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PROBLEMATICAL ASPECTS OF THE REMEDIAL PERSPECTIVE

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SUMMARY: 1. The Remedy-Based Approach and the Italian Civil Law System: the reasons for a "filtered adhesion". – 2. The conceptualization of the remedy. – 3. The Reliance Interest as a "filtered adhesion" to the Negative Interest Theory.

1. In recent years the Italian civil law system has been deeply influenced by common law.

The most significant influences are in the increasing significance assigned to judicial precedent either by the courts or the legal literature, particularly in the delicate area of rights protection. Now, more than ever in Italy, the judicial precedent is given importance[1]. The recent reform of the code of civil procedure has made it more difficult for the Courts to change a precedent established by the joint sitting of the divisions of the Court of Cassation (art. 374 c.p.c. modified by d.lgs. 40/2006)[2].

The approach based on remedies affected the Italian legal theory[3]. Its value depends on its capacity to define the interests involved more precisely than the rights approach.

The remedy which is defined as «the means of enforcing a right or preventing or redressing a wrong»[4] represents the very answer the system offers against torts[5].

* Dottore di ricerca in Diritto privato.

[1] On this topic see recently M. Serio, *Il valore del precedente tra tradizione continentale e* common law*: due sistemi ancora distanti?*, in *Riv. dir. civ.*, 2008 Suppl., 190 s.

[2] The increasing importance of the judicial precedent is shown also by the Italian legal literature suggested for public competition (Lawyer, Judge, etc.). The manuals appear to emulate the case books of the common law: see for example the series "Percorsi" edited by F. Caringella and R. Garofoli, published by Giuffrè.

[3] In the Italian doctrine there are two different ideas of remedy: on one hand the remedy is identified as a flexible instrument of protection against wrongs (A. di Majo, *Il linguaggio dei rimedi*, in *Europa dir. priv.*, 2005, 341 s.; Id., *La tutela civile dei diritti*[4], Milano, 2003, 13 s.; Id., *La tutela dei diritti tra diritto sostanziale e diritto processuale*, in *Riv. dir. civ.*, 1989, 363 s.; U. Mattei, *I Rimedi*, in G. Alpa - M. Graziadei - A. Guarnieri - U. Mattei - P.G. Monateri - R. Sacco, *La parte generale del diritto civile. 2. Il diritto soggettivo*, in *Trattato di diritto civile*, diretto da R. Sacco, Torino, 2001, 105 s.); on the other hand the remedy is defined as an istrument that fulfils a general principle of the system in a place where it is not fulfilled or it is broken. In this sense the remedy is not reflected in the right pre-defined by the law maker, but it regulates the case by itself (D. Messinetti, *Sapere complesso e tecniche giuridiche rimediali*, in *Europa dir. priv.*, 2005, 605 s. spec. 610.; Id., *Processi di formazione della norma e tecniche «rimediali» della tutela giuridica*, in *Scienza e insegnamento del diritto civile in Italia. Convegno di studi in onore del prof. Angelo Falzea*, a cura di V. Scalisi, Milano, 2004, 209 s.). The remedial approach was discussed in a recent Conference in Florence organized by Prof. Vettori: *Remedies of Contract. The Common Rules for a European Law*, Florence 30th March 2007, Aula Magna dell'Università and Altana di Palazzo Strozzi.

[4] The etymology of the term «remedium» gives the idea of cure, treatment or, in a figurative sense, aid, refuge. In the Common Law the wrong which gives refuge is the tort. In this sense see S. Mazzamuto, *La nozione di rimedio nel diritto continentale*, in *Europa dir. priv.*, 2007, 585.

[5] See di Majo, *La tutela civile*, cit., 14.

This approach was born in the Roman law, where *praetor* vested the *formula* to the individual who asked for justice[6]. Thus it becomes easy to find the analogy in the forms of action of the medieval Common Law system founded on "writs". The writ (Latin: *breve*) was a letter from a superior, ecclesiastical or secular, containing a message to the addressee, normally a request or an instruction[7]. In the nineteenth century the abolition of the *forms of action* led to the birth of a remedial system of protection (equitable remedies, substitutional and specific remedies, money remedies)[8].

The remedy-based approach is not intended to substitute the rights-based approach. On the contrary, it is meant to work alongside it, sharing the same scope. Both these approaches represent the methods to allow the interest to be seen as a right[9].

