

RELATIONAL CONTRACTS IN BRAZILIAN LAW

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ABSTRACT:

The neo-classical contractual paradigm that dominates Brazilian law is increasingly demonstrating its deficiencies and limitations in describing and regulating relational or long-term contracts, which are becoming more frequent in post-fordist production. The paper discusses the elements for a relational contract theory which is able to provide a new description and new normative principles to contract law, such as the principles of solidarity, cooperation, participation and balance. These principles are examined through the example of private pension fund contracts.

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POST FORDISM AND RELATIONAL CONTRACTS

The several contractual models and doctrines translate a specific form of organization of production and economic circulation. It is thus with regard to the classical contractual doctrine, formed during the height of liberal classical thinking and the predominance of manufacturing production. Likewise, the neoclassical contractual doctrine flourished in the light of the growth of demands for welfare born in the political and ideological environment in which social democracy was formed ⁽³⁾. Recently we have been watching significant changes in the form of production organization and circulation of wealth which have been causing important changes in contract dynamics.

The growth of post-fordist structures of production organization and goods circulation is a widely acknowledged phenomenon in specialized literature. Many models have been used to describe these changes, such as post-fordism, flexible specialization, formation of productive networks, toyotism, etc ⁽⁴⁾. Several studies point to the fact that the cooperation process between companies which operated within a North-American corporate model was already visible even before the great ascension of the Japanese business model, strongly marked by for cooperation relationships, trust and solidarity. In the Japanese model contractual integration of the various productive sectors came into being from within the companies (vertical keiratsu) and among companies (horizontal keiratsu), which enabled the institution of a continuous

¹ - This paper is part of wider research work which is the basis for my Doctorate thesis on Relational Contract Theory and Consumer Protection in Brazilian Law.

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³ - Along the same research line cf. John P. Esser's , The Changing Form of Contract Law, paper presented to the Social Science History Association Baltimore, Maryland, November 4-7, 1993 and Welfarism in Contract Law, Edited by Roger Brownsword, Geraint Howells and Thomas Wilhelmsson, Dartmouth Publishing Company, Great Britain, 1994.

⁴ - Among significant works it is worth mentioning Michael J. Piore and Charles Sabel, The Second Industrial Divide. Possibilities for Prosperity, Basic Books, 1984; Amin, Post-Fordim. A Reader, edited by Ash Amin, Blackwell, Great Britain, 1994; Egon Matzner and Wolfgang Streeck (editors), Beyond Keynesianism. The socio-economics of production and full employment, Edward Elgar Publishing Ltd, Cambridge, 1991.

planning and learning process, with intense exchange of information and stimulus to innovation and productivity⁽⁵⁾.

Although it is considered that the expansion of these new forms of production organization are more widely spread in certain productive centers, especially in the more industrialized countries, such as Japan, Europe and the USA, such trend has also been expanding in developing countries ⁽⁶⁾. In Brazil this has been seen through the efforts to widen flexibility in production organization, especially in the sectors which have been showing greater competitiveness, such as the autoparts industry, the orange juice processing industry and the service industry.

Although the world trend points to the increment of forms of economic cooperation based on trust, available empirical results reveal that, in Brazil, the prevailing business culture is still one which is rather antagonistic and adversary. Evidence in this respect may be found in recent studies about competitiveness in Brazilian industry. An example may be found in the shoe industry, where one notes that many companies do not subcontract tasks, because they fear their suppliers may not keep to the quality standards that have been agreed on ⁽⁷⁾. In those businesses which use metal-mechanic technology it was also noted that stock reduction techniques were proportionally applied more to intermediary stock than to beginning and end of production line, due to uncertainty regarding customer service failures and/or fear of opportunistic behavior on the part of customers and/or suppliers. Opportunistic behavior was also noted in the autoparts sector by car manufacturers with a view to benefiting from short-term conditions in the business cycle. Thus, when demand is lower and there is idle time, the manufacturers threaten to, or do in fact integrate the production of various kinds of autoparts, thus obtaining

⁵ - Literature on the subject is vast. Cf., among others and beyond previously mentioned work, Victor Prochnik's , "A cooperação entre empresas como impulsora da inovatividade: (Proposta para as empresas nacionais)", in Estratégias Empresariais na Indústria Brasileira. Discutindo Mudanças, organized by, Antônio Barros de Castro, Mário Luiz Possas and Adriano Proença, Editora Forense-Universitária, RJ, 1996, p. 173-174 and Ronald Dore, "Goodwill and the Spirit of Market Capitalism", in Mark Granovetter and Richard Swedberg (editors), The Sociology of Economic Life, Westview Press, Colorado, 1992.

