Sentenza n. 1734/2020 pubbl. il 15/12/2020
RG n. 7958/2019
Repert. n. 3818/2020 del 15/12/2020

N. R.G. 7958/2019

ITALIAN REPUBLIC

IN THE NAME OF THE ITALIAN PEOPLE

ORDINARY COURT of MONZA

First Section CIVIL

Judge Dr. *Mirko Buratti*

The single judge delivered on **15/12/2020** the following

VERDICT

in the 2nd grade of civil case entered in the n. **7958/2019** R.G. filed by:

LENOVO ITALY S.R.L. (C.F. 04771300961), assisted by Cxxxxxxxxxxxx and Mxxxxxxxxxxxxx lawyers, electively domiciled on Digital Address

ACTOR[S]

against

LUCA BONISSI (C.F. FISCALCODENNNNN), assisted by lawyer BERETTA MICHELE MARTINO, electively domiciled on VIA CAMPERIO, 8 20900 MONZA

DEFENDANT[S]

CONCLUSIONS

Parties concluded as documents electronically filed.

Concise statement of the factual and legal reasons for the decision

With writ of summons notified on July 29th 2019, Lenovo Italy s.r.l. proposed appeal to integrally reform the verdict n. 930/19 issued by Monza's Justice of the Peace on June 24th 2019, sentencing to payment in favour of Luca Bonissi of the amount of € 42,00 plus interests and expenses.

Lenovo Italy s.r.l. highlights that Luca Bonissi had called her in the first-degree judgment where he asserted that he bought, on January 19th 2018, the Personal Computer Lenovo model Ideapad MIIX 320-10ICR coming withh Microsoft Windows 10 Home operating system pre-installed and that, not being interested in the use of such *software*, he did not accepted the Microsoft operating system license's term of use and he demanded the refund of the amount of € 42,00 paid to purchase such product. Lenovo Italy s.r.l. objected the Bonissi's product purchase and the evidential relevance of the produced receipt, she objected lack of passive legitimation because she did not have any business relationship with Luca Bonissi and absence of any consumer right regarding the refund of the Microsoft *software* license. The appellant now laments that the Justice of the Peace would be wrong in believing proved the purchase of the Lenovo product and, thus, the active legitimation or title of the underground legal relationship; that Luca Bonissi could not avail himself of contractual terms related to an agreement (the EULA Terms) which he did not acknowledged and he was not a party due to the missing acceptance, and he would not respect the exact procedure required for the refund; that the subject of the contract of sale was a complex good, not only a machine (*hardware*), rather an *unicum* composed by *hardware* and *software* elements, regardless of whether the actual software usage should have implied the acceptance of a subsequence license agreement; that the license rejection and the missing usage of the Microsoft operating system would not be proven; that there would be no right to refund only the operating system and that there would be no proof that the price to buy the license has been paid.

Luca Bonissi appeared highlighting the purchase of then Lenovo product model Ideapad MIIX 320-10ICR on 19/01/2018, 11.07 A.M., at the Supermedia s.p.a. store, belonging to Trony franchising, in Sesto San Giovanni, and explaining that, against such purchase, he only received a receipt (doc. 1 from first-grade dossier), document suitable and sufficient to prove the purchase by the consumer, when the other party has the burden of proof to support its own possible objection. In any case, he point out that he had filed (doc. 11 first-grade), following the opposing objection, the backup receipt issued by Supermedia s.p.a., upon formal request, reporting the complete product description, and the documentation (n. 12 e 13) related to the product warranty activation procedure, by registering on the Lenovo website. He highlight the irrelevance of the missing indication of serial number, because the objection does not regard the Lenovo physical product (*hardware*), identified by the mentioned serial number, but the refund of the pre-installed Windows *software* license cost that form a totally autonomous good and distinct from the *hardware*. About the contractual relationship related to the pre-installed *software* usage, he remarks that the user license (EULA, End- User License Agreement) is shown on the computer screen the first use time following the purchase (doc. 4 first-grade dossier) and you cannot refuse it. He add that the EULA terms only establish that the license must not be accepted and the *software* product must not be used and the user should contact the device manufacturer, and not the seller, to determine the *software* return and refund policy. He states that the license was not accepted and the device manufacturer was contacted but, unfortunately, they had never let know the return and refund policy (doc. 5). In addition, Lenovo did not contested at all the amount indicated on the summons about the Windows license cost, equal to € 42,00, the price normally charged. He files interlocutory appeal due to the missing settlement of advances.

