Teisės aktualijos

GOOD FAITH IN THE BRAZILIAN CIVIL CODE: TEN YEARS LATER

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The general clause of good faith was one of the innovations of the Brazilian Civil Code, enacted in 2002. It came into force in January 2003, in order to widespread ethics in private affairs. Indeed, good faith was applied in specific cases, such as the "theory of appearance" or the requirement of utmost good faith in insurance contracts. But in the Civil Code of 2002, heavily influenced by German, Italian and Portuguese codes, good faith is applied to provide operability, ethicity and sociality in private relations as well as in the enforcement of private law by courts. In this sense, good faith has been used to impose duties of consistency, information and cooperation between the parties of a transaction. The aim of this paper was to introduce an overview of good faith, its consecration in the Brazilian Civil Code and then to analyze its application in Brazilian Courts in the last ten years.

1. An overview about good faith

The concept of good faith is easy to understand but hard to define due to its compliance in situations apparently opposite one another. Scholars present it as an example of indeterminate legal concept, whose content is defined by case law from logical inductions, which resulted in the use of vague expressions such as "honesty in fact", probity and ethics. Taking advantage of this semantic indeterminacy, good faith was used during the twentieth century as an "operational" concept, conveyed by general clauses – legal norms whose hypothesis of incidence is comprehensive, able to preserve current law – in order to fix regulatory gaps in a particular jurisdiction. This occurred especially through § 242 of German Civil Code[1], in which good faith had been widely applied to solve unruled problems at that time. For example, the imposition of protective duties for the parties, not only because it is a requirement general society, but because under German law there was no general clause

[1] German Civil Code: § 242. An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.

about torts as it exists in the article 1382 of the French Civil Code[2] or as existed in the article 159 of the Brazilian Civil Code of 1916[3] and that has been enhanced with the wording of article 186 of the Civil Code of 2002[4]. Similarly, the prohibition of abuse of rights was associated with the concept of good faith due to the narrowness of the hypothesis of incidence under § 226 of the German Civil Code[5] which only recognizes *aemulatio* as a form of abuse of rights, which was not the case of other jurisdictions, including Brazilian Law. The third case was the adjustment of contractual clauses, balanced by the principle of good faith, while, in other countries, doctrines of supervening impossibility are recognized. From these specific cases distinct, good faith became a general principle of law in Germany, from the work of Franz Wieacker in the 1950s.[6] This idea of relying on general clauses for the purpose of updating certain legal text was used in the preparation of the Brazilian Civil Code, but no one took into account the reasons why this occurred. In the German case, these problems were corrected with the *Schuldsmodernisierungsgesetz in* 2002.

Indeed, the typical concept of good faith corresponds to the duty to act properly. A person who acts in good faith, is honest in fact; being honest in fact means to act properly. One could invoke morality as a criterion of correctness in order to consecrate ethics in law. However, it is necessary to argue which ethics one is talking about. From a deontological perspective, which was masterfully formulated by Kant's categorical imperative to "act only according to that maxim by which you can at the same time will that it should become a universal law"[7], it will not be easy to achieve a consensus on what would be an action according to good faith for mankind in this way, but the assertion that one should act properly. Moreover, it runs the risk of arguing the moral system to which the principle of good faith is subject, like utilitarian or eudaimonic morals. More seriously: the Nazis stated the concept of good faith as synonymous to ethics and, from there, they set up anti-Semitic persecutions, very little disclosed by the legal historiography[8].

An interesting analysis of good faith comes from economists, which formulated the concepts of asymmetric information and transaction costs, such as enhancements to classical economic thought. They criticized economic models of the late nineteenth and early twentieth century that assumed economic relations are conducted by agents on equal terms, holders of full rationality in an environment of full availability of information, which resulted in

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[2] French Civil Code: Article 1382. Every human fact that causes harm to others, who obliges her fault produced it to repair it.

[3] Brazilian Civil Code of 1916 (revoked): Article 159. He who, by voluntary act or omission, negligence, or recklessness, violating law, or causes injury to another person, is obliged to repair the damage.