The main difference between Common Law remedy-based approach and the Civil Law rights-based approach is in the way in which protection is given against torts. In Common Law, the interest comes to light when the judge vests a remedy to protect it. Thus, the judge defines the specific interest in relationship with the peculiar remedy[10].

In Civil Law systems, the law-maker establishes through the law the relevance of the interest, regarding it as worthy of protection[11].

In the remedy perspective, on the contrary, what really matters is the existence and availability of a remedy against a tort. The right is subsequent[12]. In common law, therefore, instead of the conception expressed by the Latin brocard *ubi ius ibi remedium*, the opposite idea is applied, *ubi remedium ibi ius*, or rather remedies precede rights[13]. Common law point of view, in other words, implies that rights originate from vesting remedies against torts[14].

The remedy approach can be qualified as more pragmatic than the rights

[6] The *formula* is like a written instruction containing a brief indication of a matter under dispute to the judge who examines it. In this way the formula progressively involves the Roman Law. See E. Volterra, *Istituzioni di diritto privato romano*, Roma, 1961, 214.

[7] «In Law "writ" meant a command of the King directed to the relevant official, judge, or magistrate, containing a brief indication of a matter under dispute and instructing the addressee to call the defendant into his court and to resolve the dispute in the presence of the parties». K. Zwigert - H. Kötz, *An Introduction to Comparative Law*[3], Eng. tr. by T. Weir, Oxford, 1998, 184.

[8] See di Majo, *La tutela civile*, cit., 14. In the Comparative Law see C.A. Cannata - A. Gambaro, *Lineamenti di storia della giurisprudenza europea*. *II*. *Dal medioevo all'epoca contemporanea*[4], Torino, 1989, 39 s. e 92 s.; Zwigert - Kötz, *An Introduction to Comparative Law*, cit., 182 s.; A. Gambaro - R. Sacco, *Sistemi giuridici comparati*[2], in *Trattato di diritto comparato*, diretto da R. Sacco, Torino, 2002, 85 s. e 123 s.

[9] See di Majo, *Il linguaggio*, cit., 345; D.B. Dobbs, *Law of Remedies*. *Damages-Equity-Restitution*[2], St. Paul Minn., 1993, 2: «the law of remedies is thus sharply distinguished from the substantive law of rights. It is also distinguished from the law of procedure». This necessity is highlighted also by Mattei, *I rimedi* cit., 108. *Contra* F. Piraino, *La vendita di beni di consumo tra obbligazione e garanzia*, in *Europa dir. priv.*, 2006, 547 s.; ID., *La pretesa dell'adempimento e il giudizio di responsabilità contrattuale. Contributo alla teoria dell'obbligazione*, publishing, 61 s. (of the typescript) who highlights that there is a reciprocal influence between the substantive law rights and the law of remedies.

[10] See di Majo, *Il linguaggio*, cit., 342, who describes that method with the Latin sentence: *ubi remedium ibi ius*.

[11] See D. Barbero, *Il diritto soggettivo*, in *Foro it.*, 1939, IV, 15; A. Gentili, *A proposito de «il diritto soggettivo»*, in *Riv. dir. civ.*, 2004, I, 357; di Majo, *La tutela civile*, cit., 15.

[12] See di Majo, *La tutela civile*, cit., 15.

[13] See D. Friedmann, *Rights and Remedies*, in *Comparative Remedies for Breach of Contract*, ed. by N. Cohen and E. McKendrick, Oxford-Portland, 2005, 4: «the right derives from the remedy and as matter of sequence the remedy precedes the right. Consequently the absence of a remedy points to the non-existence of a legal right. This model is in line with the traditional approach of the common law under which "where there is a remedy there is a right" (*ubi remedium ibi ius*)».

[14] See di Majo, *Il linguaggio*, cit., 341-342.

one. It deals immediately with the violation, therefore it is strictly connected with the kind of tort and escapes from the ineffectiveness of proclamations of rights[15]. In other words the remedy is a method that loves realism and hates formalism; it tends to give the person the best protection against tort[16].

The possibility to enforce the remedy-based approach in the Italian civil law system is complicated and controversial.

