall be under a mandatory obligation to communicate it to the other party when the latter is unaware of such information and has placed necessary reliance on the loyalty of the other party; information concerning the value of the subject matter of the contract shall be excluded". The draft enabling act follows in the footsteps of the reform of the French Civil Code, which contains a similar provision (Article 1112-1 Code Civil).

The Report traces the duty to inform to objective good faith (Art. 1337 of the Civil Code) and explains the inclusion of a pre-contractual duty to inform on the party with an information advantage by the fact that it would not be present in the Civil Code, outside Art. 1338 of the Civil Code.

The objectives of the suggested revision of the Civil Code in this field, as expressed in the accompanying Report, seem limited (modernizing the Civil Code with the fixed points reached by the prevailing case law, concerning the accepted theory of "incomplete defects", translated by the courts into pre-contractual liability following the conclusion of a valid but unsuitable contract).

The postulates indicated in the Report, which lead to the formulation of the considered provision, are derived from several case laws, about the conclusion of a valid but inconvenient contract. Let us follow what is stated in the Report.

The most recent case law (in addition to cases of breach of negotiations and the conclusion of an invalid or ineffective contract) has come to include in pre-contractual liability also the conclusion of a valid contract when, because of the failure of the party with an informational advantage to disclose relevant information, the contract has been concluded by the other party on terms different from those on which it would have been concluded. Withholding is the failure by the party with an informational advantage to disclose material information possessed to the other party, leading the other party to the conclusion of a valid contract, but on terms different from those on which it would have been concluded. Failure to disclose relevant pre-contractual information, while leaving the contract valid, gives rise to pre-contractual liability, with compensation for damages, of the positive contractual interest, for difference (so-called "pre-contractual liability for a valid but unfavorable contract").

The "necessary reliance on the loyalty of the other party", required for the party with less information, is justified by the need to avoid protecting negligent or unwarranted reliance.

The reticence is not fraud, since fraud requires, according to the prevailing jurisprudence, commissioned behaviour, accompanied by cunning or malice; the omitted information, the reticence does therefore never entail the annulment of the contract, but only the compensation of damages. The provisions of the Civil Code on determining fraud (Art. 1439 of the Civil Code) and incidental fraud (Art. 1440 of the Civil Code) are therefore not affected, but only supplemented.

The relevance of reticence, derived from case law on pre-contractual liability for the conclusion of a valid but inconvenient contract, leads to the formulation of the proposed provision, and leads to the mandatory duty of the pre-contracting party with more information to disclose, during the formation of the contract, to the other party who is unaware

of it the known relevant information determining consent, whatever it may be (except information on the value of the subject matter of the contract). Breach of this duty is reticence and gives rise to damages.

By speaking generically of "material" determinative information, the provision places a general duty of information on the party with an informational advantage in favour of the other party. Any information possessed by a party may be of decisive importance for the other party for the conclusion of the contract (e.g., information on the convenience of the deal, market trends, etc.), and the exclusion of information relating to the value of the subject matter of the contract is of little significance since important information usually influences the value of the subject matter of the contract.

Thus, the party's with more information duty to inform is disproportionately broadened, and at the same time the relevance of reticence is broadened (contrary to the intentions expressed in the Report). Any failure of the party with more information to provide information on known circumstances "of importance" to the other party may constitute non-disclosure and give rise to damages.

It may be observed that the proposed provision, and the accompanying report, do not take account of the literature on information; the distinctions that are made concerning the information. No distinction is made between the asymmetries of information in general that may exist between the pre-contractual parties, which may concern any information, and the asymmetries of institutional information between the parties themselves, which concern characters, attributes, important essential elements relating to their sphere, inherent in the contract to be concluded, and relevant to the contractual choice of the counterparty. The costs of information, the special characteristics of the information good are not considered.

Again, it may be observed that the provision speaks only of “material” information determining the other party’s consent, leaving out information affecting the content of the contract (whereas the example given in the Report is of incidental information). Moreover, it does not point out a duty of ordinary diligence[11] of the other party in obtaining and checking the information.