[4] Brazilian Civil Code: Article 186. He who, by act or omission voluntary negligence or recklessness, violating law and harm others, even if only moral, commits an unlawful act.

[5] German Civil Code: § 226. The exercise of a right is not permitted if its only possible purpose consists in causing damage to another.

[6] WIEACKER, Franz. *El Principio General de la Buena Fé*; trad. de José Luis Carro. Pról. de Luis Diez-Picazo. Madrid: Ed. Civitas, 1977 (Cuadernos Civitas; 13).

[7] KANT, Immanuel. *Fundamentação da metafisicas dos costumes e outros escritos*; tradução de Leopoldo Holzbach. São Paulo: Martin Claret, 2003.

[8] COLOMBO, Sylviane. *Implications of The Good Faith in culpa in contrahendo* (1990). Ph.D. Thesis. Yale Law School.

maximum efficiency in the movement of wealth. The same was in the right formulation of liberal ideologies underlying the concepts of business and contract law: both parties were on equal terms, endowed with full rationality, with full access information and maximum efficiency – after all, "*qui dit contractuel, dit juste*". So, economists such as Ronald H. Coase[9], George Akerlof[10] and Oliver Williamson[11], contributed to the recognition that both economic relationships are held among people who are not necessarily equal, endowed with the same capacity of decision and reasoning, in environments where a party knows more than the other, i.e. in state of asymmetric information. This situation creates the so-called "transaction costs", that are present in all economic transactions affecting the same maximum efficiency. Transaction costs are those arising from the acquisition of information, negotiation (travels, investigations, audits), costs of monitoring and enforcing contracts (supplies, conferences, management of deadlines), costs of contractaul rediscussions (excessive burden, defaults, attorney fees, litigation costs, uncertainty of judgment) and bureaucracy.

From this point of view, the reading of situations where there are problems related to good faith becomes simpler, because it is possible to observe the "common denominator" between seemingly disparate cases: good faith corrects the state of asymmetric information between the parties and reduces transaction costs in legal relationships. This correction is given by imposing duties of consistency, information and cooperation. Who acts in good faith is consistent, keeps his word, supplies correct and relevant information, and cooperates, facilitating the life of people with whom he interacts. Whoever violates the principle of good faith, acting in bad faith, goes back to what he said, lies, omits, hinders, procrastinates, disregards the consequences of a irresponsible exercise of his freedom[12].

Legal scholars, moreover, almost unanimously assert the distinction between a subjective good faith, a type of a consistent state of ignorance of the person, and an objective good faith, which is the correct behavior, or, in other words, the distinction is between "being in good faith" and "acting in good faith." However, this does not prevail to a minimum questioning, because every good faith is necessarily objective. The claim of ignorance is only admissible in any legal system when the person did not know – or did not have the relevant information about the fact – but when he could not know this fact, which is demonstrated by the ability or possibility of the person to seek information and not have it achieved due to prohibitive transaction costs. Only who acted correctly, i.e. after having searched information, can state that acted in good faith. Otherwise, the statement of being in good faith is an odious example of conduct in bad faith.

Another reflection is commonly done by the doctrine whether good faith is a legal principle or a legal *standard.* In the

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[9] COASE, Ronald H. *The Problem of Social Cost*. J.L. & Econ. 3. 1 (1960).

[10] AKERLOF, George A. *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*. Q J Econ. 84. 488 (1970).

[11] WILLIAMSON, Oliver E. *The Economic Institutions of Capitalism*. New York: Macmillian, 1986.

[12] See TOMASEVICIUS FILHO, Eduardo. *Informação assimétrica, custos de transação, princípio da boa-fé*. (2007) Ph.D Thesis. Univesrity of São Paulo Law School.

first case, good faith is a legal rule; in the second one, a behavior model necessarily respected. Indeed, good faith is not a standard, but a principle to be observed due to its enactment not only through general clauses, but also to be disseminated in various legal institutions which protects legitimate expectations. Examples of such recognition are the protection of appearance of rights in agency, marriage, possession and payment, the case of mandatory offer and the duty to act in accordance with the utmost good faith ("*uberrima fides*") in insurance contracts. Good faith is not a legal *standard,* because human behavior is not suitable into a single model of behavior, but rather requires, in each case, certain type of behavior to combat the effects caused by asymmetric information and by transaction costs. For example, there are contracts in which *dolus bonus is* allowed and contracts in which do not tolerate the slightest omission, as in insurance contracts.