⁶ - Cf.: Estratégias Empresariais na Indústria Brasileira. Discutindo Mudanças. organizadores, Antônio Barros de Castro, Mário Luiz Possas & Adriano Proença, Editora Forense-Universitária, RJ, 1996, José Luiz Celeste, "Especialização Flexível: Uma alternativa promissora para o desenvolvimento econômico de regiões subdesenvolvidas", in Revista de Administração de Empresas, São Paulo, 33 (6): 34-41, Nov/Dec, 1993. Charles F. Sabel, "A mudança de modelos de eficiência econômica e suas implicações para a industrialização no Terceiro Mundo", in Alejandro Foxley, Michael McPherson & Guillermo O'Donnell (org), Desenvolvimento e Políticas e Aspirações Sociais. O pensamento de Albert O. Hirschman, Editora Vértice, São Paulo, 1988 and Elizabeth Bortolaia Silva "Pós-Fordismo no Brasil", in Revista de Economia Política, vol. 14 n. 3 (55), Julho-September/1994.

⁷ - Victor Prochnik, "Spurious Flexibility: Technical Modernization with Social Inequalities in the Brazilian Footwear Industry". Discussion paper n. 222, OIT/ONU, Geneva, 1991, mentioned in Prochnik (1996).

substantial discounts in the price of these parts or using idle machinery. During times when demand is greater, the reverse occurs, as the autoparts manufacturers use their now greater market power to demand several types of advantages. Finally, the knitwear industry serves as an example of antagonistic behavior. Several business in the sector, faced with the risk of a cut in supply during high demand periods ended up opting for the purchase of raw materials, which privileged only, the offered price and not other variables, such as the establishment of more durable relationships with their suppliers. The manufacturers' strategy was, thus, to diversify suppliers and customers so as not to depend on them (⁸).

In spite of indications of improvement in the standard of inter-business relationships, as said before, there is evidence that the current situation has not yet reached a satisfactory level, from the perspective of needs for increased productivity (⁹). Furthermore, studies on competitiveness in Brazilian economy point to the possibility of coexistence, in Brazil, of "nostalgic fordism", marked by the traditional management culture - authoritarian, conservative and selfish-, with a post-fordist model of production. Such possibility increases as the country is not able to overcome its heterogeneity and structural dualism, marked by the huge dispersion in wealth distribution, regional disparities, high productivity differentials between economic sectors and within them. On the other hand, widening of production post-fordist structures increases their possibilities in the light of an economic policy which is aimed at modern industrial development. The effects of this movement may be felt in the transfer of a modernizing business culture to suppliers and producers, by the reduction of hierarchical levels and changes at plant level, with direct participation by employees in management and profits. This movement has been invariably accompanied by the adoption of more negotiated mechanisms for conflict resolution and explicit cooperation and trust strategies among companies and between suppliers and consumers.

⁸ - Such research is described in Victor Prochnik's, "Programas Regionais de Difusão de Tecnologia para Setores Tradicionais", Revista Planejamento e Políticas Públicas, IPEA/INPES, n. 3, Jul 1990 185-186.

⁹ - R. Valle, presenting the results of a survey carried out with 278 companies, representing the universe of the largest Brazilian industrial businesses, states: "The business/supplier relationship is marked mainly by the constant dispute regarding price and quality: 69,3% chose dispute around price and 59,8% chose quality. Dispute around delivery dates is also quite high: 43,7%... It must be noted that the question referred only to the existence of conflict and not at price and quality levels (known to be inadequate) which result from these conflicts. Therefore, one can conclude that in Brazilian industry's productive chains, the degree of collaboration is low and dissatisfaction is high"., in "As Empresas Industriais Brasileiras Diante de suas necessidades de Mão-de-obra, mimeo, Programa de Engenharia de Produção da COPPE/UFRJ, 1995, p. 12/13.

RELATIONAL CONTRACT THEORY

These changes in the form of economy regulation have been the object of studies on the changes in contractual relationships, mainly in complex, long-term contracting (¹⁰). Long-term, or relational contracts, as I prefer to call them, adopting Ian Macneil's terminology (¹¹), differ substantially from autonomous, instant or discrete contracts.

Discrete contracts' basic characteristics lie in the fact that they are impersonal, presentifying, i.e., tend to bring the future into the present; involve bargaining between parties which are instrumentally oriented and require mutual consent from both parties. They are discontinuous and compose a separate entity, inasmuch as they plan a transaction which is separate from all previous, contemporary or subsequent transactions. Each contractual act is considered an isolated, independent and autonomous act, for they possess, within them, all the necessary essential constituting elements. Thus, for example, a contract, according to the 1917 Brazilian Civil Code, as long as it contains free will, a licit object, capable agent and does not offend the form prescribed by law, is considered perfect legal business and generator of legal effects, in particular the linking and enforceability effects.