The Explanatory Memorandum accompanying the provision also shows little or no knowledge of the complex subject of pre-contractual liability in doctrine and case law. (This is evidenced by the exclusive reference to several case law maxims, relating to pre-contractual liability for a valid but unsuitable contract).

Above all, the report shows a lack of knowledge of the rules contained in the Civil Code, Article 1337 of the Civil Code and the other rules linked to it.

The duty to inform is already present in the code, imposed by pre-contractual objective good faith, in Art. 1337 of the Civil Code. In the civil code, pre-contractual objective good faith does not impose a general duty of information on the party with an information advantage.

This should be repeated briefly.

Objective good faith (Art. 1337 of the Civil Code), with the limit of ordinary diligence, operates in the presence of asymmetries of (reciprocal) information between the pre-contractual parties and controls the circulation of information (all information) between those parties. Objective good faith imposes on the party with more information the duty not to give false information and the duty to give true information

11 Although the counterparty’s duty of care seems to be expressed in the Report concerning the explanations given on the “necessary reliance on the loyalty of the counterparty”, and on the balance between the duty to inform the other party and the duty to inform oneself, to which reference is made.

when given (Williamson, 2018). It imposes on the party who institutionally has more information the duty to give some true information to the other party on certain precise points which are the subject of asymmetry.

Not everything has to be said, nor is it desirable that it be said. Information is indeed expensive and has characteristics that bring it closer to public goods.

The duty of information imposed on the party with an informational advantage established by pre-contractual objective good faith (Art. 1337 of the Civil Code) is limited, instrumental to the truth of the information circulating between the pre-contractual parties.

The true information which the party with an institutional information advantage must give to the other party is information on market parameters, on important characteristics, qualities, essential attributes, relating to its own sphere or to the sphere under its control, inherent in internal elements or presuppositions of the contract to be concluded (the characteristics or qualities of its person, its goods, its performance, the terms of the contract prepared, etc.), object of asymmetry, not easily observable by the other party with ordinary diligence, relevant to the choice of the counterparty; it is information which the party has, or may have, at a low cost, less than the cost of the counterparty; it is information which is not so expensive for the party to obtain.

And more precisely, the duty to give true information imposed on the party with an institutional information advantage translates into the duty to give the other party true information on the characteristics, qualities, essential important negative attributes of its sphere, object of asymmetry, inherent in the contract to be concluded, relevant to the choice of the other party, which the party has no interest in giving, or has an interest in giving false, because unfavorable to its contractual position. (It should be noted, however, that some information on characteristics, qualities, important negative attributes of

one's sphere, inherent in the contract, which the party who institutionally has the most information must give - about one's goods, one's own thing, one's performance, etc. - is information on value, which the provision in question seeks to exclude from the duty to inform).

In the presence of a duty to inform on the part of the party that institutionally has more information, the omission of information, the reticence of that party on the precise negative points, which are the object of asymmetry, amounts to false information. Moreover, reticence may be culpable or intentional, and intentional reticence is fraudulent (contrary to what is stated in the Accompanying Report, following some case law).

It may be observed that the Civil Code's discipline of error induced by fraudulent intent on the part of the other party, whether decisive or incidental, includes intentional reticence, whether decisive or incidental, on the part of the party with an institutional information advantage on essential relevant elements of its sphere, inherent in the contract to be concluded, for which a duty of information is prescribed; with the consequence respectively of the annulment of the contract, under Art. 1439 Civil Code, plus compensation for damages, under Art. 1338 Civil Code, or compensation for damages, under Art. 1440 Civil Code.

It may also be observed that in the Civil Code's regulation of a party's spontaneous essential determinant error on important elements of the contract to be concluded falling within the sphere of the other party (for which there is a duty of information on the part of that party with an institutional information advantage), if the error is recognisable with ordinary diligence, the omitted information, negligent or willful reticence is followed by the annulment of the contract, under Arts. 1428, 1429, 1431 Civil Code, and damages, under Art. 1338 Civil Code.

The duty to provide pre-contractual information, which is linked to pre-contractual objective good faith (Art.