Considering that the good faith imposes a general duty of right conduct, it is necessary to specify which duties need to be followed to achieve this goal. For this, it is now analyzing the three duties under this principle noted above.

The duty of consistency is based on the fact that all social contacts arise expectations of behavior in people from which they orient their actions. For a intersubjective coexistence, it is important that expectations are kept and the realization of what is hoped behavior is important for the structuring of social relations. For example, the principle of the binding force of contracts ("*pacta sunt servanda*"): if it were not possible to believe that contracts should be enforced, specialization of activities in society would be excessively costly, or with prohibitive transaction costs – that would not normally have. The same is true in terms of maintaining the word given, because the sudden change of opinion implies breaking expectations and this can cause damages. Thus, the good faith prohibits contradictory behavior ("*venire contra factum proprium non potest*"), also known in Spanish-speaking countries as "*teoria de los actos proprios*" or *estoppel* in *common law* jurisictions. Looking up through the principle of good faith, the effects of surprise due to the impossibility of negotiating knowledge of reality and the conduct of others are punished. An important application is the prohibition of claiming a nullity caused by whoever caused it, because "equity must come with clean hands".

In a state of asymmetric information, one will always know more than the other, may take advantage of those who do not know. In this case, good faith imposes a duty to disclosure relevant facts in order to reduce transaction costs in aquisition of information, which balances the state of asymmetric information between the parties. In fact, good faith does not reward laziness and the person has the burden to search information ("*caveat emptor*"). On the other hand, there is a duty to disclosure ("*caveat vendor*") relevant facts to the formation of negotiating consent. Thus, the reduction of the state of asymmetric information is given by the person concerned, who seeks information, and also by the part better informed, who is bound to provide information to anyone who does not have it. A duty of clarification may also be necessary to held the party to understand the information, as it might also arise a duty to inform to be informed, when the person

holding the information does not necessarily know what the other needs to take a decision regarding the transaction. Additionally, the information submitted must be true – because false information is an example of bad faith – and relevant, i.e. can not be excessive, insufficient or overefficient, since the work of separating relevant from irrelevant facts implies transaction costs. In the same sense, there are situations where simply the disclosure of information requires further explanation or clarification about its meaning to the counterparty by a duty to advice. In contractual negotiations, good faith is also related to problems of the state of asymmetric information about the intentions in the business. In order to protect the counterparty of the effects of an unexpected change of opinion, which can be understood as a breach of the duty of consistency, the duty to disclosure the own intentions in the negotiations, e.g. the duty to disclosure that a person negotiates with third parties or not and even the duty to immediately notify the change of opinion or other relevant information.

There are restrictions to the duty to disclosure when the disclosure of facts involves violation of fundamental rights of the debtor or third parties, such as the right of privacy or violation of business secrets. Other restriction is when the creditor has already had relevant information - for example, nowadays, everyone knows that smoking is harmful to health – or even to inform about the convenience of the transaction, in other words, the seller is not obliged to inform the buyer that his competitor sells cheaper, because the discovery of this information is included in the burden of self-informing.

The duty of cooperation requires facilitation in the formation and enforcement of contracts, in order to reduce unecessary transaction costs. Therefore, both parties must cooperate. The creditor shall facilitate the due performance of the obligation, not only in terms of avoiding *mora creditoris,* but also to help the debtor in compliance with the obligation in terms of receiving the benefit. Nor should leave increase the damage of the debtor, as in the case of the insurance contracts, in which there is a duty to mitigate the loss, for which the insurer does not have to indemnify unnecessarily. Moreover, the debtor must perform the contract by an interesting way to the creditor or, as concisely appeared in the former Brazilian Commercial Code of 1850, the term "make good the asset sold"[13]. Also the borrower must do everything by the best, easiest way. There is also mutual cooperation, as the duty of confidentiality in negotiations and duty to renegotiate the contract when necessary.