This approach, in fact, can be applied only in Common Law systems, where judges have the legal mandate and competence to make the law[17]. In Civil Law systems, like in the Italian one for example, the Courts do not have the competence to establish a judicial precedent with absolute authority and the rights and its forms of action are established from the law maker[18], who has a democratic mandate, through the balance of interests carried out *a priori*[19]. In this way, if the remedy-based approach was adopted, a lack of democratic justification would affect the task of the Courts. There would be a gap between what the Constitution mandates about the role of judges and their actual role in the judiciary.

Though the remedy-based approach could assure in many ways a good protection of the interests involved, it cannot be fully implemented in the Italian system. However it gives some pointers to improve the quality of the interest protection in civil law systems.

For this reason it seems better to assent to the remedy-based approach in "filtered terms", submitting its entrance in the Italian system to a compatibility assessment. This type of approach is suggested by those studies which highlight the tendecy of judges in using the remedy-based approach overall in the area of interlocutory procedure of rights protection (art. 700 c.p.c.), where judges frequently vest remedy imagining preponderance of the probability of right[20].

The priority of remedy in respect to right, therefore, moves us in escaping from an untrammelled adhesion to the remedy-based approach which was born and has developed in a system that is very deeply different from our one, in particular in relation to the sources of law. Thus the scope of the filtering action has to aid in avoiding an anarchist migration of the remedial approach from the Common Law system to the Italian one without any control in the light of the fundamental principles of the Continental tradition.

This idea is the result of the knowledge that the necessity to give more

[15] See di Majo, cit., 344, who says that the remedy-based approach is closer than the rights one to the needs of protection of society.

[16] See Mattei, *I Rimedi*, cit., 107, who highlights that the remedy-based approach is focused on the person and his interests, instead of the right-based perspective that focuses on Ordainment. The differences between the two methods are highlighted by the different approaches of the legal books: the common lawyer's discussions are involved on cases. See for example E. McKendrick., *Contract law. Text, Cases and Materials*[2], Oxford, 2005; H.G. Beale - W.D. Bishop - M.P. Furmston, *Contract. Cases & Materials*[5], Oxford, 2008.

[17] The inverse technique to make law is demonstrated by the circumstance that in Common Law the rights that are recognised from the Law are developed around the remedies. See di Majo, *La tutela civile*, cit., 15.

[18] See A. di Majo, *Forme e tecniche di tutela*, in *Foro it.*, 1989, V, 132 s. and in *Processo e tecniche di attuazione dei diritti*, I, a cura di S. Mazzamuto, Napoli, 1989, 1 s.; Id., *La tutela dei diritti*, cit., 367.

[19] See R. Nicolò, *L'adempimento dell'obbligo altrui*, Milano, 1936, 71; Barbero, *Il diritto soggettivo*, cit., 15.

[20] See di Majo, *Il linguaggio*, cit., 342-343; Id., *La tutela civile* cit., 75 s.; Id., *La tutela dei diritti*, cit., 379 s.

effectiveness to the rights protection and the charm of a more pragmatic approach, which is characterised by the promptly replied to the needs of protection of society, are bringing in a system that undermines the fundamental principles of the Italian one. In the words of a comparative author we can describe this phenomenon as an example of «legal flux»: a particular trait of a legal system which is perceived by another system and brings in it elements of imbalance[21] and therefore the necessity to provide adaptation instruments.

2. The filtered adhesion to the remedy-based approach, firstly, goes through the recent work of conceptualization of the remedy to avoid negligent generalisations and, in addition, to determine where the use of the term «remedy» is appropriate and where not[22].

In this way Mazzamuto defines the remedy as an instrument to react against either a violation or non-fulfilment of a pre-existing order due to an external event; it is an instrument that is initiated by the impulse of the individual; vested by judge after balance of interests. The remedy, therefore, postulates an unsolved conflict by the law maker. Thus the main difference to describe an action as remedy affects the time of the balance of interests: if this is done *a priori* by the law maker, there is not a remedy; when the balance of interests, on the contrary, is done *a posteriori* by the judge we can use the term «remedy» to describe it.