It is also impersonal, for it defines the transaction in terms of simple goods exchange, i.e., in terms of description, price, quantity, and delivery date of the merchandise. In it no importance is given to the contracting parties, their belonging to a class, status, group, family or social standing. It suffices to comply to the overall abstract concept of creditor (sujet de droit).

It is presentifying in that it seeks to plan, in the immediate present, behaviors to be carried out in the future. All the essential elements and constituting terms are established in the present, no importance or substantive relevance being assigned to the parties' performance in defining

¹⁰ - Literature on the subject is vast today. See especially, The Complex Long-Term Contract, Structures and International Arbitration (Der komplexe langzeitvertrag. Strukturen und Internationale Schiedsgerichtsbarkeit), edited by Fritz Nicklisch, Heidelberger Kolloquium Technologie und Recht 1986, C.F.Müller Juristischer Verlag, Heidelberg, 1987, Joerges, Christian. "Relational contract theory in a comparative perspective: tensions between contract and antitrust law principles in the assessment of contract relations between automobile manufacturers and their dealers in Germany. (Symposium: Law, private governance and continuing relationships)" Wisconsin Law Review May-June 1985, v.1985, n3, 581-613; Gunther Teubner, "Beyond Contract and organization? The External Liability of Franchising Systems in German Law" in Christian Joerges (ed) Franchising and The Law. Theoretical and Comparative Approaches in Europe and the United States, Nomos Verlagsgesellschaft, Baden-Baden, 1991.

¹¹ - See especially Ian Macneil's, "The Many Futures of Contracts", California Law Review, vol: 47 (1974), and The New Social Contract. An Inquiry into Modern Contractual Relations, New Haven and London, Yale University Press, 1980.

effects arising from breach or failure to perform. Furthermore, little or no importance is attributed to pre-contractual communication, such as preparatory dialogues. According to this conception, the predominant idea is that the contract must be kept, based on the “pacta sunt servanda” principle, regardless of the effects it may cause.

Discrete contracts also involve negotiations which take on the basic characteristic of an instrumental bargain, in that they assume a relationship between two parties which force the exchange terms to achieve their own, individual and exclusive economic interests. It is regulated, therefore, by the assumption of the existence of an essentially selfish, individualist and instrumental conduct by each one of the parties in contractual negotiation. Any premise that the contractual relationship may be predominantly based upon cooperative or solidary behavior is thus excluded. Such idea is indissolubly linked to liberal anthropology and philosophy, according to which each individual acts, in the market, as a true “homo economicus” who tries to behave rationally in the light of the means available to him so as to obtain the most possible economic advantages for himself.

Finally, discrete contracts imply mutual consent, in that they assume that the exchange terms which result from the instrumental bargain are freely established by the parties before the start of the fulfillment of the contract. Such principle is consecrated in the idea of free-will and the importance of consensus for the formation of contracts.

Therefore, discrete contracts correspond to the definition that the classical thought gave them, regarding both the doctrine and the elaboration of statutes and codes. The classical contractual theory - as the typical ideal formulation of this contractual conception - and the neoclassical theory -as its mitigated version-, created norms and principles for the operationalization of contractual law from concrete problems which arose during its application by the courts.

It is worth noting, finally, that, despite the centrality of the idea of meeting of minds in classical contractual theory, it acknowledges that non-promissory relations, such as good faith, forbidding of leonine clauses, equity rule, respect to costumes, etc, also interfere in contractual law. However, the classical school of thought refers to them only as subsidiary elements, gapfillers, and still only when the privileged source, i.e., the formally established contract, require them. It is easy to note how the development of neoclassical contractual law - in Brazil this is particularly clear since the promulgation of the Consumers’ Code - has mitigated such principles on admitting to a certain degree of indetermination in contracts, widening the hypotheses of contractual

changes in the course of performance and protecting the parties' legitimate expectations (¹²).

Relational contracts tend to create continuous and long-lasting relationships, in which the terms of exchange are increasingly open and the substantive clauses are replaced by constitutional clauses or clauses to regulate the continuous negotiation process, determined both by promissory relations and non-promissory links which are established among the various parties, such as status (e.g.: weaker party protection), trust and economic dependence.