2. Good faith in the former and in the new Brazilian Civil Code

There was not a general clause on good faith in the former Brazilian Civil Code of 1916. In terms of contractual good faith, scholars mentioned the article 1443 about insurance contracts as the one which established the duty to disclose the counterparty

[13] Brazilian Comercial Code 1850 (revoked): Article 214 – The seller is obliged to make good the thing sold to the buyer, even if the contract stipulates that it is not subject to any liability, unless the buyer, knowing the danger at the time of purchase, the instrument expressly declare the contract, which takes about the risk itself, it being understood that this clause does not cover the risk of the thing sold, which, in some way, may belong to a third party.

about the risks to be covered[14]. However, good faith was not a missing principle in Brazilian law. Due to the approach to an English model of good faith, the parties had freedom to make contracts, except in specific cases, like the observance of an utmost good faith in insurance contracts. There was also another provision on good faith as a rule of conduct, in the case of fraud of creditors[15]. Yet, the Brazilian Consumer Protection Code of 1990 consacred good faith. While most of its provisions are consequences of the main duty to act in good faith, there are also provisions that mention this principle. The first hypothesis is the placement of good faith as a means of harmonization of interests of suppliers and consumers[16] and the second one is the use of good faith to qualify abusive contractual clauses[17].

The Civil Code of 2002 was conceived in the 1970s, highly inspired by the German, Italian and Portuguese Codes, which adopted the use of general clauses to advance the law through case law. The chairman of the drafting commission, Professor Miguel Reale, stated that the Civil Code shall consecrate three main values: operability, ethicality and sociality[18]. The recognition of the principle of good faith as a general clause was important to achieve these goals. Three general clauses have been inserted on the good faith of the Civil Code of 2002.

The first general clause is article 113, according to which "legal transactions shall be interpreted according to good faith and customs of the place of its formation" of inspiration in § 157 of the German Civil Code[19]. In fact, there is no interpretation of the good faith because there is no interpretation in bad faith. What exists is conduct inconsistent with good faith in contractual interpretation. Thus, it is forbidden to sustain a misconduct, or adopt an interpretation unfounded, abusive or whose effects are inconsistent or non-cooperative.

The second general clause is article 187 of the Civil Code, according to which "commits a tort the holder of a right that exercises it clearly exceeding the limits imposed by their economic or social order for the good faith or good morals". In

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[14] Brazilian Civil Code 1916 (revoked): Article 1443. The insured and the insurer are obligated to keep the contract the utmost good faith and truthfulness, as well as to the object, as the circumstances and statements related to it.

[15] Brazilian Civil Code 1916 (revoked): Article 112. The ordinary business essential to maintaining the mercantile establishment, agricultural, industrial or the debtor shall be interpreted as practiced according to the good faith.

[16] Brazilian Code of Consumer Protection: Article 4. The National Consumer Relations Policy aims to meet the needs of consumers, respect their dignity, health and safety, the protection of their economic interests, improving their quality of life, as well as transparency and harmonious relations consumption, attended the following principles:

(...)

III – harmonization of the interests of participants of consumer relations and harmonization of consumer protection with the need for economic and technological development, in order to allow the principles on which it is based economic order (art. 170 of the Federal Constitution), always with based on good faith and balance in the relationship between consumers and suppliers.

[17] Brazilian Code of Consumer Protection: Article 51. The contractual terms relating to the provision of products and services mentioned below shall be null and void in case of:

(...)

IV – establishment of clauses considered unfair, abusive, placing the consumer at a exaggerated disadvantage, or inconsistent with the good faith or fairness;

[18] REALE, Miguel. *Exposição de Motivos do Supervisor da Comissão Revisora e Elaboradora do Código Civil* (1975). Brasília: Senado Federal, 2003

[19] German Civil Code: § 157. Contracts are to be interpreted as required by good faith, taking customary practice into consideration.