After conclusion clarification within June 11th 2020, made in written mode due to Covid19 emergency, the lawsuit come to decision, without inquiry need, in accordance with Article 190 Italian Civil Procedure Code.

The appeal must be rejected.
The countless and wearying grounds for appeal are susceptible of unary treatment because all are based on violation of legal rules or on motivational deficiency or on misinterpretation of negotiation terms and evaluation of evidence.
About the proof of purchase by Luca Bonissi of the Personal Computer Lenovo model Ideapad MIIX 320-10ICR with Microsoft Windows 10 Home operating system pre-installed, the produced receipt issued by the shopkeeper Supermedia s.p.a. in Sesto San Giovanni constitutes sufficient evidence; on the ticket you can find the essential characteristics to identify the good (2-in-1 Tablet with Windows 10), the price, the payment method, date and time of the transaction and the identification code of the transaction.
It is not true, therefore, against what asserted by appellant, that the receipt does not identify the purchased good and, in the face of a completely generic and specious dispute, the Justice of the Peace correctly considered that the document issued by the shopkeeper who usually sell this type of items was suitable to prove the purchase, in accordance with the teaching of the Supreme Court reported in the verdict, and that no more strict burden of proof could be asked to the consumer.
On the other hand, in case of doubt, the receipt shows sufficient information to allow Lenovo Italy s.r.l. to check at her retailer the real correspondence with the purchased product.
It is irrelevant, thus, that Lenovo Italy s.r.l. was not the direct seller because this did not prevent her to make the above check.
In any case, we should not forget that the raised objection by the consumer, subject of the first instance judgment, is not the purchased machine, but the use of the *software* peacefully pre-installed on the machine, and that the *software* has its own and distinct identity, which is perfectly verifiable regardless of the Tablet's proof of purchase.
The objection of lack of passive legitimation is likewise specious, based on the supposition that Lenovo Italy s.r.l. would not have had contractual relationship with Luca Bonissi.
On that point, the motivation of the Justice of the Peace is exemplary, while renewing the objection in this court even reveal the bad faith of Lenovo Italy s.r.l. and her counsels.
It should be noted that the Supreme Court has already expressed itself exhaustively in an identical case, explaining that *"… there is no doubt that the license agreement is between, from one side, the end user and, on the other side the "manufacturer"; where the latter is, as textually inferred from the defining part of the clause in question, "the manufacturer of the computer system or computer system component (hardware) with which you acquired Microsoft software product(s) identified in the certificate of authenticity (COA) included in the hardware or in the documentation related to the software product."*
In the present case, the Microsoft *software* license terms (doc. 2) decree that *"this is a license agreement between **you and the device manufacturer**…" and that "... If you do not accept and comply with these terms, you may not use the software or its features. You may contact the device manufacturer or installer, or your retailer if you purchased the software directly, to determine its return policy and return the **software or device** for a refund."*
The same prompt appear on the start screen when turning on the machine (doc. 4).
The Lenovo license agreement (doc. 3), even more clearly, states that *"The Software Product **is owner by Lenovo**… and it is licensed, not sold"*, with all due respect also to the unfounded dissertation of the uniqueness of the sold product, "composed by *hardware* and *software* elements".
Uniqueness, if ever, of a purely commercial nature, but without any legal relevance, place that the *software* is not sold at all, but only granted for use.