Thus we can distinguish cases where the law maker has provided protection vesting on the person a power or a faculty, solving by himself the balance of interests when he wrote the law, and cases where the law maker has provided a so-called "large rule" leaving to the judge the task of solving the balance of interests. We can describe this difference through the example of the Italian rescission in the labour law and in the consumer protection: in the first case the law maker leaves to the judge the authority to establish, through the balance of interests, when there are requirements to vest the remedy (art. 1372 c.c.); in the second the law maker established *a priori* the primacy of the consumer protection, therefore, in this case the rescission is not a remedy, but rather a power of the consumer. Thus the judge has only to verify whether there are all of the requirements - that the law maker has already established - to give a remedy[23].

The necessity to adhere to the remedy-based approach in order to avoid a crisis of the Italian system is really important in this moment in which the European legislation, that adopts the remedy-based approach, affected the Italian one.

The choice of the European legislation to use that approach is justified, for an Author, as in the European Union there is not a real State and therefore there is

[21] M. Lupoi, *La percezione della funzione del precedente quale flusso giuridico*, in *Lo stile delle sentenze e l'utilizzazione dei precedenti. Profili storico-comparatistici. Seminario ARISTEC – Perugia 25-26 giugno 1999*, edited by L. Vacca, Torino, 2000, 85-86. According to Lupoi a particular trait of a system becomes a flux when it is called from another system to satisfy a necessity the system cannot reply using own instruments. For this Author we have to provide adaptation instruments to the judicial precedent approach that is affecting the Italian Courts, as they are not used to act as law maker, and therefore they do not know how to use this power: the danger is in an arbitrary use of that approach.

[22] The work was developed by Mazzamuto in the Conference of Florence, *Remedies of Contract*, cit., and now it is published as Mazzamuto, *La nozione*, cit., 585 s. and Id. in S. Mazzamuto - A. Plaia, *I rimedi*, in *Manuale di diritto privato europeo*, cit., II, 748 s.

[23] See Mazzamuto, *La nozione di rimedio*, cit., 594-595.

not a real law maker[24]. In addition the European Law affects the diferent legislations of the member States and therefore tends to provide simple actions characterized by their flexibility. The proof of that is the utilisation of proportional and reasonableness criteria that are not adequate to the right-based approach of the Civil Law system[25].

3. The different characters of the Common law system and the Civil Law one, described in the precedent paragraph, come to light through the analysis of the development of the Reliance Interest[26].

We have seen that the remedy-based approach deals immediately with the violation and it is strictly connected with the kind of tort. The analysis of the Reliance Interest, arisen by Fuller and Perdue at the beginning of the twentieth Century[27], reflects this kind of approach.

This legal theory moves from the idea that each remedy tends to protect a specific interest. Therefore, it has to be flexible to reach any case that affects society.

Thus the authors analyse the grounds that have determined the reason why the law ever protects the expectation interest in each case of breach of contract[28].

The different approach of the civil lawyer and the common lawyer comes to light through the elucidation of the grounds that bring to the revisitation of that principle: the authors show the existence of other interests, above the expectation one, highlighting that the recovery of the expectation interest is deficient in reflecting the exact need of protection that arises from each case of breach of contract. In the Civil Law, on the contrary, this topic is developed by Rudolf von Jhering through the analysis of the contract and its effects[29]. The Reliance Interest

[24] See di Majo, *Il linguaggio*, cit., 349 s.

[25] See Mazzamuto - Plaia, *I rimedi*, cit., 758 s.

[26] The protection of the reasonable Reliance has been recognized recently by the Draft of Common Frame of Reference (DCFR) like one of the «main ingredients» of contractual security. See *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition*, Edited by Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), München, 2009, 72. About the DCFR see R. Schulze - T. Wilhelmsson, *From The Draft Common Frame of Reference towards European Contract Law Rules*, in *ERCL*, 2008, 154 s.; H. Beale, *The European Commission's Common Frame of Reference Project*, ivi, 2006, 303 s.; Id., *The Future of Common Frame of Reference*, ivi, 2007, 257 s.; Id., *The Draft Common Frame of Reference: Mistake and Duties of Disclosure*, ivi, 2008, 317 s.; O. Lando, *The Structure and the Legal Values of the Common Frame of Reference (CFR)*, ivi, 2007, 245 s.; J.M. Smits, *The Draft-Common Frame of Reference, Methodological Nationalism and the Way Forward*, ivi, 2008, 270 s.; S. Whittaker, *Burden of Proof in the Consumer Acquis and in the Draft Common Frame of Reference: Law, Fact and Things in Between*, ivi, 2008, 411 s.; G. Vettori, *L'interpretazione di buona fede nel codice civile e nel Draft Common Frame of Reference (DCFR)*, in *Riv. dir. priv.*, 2008, 675 s.; G. Alpa - G. Conte, *Riflessioni sul progetto di* Common Frame of Reference *e sulla revisione dell'*Acquis Communautaire, in *Riv. dir. civ.*, 2008, I, 141 s.; M. Meli, *Armonizzazione del diritto europeo e Quadro comune di riferimento*, in *Europa dir. priv.*, 2008, 59 s.