Brazilian law, the thinking of Jorge Americano[20] and Pedro Baptista Martins[21], followed the French doctrine on this matter, which has been criticized and developed by leading jurists, as Marcel Planiol[22] and Louis Josserand[23]. The concept was forged from the exercise of a right that supersedes its regular effects, under the guise of its regular exercise. Accordingly, the criteria for assessment of abuse were the doctrine of emulative acts, developed in the Middle Ages as a hidden intention to cause harm to others, as well as the lack of legitimate interest, shunt of economic and social purpose, the disproportion between the means and the purposes and claim normalcy before the unnatural conduct. These criteria are present in the rule of the article 187 of the Civil Code. Brazil, unlike many European and Latin American countries, did not adopt the prohibition of contradictory behavior or the theory of *estoppel* in the twentieth century. These duties have become sanctioned by article 187, by mentioning the breach of good faith in the exercise of a right through the duty of consistency of conduct, or respect to their word. Interestingly, the wording of article 187 nor the article 334 of the Portuguese Civil Code,[24] which served as inspiration for the Brazilian law in this case, mention the contradictory or inconsistente behavior in his statement[25]. In any event, this was the intention of the legislature, being mistaken decree the end of abuse of rights as a legal institution for its replacement by the legal prohibition of contradictory or inconsistent behavior.

The third general clause is the article 422, by which "the contractors are required to act according fairness and good faith, so at the conclusion of the contract, as in its enforcement." This wording corresponds to that originally envisaged for the French Civil Code and designed by Cambacères[26], but not inserted in the final text. The idea is that enough observance of good faith in completing the contract, because they presume such conduct during the negotiating period. Because of the general clause inserted in § 242 of the German Civil Code refers only to the contract already formed, the manner by which it corrected its hypothetical failures during the precontractual period was through the interpretation that contractual default would result from conduct carried out before its completion. As the systematic contractual liability is distinct from contractual liability, it was understood that it was strict liability. This is mixed up strict liability, which stems from the risk of an activity,

[20] AMERICANO, Jorge. *Do Abuso do Direito no Exercício da Demanda*. 2ª ed. muito melhorada. São Paulo: Saraiva, 1932.

[21] MARTINS, Pedro Baptista. *O Abuso do Direito e o Ato Ilícito*. 3ª ed. com "Considerações Prelminares à Guisa de Atualização", de José da Silva Pacheco. Rio de Janeiro: Forense, 1997.

[22] PLANIOL, Marcel. *Traité Elémentaire de Droit Civil*. T. 2. Paris: LGDJ, 1911.

[23] JOSSERAND, Louis. *De L'Esprit des Droits et leur Relativité. Théorie dite de l'Abus des Droits*. 2ª ed. Paris: Dalloz, 1939.

[24] Portuguese Civil Code: Article 334. Abuse of rights. The exercise of a right is illegitimate, where the holder manifestly exceed the limits imposed by good faith, by morality or the social or economic order that right.

[25] See Statement 362, of the Fourth Journey of Civil Law, of the Center for Judicial Studies of the Counsel of the Brazilian Federal Court: "362 – Article 422: The prohibition of the contradictory behavior (venire contra factum proprium) is based on the protection of the trust, as extracts of articles 187 and 422 of the Brazilian Civil Code".

[26] PA, Fenet. *Recueil Complet des Travaux Préparatoires du Code Civil*. Tome Treizieme. Paris, Au Depôt, 1828.

extending the effect of the contract to negotiation proceedings[27]. Article 422, in effect, imposes duties of consistency by the parties – also prescribed in article 187-as well as the duties of information and cooperation.

