

## DUAL SPLIT (2020)

### KEYWORDS:

*contract negotiated away from business premises; deposit; right to withdraw*

### FACTS:

The consumer asked by phone information about the purchase and installation of the 'Dual Split' air conditioning system to a specific company.

This company conducted an inspection to the consumer's house in order to perform a feasibility study.

In the meantime, the consumer signed the purchase proposal and she paid to the Company € 1,000.00 as a deposit.

After several meetings and some telephone conversations, the Company declared that it could not proceed with the installation of the air conditioner; nevertheless, the company refused to return to the consumer the deposit back, according to a specific clause of the contract.

*The consumer would like to receive the deposit (1000 euro) back*

*For this reason, the consumer contacted the consumer association 'Federconsumatori', which subsequently sent the Company a request in order to obtain the deposit back. Since the Company's refused to return the deposit, according to a specific clause included in the contract, Federconsumatori reported the case to the Brescia Chamber of Commerce, which, in turn, contacted the Legal Clinics for support.*

### LEGAL ANALYSIS:

Type of contract: the contract in question is a contract for the sale of a mobile good, i.e. the air conditioning system called 'Dual Split'. Since there is a relationship between a professional and a consumer, the provisions of Legislative Decree no. 206/2005 (the so-called Consumer Code) apply. Pursuant to Article 45 of the Consumer Code, the proposed contract can be qualified as a contract negotiated away from business premises, as "concluded in the simultaneous physical presence of the trader and the consumer, in a place other than the trader's premises" (Article 45, paragraph 1, letter h, no. 1).

Right of withdrawal and reimbursement: the consumer can exercise the right of withdrawal within 14 days from the stipulation of the contract itself, without being even obliged to explain the reasons and without having to pay the professional sums of money, according to art. 52 of the Consumer Code. Moreover, according to Article 56 of the Italian Consumer Code in case of withdrawal, it is irrelevant what qualification is given to the amount paid by the consumer, since the trader must reimburse all kinds of payment; moreover, any clause that provides for limitations to the refund to the consumer of the sums paid as a result of the exercise of the right of withdrawal is null and void.

The unfairness of the clause: the term in question must be traced back to the discipline of letter e), art. 33 of the Cons. code, and has therefore to be qualified as unfair because it allows the professional to retain the amount paid by the consumer, even in case of withdraw. Thus, it is determined "at the expense of the consumer a significant imbalance of rights and obligations arising under the contract, to the detriment of the consumer" (Article 33, paragraph 1 of the Cons. Code).

### LEGAL SOLUTION:

Since the consumer has exercised the right of withdrawal within the terms established by law, she is entitled to the refund of the amount paid, regardless of the legal classification of this sum.

### APPLIED SOLUTION:

The legal clinic has drawn up an opinion arguing about the unfairness of the contractual clause, according to which the company unlawfully withholds the amount of € 1,000.00 paid by the consumer, and which must be returned to the consumer. The clinic also suggested to the company to cancel or rephrase that unfair term according to law.

**PARTICULAR NOTE: NONE**