[27] L.L. Fuller - W.R. Perdue, *The Reliance Interest in Contract Damages*, in *Yale Law Review*, 1936, 52 s., and ivi 1937, 373 s.

[28] See Fuller - Perdue, *The Reliance Interest*, cit., 57 s.

[29] See R. von Jhering, *Della Culpa in contrahendo ossia del risarcimento del danno nei contratti nulli o non giunti a perfezione*, tr. it. a cura di F. Procchi, Napoli, 2005. The Author analyses how to combine the action on damages with the retrospective effect of nullity. He shows that in the Roman Law in the sale of goods contract was possible to file for an action to get a declaration of nullity and then to file for *actio empti*. Thus the German Author assumes that the nullity cannot eliminate all of the effects of the contract but only the first one: the performance. In this way the action on damages, on one hand, cannot substitute the performance (expectation damages), but, on the other hand, it can recover all of the losses that rest (reliance damages). For the developments of this theory see mainly H. Stoll, *Abschied von der Lehre von der positiven*

analysis, thus, is abstracted from a verification of a pre-existing substantive right, but, on the contrary, it evolves itself in the light of the remedy-based approach where losses become recoverable through the procedure of its determination and measurement in the specific case[30].

In this perspective, therefore, the authors proceed on to explaining about all of different interests that are ensured by the contract: the Expectation Interest, the Reliance Interest and the Restitution Interest[31].

The target of the expectation damages is to put the claimant in as good a position as he would have occupied had the defendant performed his promise[32]. In this sense recently Lord Diplock assumed that «breaches of primary obligations give rise to substituted secondary obligations […] The secondary obligation on the part of contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach»[33].

The etymology of meaning "reliance" gives the idea of trust, in the contract law this means to rest in the promise of the other party. Thus I think that it is possible to assimilate this kind of interest to the Continental idea of «*affidamento*»[34].

Fuller and Perdue put Reliance Interest and Restitution Interest in *genus ad speciem* relationship: «it will be observed that what we have called *restitution interest* unites two elements: (1) reliance by the promise (2) a resultant gain to the promisor»[35]. Thus Restitution Interest and Reliance arise from the trust that one party gives to the other, but in the first one the reliance of the party materialises itself in a gain for the other party who did not fulfil and for this reason (unjust enrichment) the first party can file for an action of restitution.

The Reliance Interest, instead, reflects in general the need of assets protection from the losses that have flowed from the breach of contract as a result of the trust in the promise of the other, abstracting from the eventual gains. In this way, in other words, the remedy tends to protect the claimant from the losses that

Vertragsverletzung, 136 AcP, 1932; L. Mengoni, *Sulla natura della responsabilità precontrattuale*, in *Riv. dir. comm.*, 1956, II, 360 ss.; C. Castronovo, *La nuova responsabilità civile*[3], Milano, 2006, 458 s.

[30] See Fuller - Perdue, *The Reliance Interest*, cit., 52-53. Also see A. Burrows, *Remedies for Torts and Breach of Contract*[3], Oxford, 2004, 34 s. and, in the Italian legal theory, G. Smorto, *Il danno da inadempimento*, Padova, 2005, 168 s.; M.R. Marella - L. Cruciani, *Il danno contrattuale*, publishing, 75 s. (of the typescript).

[31] V. Fuller - Perdue, *The Reliance Interest*, cit., 53-54. But see Burrows, *Remedies*, cit., 65 s. who underlines that the difference between Expectation interest and Reliance interest had already been recognized implicitly by *Nurse v. Burns* (1664) T Raym 77; *Bain v Fothergill* (1874) LR 7 HL.

