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UNFAIR TRADE PRACTICES IN B2C AND B2B RELATIONS ANALYSIS OF BRAZILIAN SYSTEM

PRÁTICAS COMERCIAIS DESLEAIS NAS RELAÇÕES B2C E B2B: ANÁLISE DO SISTEMA BRASILEIRO

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ABSTRACT

The increase of activities and economic transactions, especially with the advancement of technology, gives rise to greater concern about unfair practices. Often, it is difficult to distinguish between regulation of business relations (business-to-business) of consumeristas (business-to-consumer) relations. This article discusses the multifunctional nature of good faith as a common point in the Brazilian legal system

KEYWORDS: Unfair practices. Brazil private Law. Principle of the good faith.

RESUMO

O incremento das atividades e das transações econômicas, sobretudo com o avanço da tecnologia, enseja maior preocupação com as práticas desleais. Muitas das vezes, é difícil distinguir a regulação das relações empresariais das relações consumeristas. O presente artigo discorre sobre a multifucionalidade da boa-fé como ponto comum no sistema jurídico brasileiro.

PALAVRAS-CHAVE: *Práticas desleais. Direito privado brasileiro. Princípio da Boa-fé.*

1 INTRODUCTION

The purpose of this important international seminar Brazil-Italy, that always shows the current discussion on the regulation of business relationships involving entrepreneurs, consumers and entrepreneurs, particularly those named civil and (or) business and consumeristas contracts (business-to-consumer and business-to-business).

With the advent of the Brazilian Civil Code of 2002, pointed to the unification of the obligatory right, no longer able to adduce in corporate, civil and consumeristas obligations. Not quite. There are specific within those relationships.

It appears as a common point of debate, the incidence of objective good faith. It is multifucional principle which seeks, among other objectives, away from unfair practices.

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In Brazil, the incidence of good faith won high incidence. Highlighting the recognition of the current Civil Code, on the same mat known paragraph 242 of the BGB, art. 1375 of the Italian Civil Code, art. 227, paragraph 1, the Portuguese Civil Code, and art. 1134, paragraph 3, of the French Civil Code.

In the Brazilian Code, stand out: art. 113, "the legal business should be interpreted as the good faith and the place of use of its conclusion." Under the abuse of law, art. 187 states that "also commits an unlawful act the holder of a right, to exercise it clearly exceeds the limits imposed by their economic or social order, the good faith or the good customs." As for the contract program, not with the necessary breadth and scope, stipulates the art. 422 that "the contractors are required to keep, so at the conclusion of the contract, as in its implementation, the principles of probity and good faith." Admittedly, the good faith reaches the stage of negotiations and after the execution itself.

In fact, our Commercial Code of 1850 in its article. 131 (1) already provided good faith as a source of contractual interpretation.

But the emphasis on the principle of good faith, the various discussions and comprehensive approach by the doctrine and jurisprudential application, gave up with the duration of the Consumer Protection Code, setting (art. 4, III), the principle of national policy of consumer relations, the "harmonization of interests of participants of consumer relations and consumer protection compatible with the need for economic and technological development in order to enable the principles on which is founded the economic order (art. 170 of the Constitution Republic), always based on good faith and balance in the relationship between consumers and suppliers. "in the context of contractual protection, art. 51, IV, exemplified as unfair term, those that "establish obligations considered unfair, abusive, placing the consumer at a disadvantage exaggerated, or are incompatible with good faith or equity."

More recently, in Brazil, we highlight the Laws 12.529/2011 (antitrust) and 12,846/2013 (anti-corruption) providing the mechanism of leniency agreement, seeking harmonization of economic relations and correction of irregularities.

Thus, the domestic legislative, with a view to promoting more transparent and balanced economic relations, can point the Brazilian Civil Code of 2002, the Consumer Protection and Safety Code (Law no. 8.078/90), antitrust law (law 12.529/ 2011) and anti-corruption law (law 12,846/2013).

In this article, there is no claim to analyze such laws. Just present the multifunctional nature of good faith as a parameter of economic relations.

The analysis of domestic legislation will be the subject of this international seminar Brazil-Italy.

2 GOOD FAITH AND TRUST

Good faith doesn't subordinate to a single definition.