Relational contracts (such as those for franchises, work, technological cooperation, supply between companies, private pension plans and some types of banking contracts, as opposed to discrete contracts, are long-term, based on the very dynamic established in the course of the contractual relationship. The main differences between relational and discrete contracts may be summarized in the following manner: Firstly, it is impossible to completely specify the long-term relational contract in terms of price, amount, quality and delivery, given its constant mutability. This is so because it involves elements not so easily measurable and aims at regulating situations which

¹² - To this end some articles from the Consumers' Code are noteworthy:

Art. 6th The following are basic consumer rights:

IV - Protection against misleading and abusive advertising coercive or unfair business methods, as well as against abusive practices and clauses or those imposed in the supply of products and services;

V - Amendment to contractual clauses establishing disproportionate installments or revision thereof by reason of supervenient facts which render them excessively burdensome.

Art. 51st Contractual clause, inter alia, are null and void by operation of law when relating to the supply of products and services that:

IV - establish obligations considered inequitable or abusive that plays the consumer at unreasonable disadvantage, or that are incompatible with good faith or equitable practice.

XV - Are in contravention of the consumer protection system.

§ 1st Inter alia, unreasonableness is presumed in the case of and advantage that:

I - offense the basic principles of the legal system to which it belongs;

II - restricts basic rights or obligations inherent to the nature of the contract, so as to threaten the object thereof or contractual equilibrium;

III - show itself to be excessively onerous for the consumer, considering the nature and content of the contract the interest of the parties and other circumstances specific to the case.

§ 2nd the defeasance of an abusive contractual clause does not invalidate the contract, except when, despite efforts for integration, the absence of such clause results in an excessive burden for any of the parties.

§ 4th - Any consumer or entity representing the consumer may request that the Public Attorney's Office lodge the proper action to have the contractual clause that contravenes any provision hereof or otherwise fails to ensure a fair equilibrium between rights and obligations of the parties declared null and void.

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demand a high level of flexibility. Secondly, given the continuous changes in the product or characteristics of the service rendered, it is impossible to foresee all the future contingencies and specify the terms of adjustment in relational contracts. Their indetermination goes beyond the limits defined by neoclassical solutions, such as the open contract, which stipulated defined rules (albeit more open than those of the classical theory) for contractual adjustments. The very possibility of establishing an objective and pre-determined standard for adjustment such as is formalized by the neoclassical theory begins to prove insufficient in view of the expressive rise in contingency and variation of the terms in contract relations. The contract, in a wider dimension than the neoclassical theory is capable of admitting and incorporating, assumes processual scope, which acquires the form of a self-reflecting game which produces "in fieri" the standard of its own reasonability and contractual justice. Instead of adjustment clauses, relational contracts include terms which establish institutional processes by which change and adjustment will be specified in the course of contractual performance or fulfillment. Thus relational contracts do more than regulate goods exchanges or their adjustments. They establish the process for inter-organization cooperation in the product or service, in production and structuralization of the form of management. This is why, in many relational contracts, such as inter-company supply, even the company's sacred principle of instrumentality begins to be questioned and becomes an object of negotiation. Companies which are integrated in productive networks in a post-fordist production system intensify information exchanges and begin to share books and cost spreadsheets. Profit-sharing becomes an object of negotiation between companies in the course of the performing the contract which links them. Profit is now less the product of the bargain between the parties and more the product of mutual cooperation, within new solidarity principles and where the concept of good faith gains an importance which was nonexistent before (¹³). Finally, relational contracts in general involve complex relations between several parties, in which personal and solidarity, trust, and cooperation relations are determinants.

¹³ - For an empirical description of this process see Stewart Macaulay on contract relations among businesses in the state of Wisconsin, "Non-contractual Relations in Business: A Preliminary Study", 28, *American Sociological Review*, 55-67, 1963 and Ronald Dore, "Goodwill and the Spirit of Market Capitalism", edited in Mark Granovetter and Richard Swedberg (edited), The Sociology of Economic Life, Westview Press, Colorado, 1992. For examples of the type of contract in a post-fordist or flexible specialization productive system, cf. Michael J. Piore and Charles Sabel, The Second Industrial Divide. Possibilities for Prosperity, Basic Books, 1984, especially p.s 3-18, and Oliver Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations", 22, *Journal of Law & Economics*, 233, n.1, 1979.