[32] See *Robinson v Harman* [1848] 1 Exch 850 spec. 855; *Houlsworth v Brund's Trustees* (1876) 3 R. 304; *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks* (1999) 2 Lloyd's Rep., 423, spec. 430. About this topic see Burrows, *Remedies*, cit., 33 s.; L.J. MacGregor, *The Expectation Interest, Reliance and Restitution Interest in Contract Damages*, in *Judicial Review*, 1996, 229 s.; G.H. Treitel - E. Peel, *The Law of Contract*[12], London, 2007, 1004 s. e 1013 s., and for a comparative approach to the application of the compensatory principle see G.H. Treitel, *Remedies for Breach of Contract. A Comparative Account*, Oxford, 1988, 75 s.

[33] Lord Diplock in *Photo Productions Ltd v Securior Transport Ltd* (1980), 1 All ER 556. About this see MacGregor, *The Expectation Interest*, cit., 232 s.; E. McKendrick, *Contract Law*[7], Houndmills-Basingstoke-Hampshire-New York, 2007, 392 s.; Beale - Bishop - Furmston, *Contract*, cit., 611 s. and 990 s.

[34] In this sense see also Marella - Cruciani, *Il danno contrattuale*, cit., 75 s. (of the typescript). See also *Principles, Definitions and Model Rules of European Private Law*, cit., 73 where it is highlighted that the protection of the reasonable reliance «is achieved by holding the mistaken party to the obligation which the other party reasonably assumed was being undertaken».

[35] Fuller - Perdue, *The Reliance Interest*, cit., 54.

affect the qualitative aspect of his/her assets[36]. In this perspective we need a distinction between two kind of reliance: on the one hand the claimant, in reliance on his expectation, can incur an expenditure that is directly related to the claimant's own preparations for his performance (essential reliance); on the other hand the claimant, in reliance on his expectation, can incur an expenditure not directed at performance and for this reason it is called incidental (incidental reliance)[37].

Fuller and Perdue, therefore, highlight that there are different kinds of losses. They connect in the best way the action on damages with the losses that claimant really have had because of the breach of contract, escaping from the *petitio principii* that imposed for many years the rule of expectation damages as a result of breach of contract[38]. As Fuller tells in his letter to Karl Llewelyn his main contribution to contract law is to explain an «ascending scale of enforceability» that proceeds from the restitution interest until the full protection of the expectation interest, putting on the basic alternative between restitution and expectation another kind of protection wider than the first and more minor than the second[39].

Thus we can assimilate the Reliance Interest to the Negative Interest, developed in the Civil Law system by von Jhering[40]. In fact, these two represent the relationship dimension between the party of the contract, placing itself next to the expectation interest. Fuller and Perdue follow the main suggestion of the German author in the Common Law system, indicating next to the first expectation of the performance the second one focused on the relational element of the contract, according to the remedial perspective.

The American legal theory, therefore, does not translate its own analysis in a mere application of a foreign doctrine, but von Jhering's idea is filtered through the elements of the Common Law tradition. In particular they apply that idea without forgetting the primacy of remedy instead of right and they develop a new kind of protection on these cases. This means that interaction between systems must not be a mere overlapping of them, but it shows, on the contrary, that it is possible to exchange legal theories between different systems without destroying their own legal foundations.

[36] See Luminoso in Luminoso - Carnevali - Costanza, *Della risoluzione per inadempimento*, I, in *Comm. Scialoja-Branca-Galgano*, Art. 1453-1454, Bologna-Roma, 1990, 191 s., who uses these words to describe the negative interest protection.

[37] See Fuller - Perdue, *The Reliance Interest*, cit., 78. About reliance expenditure also see D.R. Harris, *Damages*, in *Chitty on Contract. Suppl.*[29], edited by H.G. Beale, London, 2007, 26-063 s.; R. Halson, *Reliance Expenditure*, in Harris - Campbell - Halson, *Remedies in Contract & Tort*[2], London, 2002, 121 s.

[38] See Fuller - Perdue, *The Reliance Interest*, cit., 59.

[39] See Smorto, *Il danno*, cit., 177-176.

[40] See von Jhering, *Della Culpa in contrahendo*, cit., *passim* and *supra* footnote 27.