Menezes Cordeiro[1] says there is not a lapidary definition of the institute. For him, both as a linguistic element, either as legal representation, good faith stems from the fides (fidelity) Roman: fides Crucis (delivery and loyalty), fides-fact (guarantee), fides-ethics (moral duty). The fides, went to bona fides, the bona-fides and bonae fidei iudicia. The canonical bona-fides was seen as the absence of sin. Ascribes the origin of good faith to honor German oath, translated duty to ensure the maintenance and compliance with the given word (loyalty and belief).

Humberto Theodoro Junior[2] claims that the objective good faith is nothing but the old principle of contractual loyalty with new guise.

Judith Martins-Costa[3] attaches to the objective good faith socially acceptable behavior value and necessary for the establishment of general confidence. The fides relates to freedom and

1 See CORDEIRO, António Manuel da Rocha e Menezes. **Da boa-fé no direito civil.** Coimbra: Almedina, 2007.

2 THEODORO JÚNIOR, Humberto. **Direitos do consumidor***:* a busca de um ponto de equilíbrio entre as garantias do Código de Defesa do Consumidor e os princípios gerais do direito civil e do direito processual civil. Rio de Janeiro: Forense, 2009, p. 25.

3 MARTINS-COSTA, Judith. **A boa-fé no direito privado***:* sistema e tópica no processo obrigacional. São Paulo: Revista dos Tribunais, 1999, p. 126.

responsibility of the declarant be raised to alter the trust. In turn, the theory of consent vices works with a subjectivity of good faith.

To Menezes Cordeiro[4], confidence would be the bridge between the objective good faith and subjective. The movement of goods and services requires respect for the plighted word, which provides legitimate social expectations. For the author, the recognition of bargaining confidence is due to studies conducted in 1894 by Eugen Huber, on Gewere while state worthy of protection indeed.

There is even suspicion, hires himself. But the unjustified frustration of legitimate expectations entails responsibility, particularly in the relationship between unequal.

To Fernando Noronha[5], "the substantial interest of the question of the validity of the contract vinculatividade is to show that this does not require properly because it was 'dear' because fundamentally it should give importance to the free will of the parties (contractual freedom), but basically because it is necessary from a social point of view, safeguard the confidence of economic agents and, for this purpose, from the legal point of view, ensure safe celebrated business. "

In proposing the protection of legitimate expectations or the expectations created, it does not invalidate the value of autonomy source of the transaction; the other way around, what is sought is its current valuation.

To Couto e Silva[6], the principle of good faith has harmonizing function, combining the logical-deductive rigor of science of law of the last century with life and current ethical requirements.

The doctrine unfolds this function of objective good faith: a) source of interpretation and integration of the businesses; b) a

4 CORDEIRO, António Manuel da Rocha e Menezes. **Da boa-fé no direito civil**. Coimbra: Almedina, 2007, p. 1238.

5 NORONHA, Fernando. **O direito dos contratos e seus princípios fundamentais:** autonomia privada, boa-fé, justiça contratual. São Paulo: Saraiva, 1994, p. 82.

6 SILVA, Clovis Veríssimo do Couto e. **A obrigação como processo.** São Paulo: Bushatsky, 1976, p.42.

source of creation of legal duties and c) limitation rule the exercise of subjective rights.

3 FUNCTIONS OF GOOD FAITH

3.1 SOURCE OF INTERPRETATION AND INTEGRATION

The fair contract is targeted at both of who negotiates and society. According to Enzo Roppo[7], find the right meaning of the contract is the end of interpretation. If the will is the internal order, you need to take the value declaration of will which, if clear, reduces the interpreter task. Otherwise, most hermeneutic effort will be required.

Silence can say, behaviors can be conclusive, the purpose and business circumstances can externalize the legal will. Emilio Betti[8] asserts that, in the process of interpretation, does not count the content of the words, but the objective situation in which they are pronounced. In this sense, outweighs the good faith as a source of interpretation and also contractual integration, not admitting contradictory behavior.

By the way, Alejandro Borda[9] develops the "Theory of them propios acts", which is a rule of law, derived from the general principle of good faith, which enshrines as inadmissible any lawful claim, however objectively contradictory with respect to their own previous behavior made by same subject. This theory unfolds in the rule of tu quoque and the prohibition of venire contra factum proprium.