3. Good faith according to Brazilian Courts

In the Brazilian case, good faith was recognized in all cases in which it applied the "theory of appearence" – apparent agent, acquisition a *non domino,* the lender apparent payment etc. – i.e., issues denominated protection of subjective good faith[28]. However, there were difficulties to sustain it as the legal basis of a judicial decision for protection against adversarial behavior or breach of duty of consistency, information and cooperation. For example, in the case of pre-contractual liability, the solution found in the famous case tried by the Brazilian Supreme Court in 1979 was to qualify or not the legal fact as a preliminary contract, which would apply to the rules relating to contracts in precontractual period[29], or in the event that, by majority vote, the Brazilian Superior Court of Justice decided not to apply the principle of good faith by whom it was absolutely unable to carry out purchase and sale of property by senile dementia and his son, that previously agreed to the transaction which benefited his ill father, despite his unconsciousness, challenged it. This deal was nullified by the court, due to the recognition of the violation of the requirement of the transaction on the legal ability to act of the party. The prohibition of contradictory behavior based on the principle of good faith was not accepted, because it had no express provision in the Brazilian Law at that time[30]. The most famous exception is the decision of the the State of Rio Grande do Sul Court of Appeals in 1991, in which it recognized the prohibition of contradictory behavior in contractual matters, because the food industry has distributed seeds to farmers tomatoes and subsequently has refused to buy the crop from them[31].

Nevertheless, since 2003, the use of the principle of good faith has been considerably invoked to solve various cases. About unjustified interruption of negotiations[32], there is a case of a person se-

[27] In particular, it was totally mistaken the wording of Statement no. 24 of the First Journey of Civil Law, of the Center for Judicial Studies of the Counsel of the Brazilian Federal Court: "24 – Article 422: under the principle of good faith, of the article 422 of the new Brazilian Civil Code, a violation of the duties attached is kind of default, regardless of fault".

The same mistake in the recognition of a contract negotiation as a risky activity negotiation is in Statement o. 363 of the Fourth Journey of Civil Law, of the Center for Judicial Studies of the Counsel of the Brazilian Federal Court: "363 – Article 422: The principles of probity and trust are mandatory, being the aggrieved party must only prove the existence of the violation".

Rule of public policy is that which can not be excluded by the parties, as indeed occurs with article 187, but that does not justify the conclusion that the conduct of the parties must be ascertained regardless of fault, for not even the article 186 of the Brazilian Civil Code produces such legal effects.

[28] Fábio Maria De-Mattia, Aparência de Representação (1984). Thesis (Full Professor) University of São Paulo Law School.; Francisco Antonio Paes Landim, A Propriedade Aparente (A Aquisição a Non Domino da Propriedade Imóvel com Eficácia Translativa no Código Civil) (1992). Ph. Thesis. Univesrity of São Paulo Law School; Hélio Borghi, Teoria da Aparência no Direito Brasileiro (1999).

[29] BRAZIL. Supreme Federal Court. Recurso Extraordinário n°. 88.716/RJ (Sep. 11, 1979).

[30] BRAZIL. Superior Court of Justice. Recurso Especial n°. 38353/RJ (Mar 1.2001).

[31] BRAZIL. State of Rio Grande do Sul Court of Appeals, Apelação Cível Nº 591028295 (Jun 6. 1991).

[32] BRAZIL. State of São Paulo Court of Appeals. Apelação Cível n° 235.818-4/7-00 (Jun.19, 2006).

lected to act as a sales representative and, at the time of executing the representation agreement, the contractor abandoned the covenant without giving any justification. In the hearings, one has demonstrated the existence of drafts, which led to the interpretation that the contact between the parties was not only a job interview, but that, in fact, the representative was told that was selected to this activity and sent the necessary documentation to execute the contract. The State of Sao Paulo Court of Appeals emphasized the need to protect the expectation of the trade representative because it is incompatible with good faith to conduct useless negotiations. The contractor was condemned to pay compensation for damages in the amount equivalent to one hundred minimum wages.

A complex case tried by the State of São Paulo Court of Appeals was about a German transnational, chemical, pharmaceutical company, which, since 1983, had business relationship with a company (no written agreement) for the sale and distribution of sulfate sodium contaminated by chromium, resulting from industrial activities. In 1997, the German company announced the end of its activities in Brazil, moving to Argentina, and it could continue to purchase these products via import from that country. However, the Argentine subsidiary failed to provide these products because now it distribute them directly, without intermediary distributor. The latter then claimed compensation for breach of the relationship, as it had developed technology to commercialization. By majority vote, the Court condemned the transnational company to pay compensation for patrimonial damages for breach of the principle of good faith, although the dissent had pointed out that all necessary expenses for the development of technology for the distribution of this product were recovered over the years and there is no obligation of either party to maintain an activity just to not cause damages to the counterparty[33]. Indeed, there is no obligation to preserve the business relationship, but there was breach of the duty of cooperation, because it is a part, in this moment of interruption of the relationship, does not contribute to aggravate the injury of another.