THE BRAZILIAN CONSUMERS' CODE AND ITS IMPACT ON CONTRACTUAL LAW: COOPERATION, SOLIDARITY AND GOOD FAITH

It is widely acknowledged today that new legislation, among which the Consumers' Code (Law no. 8.078/90) and the Antitrust Law (Law no. 8.884/94), have introduced new elements into Brazilian contract law - widening the use of concepts of contractual imbalance, contract justice, reasonability, excessive burdensomeness, normality and good faith - which alter some of the basic principles of the classical contract theory adopted in the already outdated 1916 Civil Code and 1850 Commercial Code. These innovations have opened new prospects for legal acknowledgment of relational characteristics of contracts in general and consumer contracts in particular. These new concepts have forced upon the law applying agent the acknowledgment of the economic function of contract relations, in that they admit that the criterion of contract justice takes on a dynamic character and projects itself throughout the contract performance and not only during the act of formally celebrating the contract. In this manner, if before contractual balance fixed itself only at the moment the contract was established, now it must be acknowledged throughout the course of the contract relation. The very concept of balance, as acknowledged by a prominent Brazilian jurist, is no longer defined "a priori", but rather "a posteriori" (¹⁴).

Both the neoclassical contract doctrine and the neoclassical liberal economic thinking based themselves on the common premise that people in the market act rationally, maximizing individual advantages (¹⁵). Ample revision of such premises has been done both in economic and sociological literature with a view to reassessing the importance of trust, solidarity and cooperation relations (¹⁶). Here cooperation may be defined as an association with another for mutual benefit or for burden sharing. In the concept of solidarity one can find the idea of a unit which produces or is based on the community of interests, objectives, values and standards. Solidarity may be based on a co-operative relationship, but what is important to

¹⁴ - Cláudia Lima Marques, in her commentary on the Consumers' Code, stresses such fact upon stating that: "In consumer protection, contractual re-balancing occurs "a posteriori", when the contract is already formally perfect, after the consumer has already manifested his will, both free and reflected, but contractual result is still inequitable." In Contratos no Código de Defesa do Consumidor. O novo regime das relações contratuais. Ed. RT, 1992, p. 165.

¹⁵ - Richard Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication", in Law, Economics and Philosophy, edited by Mark Kuperberg and Charles Beitz, Rowman & Allanheld, New Jersey, 1983.

¹⁶ - Charles Sabel, "Studied Trust: Building New Forms of Cooperation in a Volatile Economy", in Industrial Districts and Local Economic Regeneration, International Institute for Labour Studies, Geneva, 1992 and Diego Gambetta (ed.), Trust. Making and Breaking Cooperative Relations, Basil Blackwell, Great Britain, 1988.

stress is the fact that it reports to a community of values and interests and, in this sense, it possesses a necessarily moral character ⁽¹⁷⁾ . Such principles tend to become increasingly important as contracts become more relational. In this sense relational contracts are closer to the ideal partnership contract than to the classical sale and purchase contract.

The concept of good faith has been gaining increasing importance in contemporary contract doctrine and practice, largely constituting the main link among the principles of cooperation, trust and solidarity in modern contract law ⁽¹⁸⁾. From a relational perspective, good faith may be seen as the primary source of contractual responsibility. Within this point-of-view, obligations arise because society imposes them and not only because an individual promise has stipulated them. Other society objectives and values, such as the idea of distributive justice or individuals' well-being also have to be balanced against the private interests in the contract. Such balance is achieved through the concept of good faith. The Consumers' Code consecrates such principle expressively in its article no. 6. It is worth noting that, beyond the classical idea already present in the 1916 Civil Code - of subjective good faith, the new Brazilian system for consumer protection has adopted the principle of objective good faith, which identifies the principle in the effective dynamics of contract relations and not only in the scope of subjective expectation of the creditor ⁽¹⁹⁾.

For relational theory, good faith plays the relevant role of encouraging the continuity of contract relations (article 6, V , Consumers' Code). This is because integration rules are not only reliance, but also reciprocity, substantive dynamic balance, trust, solidarity, balance of power and harmonization with its underlying social matrix ⁽²⁰⁾.

Good faith enables one to think of suitable contract agent behavior in different contexts, according to the outlines and meanings of

¹⁷ - Émile Durkheim, The Division of Labor in Society, translated by George Simpson, Free Press, New York, 1964, p. 337-338.

¹⁸ - For an analysis of the increased importance of these concepts, see Fernando Noronha, O Direito dos Contratos e seus Princípios Fundamentais. Autonomia Privada, Boa-fé, Justiça Contratual, Editora Saraiva, São Paulo, 1994.

¹⁹ - According to Cláudia Lima Marques, "It is firstly necessary to state that objective good faith is a standard, an objective, generic parameter which does not depend on supplier A or B's subjective bad-faith, but a general action standard, which is how the average man, a "bonus pater familia" would act, in a reasonable manner in the situation being analyzed. (...) Good faith, therefore, means conscious action, where one thinks of the other party, the contractual partner, respecting him, respecting his legitimate interests, his reasonable expectations, his rights, acting loyally, non-abusively, without causing obstruction, harm or excessive disadvantage, cooperating for achievement of goals: fulfillment of contractual objectives and realization of the parties' interests." op. cit., p. 79-80, updated edition.