To Menezes Cordeiro[10], you can enter the suppressio under the prohibition of venire contra factum proprium "the right holder,

7 ROPPO, Enzo. **O contrato**. Trad. Ana Coimbra e M. Januário C. Gomes. Coimbra: Almedina, 1988, p.309.

8 BETTI, Emilio. **Interpretação da lei e dos atos jurídicos.** Trad. Karina Janini. São Paulo: Martins Fontes, 2007, p. 347.

10 See BORDA, Alejandro. **La teoria de los actos propios.** Buenos Aires: Abeledo-Perrot, 1987.

10 CORDEIRO, António Manuel da Rocha e Menezes. **Da boa-fé no direito civil.** Coimbra: Almedina, 2007, p. 808/809.

eschewing the exercise over a period of time, would create, in counterpart, the representation of that right does not more would be performed; when supervening, would act, would contradict." In turn, the surrectio expresses the protection of the trust beneficiary of this inertia.

Under the common law, the application of the own acts theory is verified by estoppel Institute, disciplined in the art. 1.8 of principles concerning international contracts of the International Institute for Trade Unification of Private Law (Institut International pour l'Unification du Droit Privé -Unidroit).

3.2 SOURCE OF CREATING LEGAL DUTIES

Clovis Couto e Silva[11], stressing the dynamic nature of the obligation, highlighted the various stages of the obligatory relationship with a view to due performance. Although many point not be the cause essential to the negotiating concept, it can be said that the ultimate cause of the business, conceived as objective function, is its due performance, satisfaction of the interests legitimately agreed. The notion of cause is not confused with the social function, although approach. The cause has objective content and reaches the very protection of the individual interest. Social function, however, reach non-contractual interests.

In business development, gain high importance the so-called attachments duties, side or instrumental as loyalty, honesty, transparency, clarity, care, protection, collaboration and cooperation among several. The breach of these and other duties can set positive breach of contract.

The incidence of good faith, as a normative source of creation of legal duties, is not limited to the negotiation phase itself, but extends to the stage of qualified social contact (culpa in contrahendo) and also the post-negotiation phase (blame post finitum pactum).

11 See SILVA, Clovis Veríssimo do Couto e. **A obrigação como processo**. São Paulo: Bushatsky, 1976.

The theory of culpa in contrahendo, developed by Rudolph von Jhering[12], allows, today, the incidence of pre-trade responsibility, satisfying, in the words of Paulo Mota Pinto[13], the contractual interest. The compensation for damage confidence or expectation of performance is justified by good faith incident in business training phase. Jhering, however, it stood this modality as kind of contractual liability genre, even if the contract has not been concluded[14].

The pre-negotiating responsibility not to be confused with responsibility for the failure of the preliminary contract, therefore, that contact phase, there is no contract.

Unquestionably also focus on the good faith post-negotiation phase (guilt or duty post finitum pactum), as the legal transaction may be extinct, but not obligatory relationship between the parties. The Civil Code itself[15], because of the nature of the property transfer contracts, provides competition prohibition clause limiting the seller to arrange new property similar to the broadcast. According to the Superior Court[16], terminated the deal by the desired due performance, remain post-contractual effects and duties even prohibit the collection of debt already paid.

3.3 SOURCE EXERCISE OF SUBJECTIVE RIGHTS OF CONTROL

The contract is permeable to the social conditions that surround it and that are affected by himself. The social function of the contract prohibits abusive behavior, also entailing an external

12 JHERING, Rudolf Von. **Culpa in contrahendo ou indemnização em contratos nulos ou não chegados à perfeição.** Trad. Paulo Mota Pinto. Coimbra: Almedina, 2008.

13 See MOTA PINTO, Paulo Cardoso Correia da. **Interesse contratual negativo e interesse contratual positivo.** V. I. Coimbra: Coimbra Editora, 2009.

14 JHERING, Rudolf Von. **Culpa in contrahendo ou indemnização em contratos nulos ou não chegados à perfeição.** Trad. Paulo Mota Pinto. Coimbra: Almedina, 2008, p.32.