1337 of the Civil Code), and omitted information as a breach of the duty to provide information imposed, is already present in the rules of the Civil Code. In the civil code, the duty to inform, and reticence as failure to provide information due, have a more restricted content than that proposed in the provision under consideration. The discipline of non-disclosure is already present in the civil code and does not provide therefore only compensation for damages.

The so-called theory of incomplete defects may be accepted. It emphasises in the first place the configurability of pre-contractual liability after the conclusion of a valid contract. It can then serve to illuminate and partly cover, in the writer's opinion, the area of negligent false pre-contractual information, determining or incidental, which does not affect the validity or effectiveness of the contract, where concluded, and for which no specific remedies are provided for by the Civil Code, nor are special remedies granted by established case law.

Culpable misrepresentation consisting of culpably false statements, determinative or incidental, by the party with an informational advantage about relevant circumstances relating to the contract; or consisting of culpable reticence, determinative or incidental, by the party with an institutional informational advantage about relevant essential elements of the contract relating to its sphere, for which a duty of information is imposed. Culpable false pre-contractual information constituting pre-contractual unfairnesses, pre-contractual torts causing damage, which must be compensated.

The acceptance of the so-called theory of incomplete defects does not, however, lead to a general duty [12]information, linked to good faith, for the party with an information advantage.

12 Contrary to what might be suggested by the case law maxim, which speaks of "pre-contractual liability for the conclusion of a valid but unseemly contract", there is no duty to inform about the convenience of the bargain, except in contracts and relationships of trust.

Irrespective of the objectives and postulates in the Report, which underlie the considered provision, a rule inserted in the Code that follows the principles and guiding criteria indicated by the proposed revision of the Civil Code on pre-contractual liability not only does not solve any problem, but risks having disruptive effects, unhinging the Civil Code system.

Imposing on the party with an information advantage a general duty of information related to objective good faith about circumstances "relevant" to the other party deprives the party who has incurred information costs of the benefits thereof and may cause serious inefficiencies.

Again, in the writer's opinion, the (superficially) proposed rule, if accepted in positive law, could be interpreted by linking objective (pre-contractual) good faith to solidarity, to constitutional social solidarity (Art. 2 of the Constitution), as is done by a part of the doctrine and in recent times by case law.

But this would completely subvert contract law: the contracting parties are opposing parties; each party legitimately pursues its interest by concluding a contract; contract law responds to market logic.

Objective good faith is different from solidarity between the parties, and constitutional social solidarity; pre-contractual objective good faith, as regards information, and information duties, is different from solidarity, it has no redistributive purpose (Rizky et al., 2018).

Objective good faith does not require the party with an informational advantage to share all relevant information possessed by the other party.

Also, Bianca (1990), who links objective good faith to constitutional social solidarity, recognises that a duty to inform about the convenience of the bargain (which seems to emerge from the Supreme Court pronouncements cited about incomplete defects of the contract, some of which

speak of failure to communicate relevant information on the convenience of the bargain) "distorts the sense of the precept of good faith". "This precept cannot require the party to act against its interest...". (p. 143)

The area of information, and pre-contractual information, is a sensitive one. Unthoughtful intervention by the legislator in this field can have serious negative economic and social consequences.

In the Civil Code, pre-contractual information is governed by pre-contractual objective good faith, with the limitation of the ordinary diligence of the counterparty.

Pre-contractual objective good faith is pervasive in the Civil Code. There is a thin thread linking objective pre-contractual informative good faith, of articles 1337 and 1338 of the Civil Code, and the related duties of information, to many rules of the code of the general part and the special part of contracts, as has been pointed out. There is a thin thread linking the violation of the objective good faith pre-contractual information to numerous remedies provided for by the rules of the code, or granted by established case law, as has been highlighted.

The discipline of pre-contractual information implemented by the code with objective good faith, as derived from the rules, as interpreted by doctrine, and from consolidated case law (beyond the declamations), appears to be orderly and rational, consistent with the nature of the good information, with the problems highlighted by economic analysis, consistent with the system of private contract law.