²⁰ - Macneil, The New Social Contract. An Inquiry into Modern Contractual Relations, p. 67 and others.

each concrete existing contract relationship. It works as a true “calibration norm” of relational contract theory ⁽²¹⁾. It is worth mentioning, however, that the concept of good faith cannot be fully described in a formal definition since it involves elements of the real, on-going dynamics and characteristics of contracting.

The elements which make the importance of good faith more evident within the relational perspective may be thus synthesized: Firstly, good faith reminds us of the incompleteness of contracts, the limits in the forecasting capacity, costs and threats to solidarity and insuperable barriers for perfect communication between the parties. Secondly, it emphasizes, values and makes legally protected the trust element, without which no contract can operate. Thirdly, it emphasizes the participatory nature of contracts, which involves communities of social meanings and practices, language, social rules and non-promissory linking elements. Finally, good faith stresses the moral element of contract relations. Contractual good faith involves a moral conception - doing something properly and, in this sense, refers to a conception of Social Justice, Justice as normality and balance (cf. article 4, III & 51, II in the Consumers’ Code) ⁽²²⁾.

Through good faith one acknowledges that contracts serve social and moral ends, rather than only economic and individual ones. In this sense, the contract, despite being one of the main instruments for organization and structuring of a market order, does not constitute the instrument guided only by what is assumed by the “homo economicus”, the individual that maximizes advantages and resources. Market order in Social Law becomes more clearly a social market order where social values play an important role in determining the content of contracts ⁽²³⁾.

Despite the fact that the contractual paradigm which prevails today in western industrialized countries is the neoclassical one and not the relational one, there is reason to acknowledge the growth in importance of the relational approach, which is done through a widening in the use and extending the concept of good faith. Firstly, many of modern society’s contracts are relational or intertwined and others are increasingly widening their relational characteristics. Contractual associations are constant elements in our lives. Most notable examples are contracts for cooperation, franchise, work and productive network formation and product supply in post-fordist production systems. As an instance one can cite the increasing legal demand for

²¹ - Tércio Sampaio Ferraz Jr, Teoria da Norma Jurídica, Editora Forense, Rio de Janeiro, 1978.

²² - Similar ideas are developed by François Ewald, “A Concept of Social Law”, in Dilemmas of Law in the Welfare State, European University Institute, Berlin, 1985, p. 40-75. Similar elements are listed by B. J. Reiter, “Good Faith in Contracts”, (Symposium: Jurisprudential Perspectives on Contract), Valparaíso University Law Review Summ, v.1983, v.17, n4, p. 727.

²³ On market concept see Hugh Collins, The Law of Contracts, Second Edition, Butterworths, London, 1993, p. 30 and others

participation as a source of solidarity in work contracts. Participation in management by the worker creates a sense of community which has been showing to be an important stimulus element for productivity.

Good faith is basically involved in two aspects of contract participation. Firstly, it enables the coming together of the selfish individual interest and interest for the other, which makes the existence of long-term relationships easier. Secondly, it serves as a mechanism for protection of the right to participate in a similar fashion to the citizen's civil rights. Good faith becomes the set of guarantees of contracting agents in contractual relations, a sort of individual guarantee norms, within private law. This is evident in the context of labor relations with the creation of mechanisms for the maintenance of workers' dignity, right to participation, representation, work safety, etc. In the case of employment relations, good faith protects the worker against unfair dismissals, thus guaranteeing his participation right, protecting minorities and economic power abuses which may affect equality in negotiating power. Demand for such guarantees is also felt today in franchising contracts, contracts for supply among businesses and pension fund contracts and especially regarding political demand for profit-sharing and decision power in pension funds in Brazilian law, which can be seen from the bills on the subject currently in Congress.

It is worth noting, however, that the Brazilian Consumer's Code's success is still more evident where discrete contracts are concerned. There is still great resistance on the part of legal actors in acknowledging its applicability to relational consumer contracts. Thus for instance, the Consumers' Code had immediate impact on telephone and door-to-door sales, on labeling, and even on the stipulation of abusive clauses (small print, etc.) However, it is only now that relational contract problems, such as health plans, banking agreements and private pension agreements are beginning to draw the attention of Brazilian jurists, where the resistance to the use of relational innovations introduced by the Code is greatest and the results obtained the most modest.