15 Art. 1147. If no express authorization, the seller of the property can not compet with the purchaser, in the Five years subsequent to the transfer.

16 Recurso Especial n. 1.068.271/SP, Rel. Min. Nancy Andrighi, j. 24/4/2012.

credit protection, reducing therefore the consecrated aphorism *res inter alios acta*.

One can infer the duty to respect other people's agreement on the principle of respect for the rights of others. Thus, as the contract can not offend interests of third parties (third offense), may be responsible third interfering in business relationship which has prior knowledge (third offender). According to art. 608 of the Civil Code, "who entice people forced into a written contract to provide service to others will pay to this the importance of the service provider by setting undone, had to fit in two (2) years."

This protective efficacy of third parties or external credit effectiveness would justify the thesis of direct action, allowing a creditor to achieve, in his own name and on its account, the assets of the debtor of his debtor.

According to Thierry Bourgoignie[17], the legal guarantee against product defects justify direct consumer action against the manufacturer, mitigating the principle of relativity of contracts.

The Superior Court, in the judgment of the Special Appeal no. 925,130 / SP, recognized the possibility of direct and joint condemnation of the insurance company, but since denounced the deal by the author of the damaging fact, namely the insured.

The mechanism of direct action is recognized by art. 12 of the Protection Code of the Brazilian Consumer, establishing joint and several liability of the manufacturer, the manufacturer, producer and importer. The sole paragraph of lhe art. 13, in turn, excepti divisibility provided for in art. 283 of the Civil Code of 2002. The major difficulty is the proof of the level of participation of each economic agent in causing the damaging event.

Jacques Ghestin, in the preface to the work Étude critique de la notion d'opposabilité: les effets du contrat à l'égard des tiers

17 BOURGOIGNIE, Thierry. **Éléments pour une théorie du droit de la consummation**: au regard des développements du droit belge et du droit de la communauté économique européenne. Bruxelles: E. Story-Scientia/Bruylant, 1988, p. 292: "Le fabricante d'un bien de consummation court donc le risqué d'une action directe intentée par l'acheteur final du produit, bien qu'il n'y ait entre ces parties aucune relation contractuelle. L'atteinte ainsi portée au principe de la relativité des contrats reste relative."

en droit français et allemand, of the Robert Wintgen[18], justifies the temperament of the principle of privity of contracts, consecrated by Pothier in art. 1165 of the Civil Code, the notion of enforceability.

In intense communication time - including social networks - added the importance of consumer protection mechanisms, seeking to ward off aggressive and abusive marketing techniques.

How to set standard of subjective right exercise, good faith also prevents the right to contract resolution, where compliance is nearing the end result. This is the focus of the theory of substantive due performance. If the default does not compromise the economy itself or contract function only admits claim damages.

The Italian legal system provides for the inability to terminate the contract in the face of substantial due performance. According art. 1455 of the Italian Civil Code, "Il contratto non si può risolvere if l'inadempimento di una delle parti ha scarsa importanza, avuto riguardo all'interesse dell'altra."

Between us, it fell to the doctrine and jurisprudence, on the basis of objective good faith, promotion of the institute. As well highlighted the Superior Court of Justice[19], the recognition of substantial due performance is not limited to a quantitative analysis. "In substantial due performance has been the gradual evolution of the notion of the type of contractual duty breached, for the effective verification of the seriousness of the breach, considered the consequences of the violation of the adjustment, due to the purpose of the contract. In this line of thought, it must be observed two criteria that underlie the host of substantial due performance: the seriousness of the fact that consequences resulted from the breach, and the importance that the parties appeared to give the allegedly infringed clause".

No less important is the prohibition of unjust enrichment. Long before his assertiveness, expressed by art. 884 of the Civil Code of 2002, Valle Ferreira[20] already defended the incidence of

18 WINTGEN, Robert. **Étude critique de la notion d'opposabilité**: les effets du contrat à l'égard des tiers en droit français et allemand. Paris: LGDJ, 2004.

19 Recurso Especial nº 1.215.289/SP, Rel. Min. Sidnei Beneti, j. 5/02/2013.

20 VALLE FERREIRA, José Geinaert. **Enriquecimento sem causa**. Monografia (Cátedra

unjust enrichment subsidiary nature since observed the following components: a) valid asset allocation; b) enrichment of one party; c) depletion of the other; d) correlation between enrichment and depletion; e) lack of a legal question. The financial advantage without foundation in law or the will of the impoverished would infringe the good faith.