It should be noted, however, that the draft revision of the civil code seems to have lost its relevance now (one can say, fortunately, in this field).

CONCLUSIONS

A discipline of pre-contractual information and consequent problems emerges from the rules of the Civil Code. The discipline is based on the duty of objective good faith or pre-contractual correctness and on the duty of ordinary pre-contractual diligence (arts. 1337, 1338 c.c.), which are incumbent on both parties in the preliminary phase of contracting.

In the presence of (reciprocal) information asymmetries between the pre-contractual parties, objective good faith (Art. 1337 of the Civil Code) controls the circulation of information between those parties. It aims at the truth of the information, imposes on the pre-contractual parties the truth of the information when it is given, prohibits falsity or otherwise corrects the consequences.

Objective good faith does not impose a general duty of information on the party with a pre-contractual information advantage. It prescribes to the party who institutionally has more information a limited duty of information, instrumental to the truth of the information.

Objective good faith imposes on the party with an institutional information advantage the duty to give the other party some specific truthful information on characters, qualities, essential important negative attributes of its sphere (person, good, performance, terms, elements, assumptions of the contract), the object of asymmetry, relating to the contract to be concluded, relevant to the choice of the other party (to conclude, not to conclude, of the conditions under which to conclude the contract); information which the party would not have an interest in giving, or would have an interest in giving false, because unfavorable to its contractual position. In the presence of a duty of information on the part of the party with an institutional informational advantage as to the essential relevant negative features relating to its sphere, concerning the contract to be concluded, which is the object of asymmetry, reticence on the part of the party with an institutional informational advantage as to the precise points is equal to false information (and intentional reticence is fraud).

Pre-contractual objective good faith is limited by the duty of ordinary pre-contractual care incumbent on the other party.

The violation of objective pre-contractual good faith results in a variety of remedies, which always operate with the limitation of the ordinary diligence of the counterparty; among them, validity-invalidity, effectiveness-ineffectiveness of the contract, withdrawal-resolution of the contract, compensation of damages (of negative interest, of positive interest, or damages calculated with the rules of extra-contractual liability).

The recent Senate bill delegating authority to the Government for the revision of the Civil Code, No. 1151 of 2019, deals with pre-contractual liability and proposes to include in the Civil Code, at the expense of the pre-contractual party with an informational advantage, the duty related to objective good faith (Article 1337 of the Civil Code) to give the other party "relevant" determinative information.

The proposal gives rise to criticism and misgivings, for the observations already made. It places a general duty to provide information on the pre-contractual party with an information advantage; it does not distinguish between the various types of information, it does not take account of the cost of providing information or the special nature of the information; it does not establish the limit of the counterparty's ordinary diligence. It points to damages as the only consequence of reticence (which is, moreover, widely understood).

It needs to be repeated, the discipline of pre-contractual information and duties of information, linked to objective good faith, already emerges from the rules of the Civil Code, as interpreted by scholars and established case law. Legislative intervention in such a sensitive area as pre-contractual information and pre-contractual liability seems inappropriate without it being preceded by careful consideration by a study commission composed of expert civil lawyers. Extemporaneous interventions in this field may disrupt the consolidated system of the Civil Code and lead to serious inefficiencies.

REFERENCES

Akerlof, G. (1970). *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*. The MIT Press.

Arrow, K. (1996). I*nformation and Economic Behavior.* Federation of Swedish Industries.

Barcia Lehmann, R. (2019). Teoría de obligaciones, contratos y análisis de derechos económicos: una revisión argumentativa. *Revista Facultad De Jurisprudenci*a, (6), 387-435. https://doi.org/10.26807/rfj.vi6.220

Beales, H., Craswell R. and Salop, S. (1981). The Efficient Regulation of Consumer Information. T*he Journal of Law & Economics,* 24 (3).

Benatti, F. (2012). *The precontractual responsibility.* Italian Scientific Editions.

Betti, E. (1953). *General Theory of Obligations*, I. Milan.

Bianca, C. M. (1990). *Civil Law,* IV, Obligation. Milan.