PRIVATE PENSION FUND CONTRACTS: RELATIONAL CONTRACTING FROM THE CONSUMER'S PERSPECTIVE

An example may be found upon the examination of pension fund contracts in the light of the Consumers' Code. To-date, there are practically no studies of private pension funds regarding consumer protection legislation. This is largely due to difficulties in the Brazilian private law culture, still predominantly individualist and liberal and supported by neoclassical economic premises. In this sense, the Brazilian legal culture closely follows the country's business and economic culture, as mentioned earlier in the paper.

Pension contracts are relational contracts, and one of their characteristics refers to the importance given, in them, to the principles of good faith, cooperation, solidarity and re-balancing of power relations.

How could power balancing be achieved in pension contracts? In what way does the relational approach offer elements for the treatment of problems related to pension contracts listed above, initially related to fund control?

Albert Hirschmann developed quite an influential typology regarding possible consumer and agent attitudes within a market structure. To him, the agents have got the exit option, i.e., leaving the market; the voice option, i.e., to assert his rights or pressure power and the loyalty option, the possibility of a negotiated compromise solution ⁽²⁴⁾. These are the options found upon analyzing consumers' defense mechanisms regarding pension funds.

Firstly, consumer protection in private pension funds must acknowledge that pension contract clauses are usually negotiated within the context of work relations, although not necessary. In this sense, expectations involved in this type of contract are generally born from and linked to the expectations involved in the work contract itself. This fact has been expressively acknowledged by US law since 1949, differently from what has occurred in Brazilian law (article 2 , Decree-law 2.297). In legal area specialization limitation, it is symptomatic that in the US the title of private pension funds be treated together with the legal regimen for labor relations. This occurs because pension contracts are negotiated as fringe benefits, which act both as stimulating agents for the employee's trust in the company and instruments for captivity, in that they tie them to the company ⁽²⁵⁾. It is false, therefore, to admit that a pension fund is

²⁴ - Albert Hirschmann, Saída, Voz e Lealdade, Ed. Perspectiva, São Paulo, 1973, p. 30-34.

²⁵ - Manuel Soares Póvoas, Previdência Privada, volume I, p. 51

a discrete contract, like for example buying a drink from a vending machine. Ignoring this complex nature of pension contracting is imposing an intolerable limitation for consumer protection. In this sense, the exit option in Brazilian pension law is seldom respected.

The exit option can also guarantee that the market mechanism act in favor of the consumer. The consumer's right to the portability of his resources every time he changes jobs or even if he ceases trusting the insurance company is a long-known mechanism by US law and allows for the meeting of changing consumers' needs and reduces their captive dependency regarding the employer⁽²⁶⁾. Only as an example, it is fair that a policy holder who has not yet reached the age to cash in his pension and finds himself incurably sick may be able to use the resources paid in by him when he needs them the most. Nevertheless, Brazilian legislation will not allow it. It is evident that the guarantee of portability presents technical problems and risks. However, such difficulties are not insuperable and it is possible to think of mechanisms to guarantee it. There are currently two bills in the US Congress on the theme ⁽²⁷⁾. There are also several bills in the Brazilian Congress on the subject. The Federal Government itself has recently sent a bill establishing a new system for complementary pension plans, expressively including portability.

Secondly, it is important to increase the mechanisms that guarantee the participating consumer's voice and make viable solutions based on loyalty. In order to achieve effective contractual balance and respect to good faith and principles of solidarity and participation in pension contracts, it is necessary to guarantee the rights of consumer-employees to participating in management of the fund with a view not only to fraud control, but also preventive control against bad management or setting of goals which are incompatible with their legitimate interests. Control and regulation of managers' investment decisions is desirable given that no market mechanism is capable of aligning diverging interests of plans' managers and participants. Such control could be carried out directly through the creation of representation mechanisms for the consumers on the boards of funds and making use of the union structure to make the representation effective, whenever possible. This control may also, and will often, be indirect, through public watchdog bodies and agencies. It is surprising and unjustifiable that the Attorney General's Office, which plays an important role in consumer contractual protection is not authorized to carry out

²⁶ - Cláudia Lima Marques, pioneering the consumer protection theme uses the concept of "long-term captive contracts". To the author: "They are a series of new contracts or contractual relations which use mass contract methods for the supply of special market services, creating complex long-term legal relationships, involving a chain of suppliers organized among themselves and with a dertermining characteristic: creating a situation of captivity or dependence for the customers, consumers", in Cláudia Lima Marques, Contratos no Código de Defesa do Consumidor, op. cit., p. 57. John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law, The Foundation Press, Westbury, New York, 1995, p. 83 ERISA, 55-57

²⁷ - Langbein & Wolk, Pension and Employee Benefit Law, op. cit., p. 91 (Pension Bill of Rights).