Contemporaneously, Hugo Evo Magro Corrêa[21] goes beyond defending the institute's division of theory [unjust enrichment based on the provision and unjust enrichment not based on supply] and a principal and autonomous source of obligations, points to him the purpose of restoration patrimonial balance, through acts of restitution and other advantages[22]. It is noteworthy that, for the author, "in both categories of unjust enrichment (based and not based on performance), the acts committed by the subjects are lawful. Not perquire, therefore, about the violation of norms, but about whether or not the legal case for maintaining certain advantage."

Further it is not enough that the business balanced born, it must remain so. Thus, the drastic modification of the contractual obligations of successive tract by subsequent change of circumstances does evoke, in contrast to the hype of voluntarism, the incidence of rebus sic stantibus, the objective basis of the theory of the business and the resolution by excessive burden. Between us, both the art. 6 V, of Law n. 8.078/90 as the arts. 317, 478-480 of the Civil Code can be interpreted in accordance with the absolute impossibility of performance of the obligation by subsequent and costly change in circumstances. Paolo Gallo[23] emphasizes that the fulfillment of the obligation can not be required when it is economically impractical,

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de Direito Civil) – Faculdade de Direito, Universidade Federal de Minas Gerais, Belo Horizonte, 1950.

21 URBANO, Hugo Evo Magro Corrêa. **Repensando o instituto do enriquecimento sem causa no direito brasileiro**: da teoria unitária à teoria da divisão. 2013. Tese. Faculdade de Direito da Universidade Federal de Minas Gerais, Belo Horizonte.

22 *Op.Cit.*, p. 59.

23 GALLO, Paolo. Buona fede oggettiva e transformazioni del contratto. **Rivista di Diritto Civile**, nº 2, mar./abr., 2002, Padova: CEDAM, p. 239/263.

resembling Enzo Roppo[24] that impossibility stems from the unusual business risks. And in honor of the principle of conservation or the legal business use, the negotiating review is defended as opposed to its resolution. In its review, considering Inocêncio Galvão Teles[25] that courts should "proceed in this area with the greatest caution and prudence in order to avoid disturbing concussions trust that must inspire the mandatory links and specifically in security that can not help take the contract."

Genetic imbalance of business is also susceptible to legal control, highlighting notice the state figures of danger and injury. In the state of danger (art.156 Civil Code), there is the use of deceit figure - the contractor takes advantage of another vulnerability, earning disproportionate advantage. The assertiveness of the injury, by art. 157 of the Civil Code of 2002, requires disproportion between the benefit and consideration in commutative business (objective requirement), considering the pressing need or inexperience of obligation assuntor (subjective requirement). More broadly, the Consumer Protection Code recognizes as abuse the requirement manifestly excessive advantage, regardless of the use of deceit or subjective requirement (art. 39, V).

Indeed, the promotion of harmonious relations consumption, goal of the National Policy for Consumer Relations, art content. 4, of Law n. 8.078/90, assumes control of genetic and supervening disequilibrium business, applying also unjust enrichment as grounds for the return of the advantages built into the heritage enriched by meeting, in summary, the legitimate consumer expectations.

4 FINAL CONSIDERATIONS

The multifunctionality of good faith contributes to the prevention and repression of unfair and abusives economic practices.

In speed economic times, where intense variety and dynamics of goods and services is the tonic of a hypercompetitive market, even

24 ROPPO, Enzo. *Op.cit.*, p. 262-263.

25 TELLES, Inocêncio Galvão. **Direito das obrigações**. 7ª ed. Coimbra: Coimbra Editora, 2010, p. 371.

in the perspective of suppliers, continuous satisfaction of consumer expectations is more than a challenge, it is a matter of survival.

The business practices should be transparent, fair, balanced, based on the principle of freedom market.

In this sense and the perspective of a reality or cyberspace connected economy, Brazil has been consolidating a legal framework, whose applicability and dialogue with other jurisdictions - particularly with the European Union - is extremely important.

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