Bishop, W. (1981). Negligent Misrepresentation: an Economic Reformulation. In E. Burrows and A. Veljanovsky (eds.), T*he Economic Approach to Law*. London.

Bishop, W. (1983). The Contract-Tort Boundary and the Economics of Insurance. Journal of Legal Studies, (14).

Cappelli, L. (1993). Information asymmetries and the consumer goods market. *Economic Studies*, (49).

Cass., Sec. Un. (19 December 2007). No. 26724 and No. 26725.

Chan, Y. and Leland, H. (1982). Prices and Qualities in Markets with Costly Information. *Review of Economic Studies,* 49 (4), pp. 499-516.

Cooter, R. and Ulen, T. (2016). L*aw and Economics, 6th edition.* Berkeley Law Books.

Cooter, R., Mattei, U., Monateri, P.G., Pardolesi, R. and Ulen, T. (2006). T*he market for rules. Economic analysis of civil law.* Bologna.

Darby, M. and Karni, E. (1973). Free Competition, and the Optimal Amount of Fraud. T*he Journal of Law & Economics,* 16 (1), pp. 67-88.

De Lorenzi, V.A. (2002). V*oluntary direct representation*. Milan.

Emons, W. (1988). Warranties, Moral Hazard, and the Lemons Problem. J*ournal of Economic Theory,* 46 (1), pp. 16-33.

Graziadei, M. (1994). Il patto e il dolo, in St*udi in onore di Sacco,* I. Milan.

Hirshleifer, J. (1973). Where are We in the Theory of Information? A*merican Economic Review*, (63).

Jacobson, H., Carlson, A. and Lindahl, M. (2021). Legal, environmental and economic issues with functional sales – A case of indoor lighting Author links open overlay panel. *Journal of Cleaner Production*, 298.

Kotowitz, Y. (1987). entry Moral Hazard. In T*he New Palgrave of Economics and the Law*. London, Macmillan.

Kronman, A. (1978). Mistake, Disclosure, Information, and the Law of Contracts. *Journal of Legal Studies,* 7 (1), pp. 1-34.

Leland, H. (1979). Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standard. J*ournal of Political Economy*, (87).

Mackaay, E. (1982). E*conomics of Information and Law*. Boston: The Hague-London.

Magat, A. (1998). *Information Regulation. In The New Palgrave of Economics and the Law*. London, Macmillan.

Mantovani, M. (1995). *<Incomplete defects> of the contract and compensation*. Turin.

Nelson, P. (1973). Information and Consumer Behavior. J*ournal of Political Economy*, 78 (2), pp. 311-329.

Posner, R. (1992). E*conomic Analysis of Law*, 4th ed. Boston-Toronto-London.

Postlewaite A. (1989) Asymmetric Information. In Eatwell J., Milgate M., Newman P. (eds.), *Allocation, Information and Markets*. The New Palgrave. Palgrave Macmillan, London.

Rea Jr., J. (1998). entry Insurance Law. In *The New Palgrave of Economics and the Law*. London, Macmillan.

Rizky, A., Yunita Sabrie, H. and Dian, W. (2018). The Principle of Good Faith in The Choice of Law of Foreign Direct Investment Contracts in Indonesia. Fiat Justisia: *Jurnal Ilmu Hukum,* 12 (2), pp. 170-80. https://doi.org/10.25041/fiatjustisia.v12no2.1306.

Saltari, E. (1990). Info*rmation and economic theory*. Bologna.

Stigler, G. (1961). The Economics of Information. Jo*urnal of Political Economy,* 129 (7).

Varian, H. (1993). *Microeconomics*, 3rd ed. Venice.

Visintini, G. (1972). R*eticenc*e. Padua.

Williamson, T. (2018). Supervaluationism and good reasoning THEORIA. *Revista de Teoría, Historia y Fundamentos de la Ciencia*, 33 (3), pp. 521-537.

Wilson, E. (1987). entry Adverse Selection. In T*he New Palgrave of Economics and the Law.* London, Macmillan.

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