Hence, it is reasonably indisputable that *"The agreement counterpart of the end user must therefore be identified, also about the pre-installed software license's term of use, in the computer manufacturer… . There is no contractual relationship between the end user and the operating system software house (Microsoft). This is well explained by the fact that we are not dealing here with a software marketed directly by Microsoft (in the same way that it could happen in the direct sale to the end user of the "full" o "retail" licenses), but with a software related to an operating system pre-installed on the personal computer by its manufacturer, and due to economic conditions and sold licenses that are treated, upstream of large-scale distribution, by virtue of large-scale commercial agreements concluded directly between the software house (Microsoft) and the main Original Equipment Manufacturer (OEM)… . It follows that, based on the agreement clause in question, it is the manufacturer-concessionary…, and not Microsoft, that should be "promptly contacted" by the end user that did not accepted the license terms with the view of the "product[s] return" and the refund "in accordance with manufacturer's return policy". On the other hand, it should be considered that it is precisely by virtue of those commercial agreements that the original Microsoft license takes on contractual and technical characteristics (the technical ones, within the limits of adaptability and customization of the system software to the hardware that host it) of an "OEM license"; as such exclusively referring to the specific hardware manufacturer that agreed with Microsoft the general condition of pre-installation and deployment on its machines"* (see Cass. n. 19161, Sep 11th 2014).
About the non-existence of any consumer right to the refund of the pre-installed Microsoft *software* license price, the Supreme Court still decrees, as the official maxim says, that *"The purchase of a notebook does not make mandatory to accept the pre-installed operating system and if the buyer, at the hardware start-up, will express his refusal to the license's term of use of the aforesaid system and its application software, the missing acceptance only affects the license agreement and not the contract of sale of the computer, having to be considered that, between the purchase of the hardware product and the operating system license, there is no negotiation connection where there are suitable elements to prove the will of the parties to conclude both transactions in order to achieve an additional practical interest, concrete cause of the whole negotiation operation, unitary and autonomous compared to the own one of each transaction. It follows that the notebook buyer, if he does not adhere to the unilaterally set conditions for the access to the operating system and application software, refuses the conclusion of the related license agreements, without this affecting the already concluded computer's contract of sale"* (Cass. n. 19161, Sep 11th 2014).
In the current instance, it was proved (doc. 5: and, moreover, even this circumstance was certainly verifiable by Lenovo, owner and holder of the license's term of use) that Luca Bonissi contacted the Lenovo's customer service, as requested in the license's term of use, to ask for information on how to obtain the refund of the license's cost because he did not accept the installation, getting a categorical, as well as unjustified, denial.
In this way, Lenovo Italy s.r.l. contravened a precise obligation expressly assumed, with the consequence that she cannot now complain of the lack of proof on the effective license non-acceptance (by the way, negative evidence), remaining as her charge the possible evidence that the license was not activated (this evidence was not provided).
It is irrelevant the timeliness or not of the request, since no deadline, much less mandatory, was foreseen in the agreement proposal related to the license.
Similarly, Luca Bonissi was not obliged to return the Tablet to have anything being verified by the manufacturer and, in any case, Luca Bonissi's intention to don't use the operating system is certain, so much that, in the face of Lenovo's refusal to return the *software*, he states that he formatted the Tablet, as the only feasible solution to overcome the imposed lock on the machine's start-up.