preventive fund control, like the control on foundations. It is also amazing that Law No. 6.435/77 explicitly excludes the Public Prosecution from intervening in this task. It is also inadmissible that consumers are not provided even with the existing protection mechanisms available to shareholders, who can count on market sale price for their share, evaluations and are also able to sell their stock. The solidarity principle, guided by the idea of sharing burdens and benefits also makes it necessary for consumer-participants get a share of excess capital profits (article 21, XXIV Law No. 8.884/94), which currently revert entirely to the company or fund administrator, although the consumers are almost invariably solidary partners in eventual losses. It must not be alleged that the very private business nature of pension contracting does not admit this type of participation. First, there are numerous concrete examples which not only demonstrate the compatibility but also the desirability of consumer-employees' participation in company management ⁽²⁸⁾. Second, public financing for the constitution of private pension funds, especially through fiscal policies, and the underlying social interest in this type of contract make this law area particularly affected by the principles of Social Law.

CONCLUSION

These preliminary observations seem to be sufficient in showing the importance of the relational approach for contract theory in general and for consumers' contracts in particular, in a world where the role of trust, cooperation and solidarity have been gaining importance. It is very likely that such a trend will gain momentum as the Brazilian economy's post-fordist characteristic becomes wider. The barriers for the acknowledgment of relational characteristics of the contract phenomenon are still numerous, especially in the traditional formalist liberal and individualist Brazilian legal culture ⁽²⁹⁾. Nevertheless, one can identify a current trend towards its recognition by

²⁸ - For the German case see Michael Best, The New Competition. Institutions of Industrial Restructuring, Harvard University Press, 1990, Jurgen Kocka, "The Rise of Modern Industrial Enterprise in Germany", in Alfred Chandler & Herman Daems (editors), Managerial Hierarchies, Cambridge, Harvard University Press, 1980, Mark J. Roe, "Some Differences in Corporate Structure in Germany, Japan, and the United States", 102 Yale Law Journal, June 1993 and also Sabel e Piore, The Second Industrial Divide, op. cit. Also worth mentioning is that the Federal Constitution does not only provide for but also stimulates this sort of participation. Cf. articles 7, XI (exceptional business management); art. 8, VI (trade union's collective negotiation right), art. 10 (participation in collegiates on professional and welfare interests); art. 194, VII (community participation in administrative management); art. 198, III (health); 218, § 4 (stimulus to profit-sharing).

²⁹ - Ian Macneil, "Barriers to the Idea of Relational Contracts", in The Complex Long-Term Contract. Structures and International Arbitration (Der komplexe langzeitvertrag. Strukturen und Internationale Schiedsgerichtsbarkeit), edited by Fritz Nicklisch, Heidelberger Kolloquium Technologie und Recht 1986, C.F.Müller Juristischer Verlag, Heidelberg, 1987.

Brazilian Law. Within this perspective the Brazilian Consumers' Code certainly represents an important milestone, given that it introduces a new concept of social private law. Furthermore, there is indication that, following what has been seen in other western countries⁽³⁰⁾, legislation for contractual protection of the consumers will end up have a generalizing effect in other branches of private law, such as contracting among companies themselves. In Brazil, its reflexes can be seen in areas such as franchising, leasing contracts, etc.⁽³¹⁾. The future and limits to this greater importance and fecundity of the relational approach remain, however, still little evident; and stating that we are going in a well-determined direction is still premature. It does not seem exaggerated, though, to state that the Consumers' Code has started a new era in acknowledging the importance of relational aspects in contracts from the legal-normative structure that supports its experience.

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³⁰ - Palle Bo Madsen, "The Impact of Consumer Law on the Law of Contracts in Denmak", in Scandinavian Studies in Law, Vol. 28, Stockholm, Sweden, 1984, p. 85-101.

³¹ - For instance the leading case in Tribunal de Alçada/RS's decision, 2ª Câm. Cível, Ap. Cível 192188076, Rel. Paulo Heerdt, j. 24.9.92., "(published in Revista de Direito do Consumidor, 6/274-277). See also: Juizado de Direito 1ª Turma Recursal RS - Processo nº 11968.7592.4 - 18/09/96; TARS, 2ª C. Cível (Ap. Cível n. .191031798, j. 9.5.91, in Julgados TA/RS, 78/284-287), rel. Paulo Heerdt; 7ª Câm. Cível do TJ/RS (Ap. Cível 591007174, j. 10.4.91, rel. Waldemar Luiz de Freitas Filho, published in Revista de Jurisprudência do TJRGS, 152/541-543 Ap. Cível do TARS 3º Câmara Cível, j. 27.5.92, rel. Juiz Danúbio Edon Franco.

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