It follows that even today's compliant about the fact that Luca Bonissi would not have followed the right procedure is irrelevant since he could not even access it because it was opposed, from the beginning, a clear refusal to the request to take note of his will to not adhere to the agreement proposal for the use of the pre-installed program.
The autonomous relevance attributed by the license agreement to the *Software* Product with respect to the *hardware* device, reaffirmed precisely with regard to the refund in case of non-acceptance of the Microsoft's license, therefore excludes the possibility of preventing the consumer from obtaining the removal of the only operating system from the sold machine, because there is neither technical (well being the Tablet able to work with another operating system), nor legal obstacles, to the survival of the contract of sale of the *hardware* product regularly concluded in case of non-acceptance of the pre-installed *software* license's term of use.
Precisely, when Luca Bonissi bought the machine, he did not express any approval about the conclusion of the pre-installed program license agreement, not subjected to contract of sale, and the purchase of the Table did not require, by the negotiation will of the manufacturer himself, to accept the operating system, installed only for purely industrial and commercial reasons.
The non-acceptance by Luca Bonissi of the contractual usage proposal of the program related to the pre-installed operating system issued by Lenovo lead to the non-conclusion of the *software* license agreement, so the corresponding cost of such license, included in the price of the machine, remains causeless and, as such, it must be returned.
Nor can be invoked, in support of the thesis that the user has no right for "refund", the fact that the agreement terms foresee that the purchaser can turn on the manufacturer only in order to "know the return and refund policy" and that he must "comply with that policy", given that it must prevail, as interpretative criteria in case of unilaterally set conditions, the one according which the possible doubts on the parties' will reconstruction must be resolved in the sense that the agreement or the singles clauses conserve some effect, rather than not having at all.
It must be considered, therefore, that the above-mentioned right to ask information to the manufacturer can only concern operative return or refund procedures and that it must not be attribute to it the effect of denying the acknowledgement already taken in place, by the manufacturer, of the customer's authoritative right to obtain the refund of the unwanted program's cost.
Even about the price of the license, premising that the receipt prove the payment of the price of the device on which was pre-installed the operating system, so the latter must be considered as paid precisely because it is included in the uniqueness of the commercial offer, it should be noted that the related price, quoted as € 42,00, has not been specifically objected and, anyway, since this is a "commercial product" with autonomous relevance, available individually on the market, it can be determined according to its catalogue value or list price, based on Article 1474 Italian Civil Code.
Sentencing must be ordered ex officio in accordance with Article 96, third paragraph, Italian Civil Procedure Code, since Lenovo Italy s.r.l. filed the legal action not only on the basis of grounds of appeal that proved to be manifestly unfounded on the basis of its own allegations, holding during the legal process a typical conduct totally reckless, burdening and specious, but she even abuse of the legal instrument forcing the opposing party, in this case a simple consumer, to reply, in the face of a totally modest claim, to an absolutely exorbitant defensive production, made evident by the use of acts of excessive length and an innumerable series of specific grounds for appeal (which content repeats the same concepts), against the conciseness rules set by the Supreme Court, but especially illustrating the arrogance and the abuse of power of a giant business against a small consumer.
Unlike the traditional assumption of aggravated responsibility foreseen by Article 96, paragraph 1, c.p.c., sentencing can take place ex officio and the quantification of the prejudice is made fairly, without requesting the proof of damage.

In such context, the lawmaker (L. n. 69 June 18th 2009), with the Article 96 paragraph 3 c.p.c., introduced a typical *punitive damages*, because this regulation does not have a purely compensatory essence, but “sanctioning”, resolving itself in an ex officio penalty aimed to discouraging the abuse of action and preserving the functionality of the legal system, defusing the unjustified litigation; such purpose excludes the need to prove the damage actually suffered by the other party, despite that the penalty is for the benefit of the other party, not for the State’s one.
In order to quantify the damage, it should be considered that, from one side, the small size of the cost of litigation’s refund does not allow, not even remotely, to cover the effective damage due to the trouble and the defensive and resistance costs, and to the other side, the deterrent effect inherent the punitive essence of the penalty requires to take in account the real impact on the economic and financial capacity of the “strong” succumbing party.
Lenovo Italy s.r.l., therefore, must be condemned to pay compensation for the damage cause by aggravated processual responsibility, according to Article 96, third paragraph, c.p.c., which is settled on an equitable basis to the amount of € 20.000,00.
The interlocutory appeal must be rejected: the advances are not necessarily subjected to a distinct settlement, so, if missing, they should be considered included.
The court costs follow the succumbing.

P.Q.M.

The Court, finally ruling, thus provides:

1. to reject the appeal filed by Lenovo Italy s.r.l. and to confirm the verdict n. 930/19, issued by Monza’s Justice of the Peace Monza on June 24th 2019;
2. to reject the interlocutory appeal;
3. to condemn Lenovo Italy s.r.l. to pay in favour of Luca Bonissi the amount of € 20.000,00 as compensation for damage due to aggravated processual responsibility, according to Article 96, third paragraph, c.p.c., beyond legal interest from the verdict to the balance;
4. according to Article 13, 1st paragraph, *quater* of d.p.r. n. 115/2002, to acknowledge that the conditions exist for payment by the appellant of a further amount equal to the unified contribution due for the application, pursuant to paragraph 1 *bis* of art. 13 cited above;
5. to condemn Lenovo Italy s.r.l. to refund Luca Bonissi the litigation’s costs, which settle for a total of € 1.000,00 for skills, beyond general expenses (15%), I.V.A. and c.p.a.;
6. with executive verdict.

Monza, December 15th 2020.

The Judge
Dr. Mirko Buratti