An interesting case in which it acknowledged the burden to inform based on the principle of good faith was tried by the State of São Paulo Court of Appeals, about the sale of a gas station owned by the son of a famous Brazilian singer. The purchase agreement was executed and the buyer, later, sought to void the transaction, claiming that the gas station had previously been interdicted for selling adulterated fuel and the seller, the son of famous singer did not observe the principle good faith by not informing this fact. The Court did not accept the voidness of the deal, arguing that the conduct in good faith required free consultation to website of the Brazilian Gas Agency on the Internet to obtain information about the property wanted to acquire[34].

About the prohibition of contradictory behavior, for example, a businessman issued a promissory note. Instead of executing it in his own hand, according to the Convention providing a uniform law for bills of exchange and promissory notes of

[33] BRAZIL. State of São Paulo Court of Appeals. Apelação . n° 7.029.588-8 (Mar.5, 2008).

[34] BRAZIL State of São Paulo Court of Appeals. Apelação Cível n°. 388.495.4 (Jun. 29, 2006).

1930, he pasted a scanned signature in the instrument. As strict formality is a feature of promissory notes, the debtor refused to pay the creditor, arguing that a formal requirement was not fulfilled: his signature. The Brazilian Superior Court of Justice condemned the debtor, because good faith prohibited him to violate a formal requirement and to use it in order to refuse the payment of his debt, despite the voidness of the instrument[35]. A second case was about the holder of a cell phone who disagreed with the value of the invoice presented for rendered services, stating that he would not have made some calls that have been charged[36]. Due to this fact, he suited the reimbursement of the exceeding charged values. The mobile phone company required to judge the attachment of invoices in the record, which was granted by the judge with the consent of the client. However, it has filed a suit with the allegation of civil defamation because the mobile phone company violated secrecy to join invoices in the record, which is a public document and that the dispute was reported in the press. During the investigation, it was proved that the client took the initiative to take the dispute to press. Besides, if he wanted to preserve his privacy, the judge could have requested that the case be covered up by secrecy. The decision was the dismissal of the action by the contradictory behavior founded on the principle of good faith.

Good faith has not been restricted to private relations. Courts have applied it in public law. For example, a criminal was sentenced to four years of imprisonment, but he recurred to State of Mato Grosso do Sul Court of Appeals in order to nulify the condemnatory sentence, arguing that the judge based his *ratio decidendi* in evidences of another criminal proceeding in which the criminal was accused. The Brazilian Superior Court of Justice rejected this allegation, because if this evidence were illegal, his defence should have rejected its insertion in the current proceeding. Unlike, he agreed with this insertion[37]. The same Court decided a case in which a taxpayer refinanced his debt with the Brazilian Federal Revenue, but, according to the Brazilian law, he was not eligible to do it. Anyhow, he payed forty-eight installments of this debt with no opposition of the Federal Revenue. In this case, "Indeed, the principle of trust stems from the general clause of objective good faith, general duty of loyalty and mutual trust between the parties, it being understood that the legal system provides, implicitly, the duties of conduct must be observed by both parties of the obligational relationship, which translate into order generic cooperation, mutual protection and information, protecting the dignity of the debtor and the claim holder's assets, subject to the solidarity that must exist between them"[38].

Conclusion

Good faith has always been in Brazilian law before 2002, despite its enforcement in isolated situations. Due to the inexistence of general clauses similar to § 242 of the German Civil Code, courts avoided to use

[35] BRAZIL. Superior Court of Justice. Recurso Especial n°. 1.192.678/PR. (Nov 13. 2012).

[36] BRAZIL. Superior Court of Justice. Recurso Especial n°. 605.687/AM. (Jun 2. 2005).

[37] BRAZIL. Superior Court of Justice. Habeas Corpus n°. 143.414/MS. (Dec 6. 2012).

[38] BRAZIL. Superior Court of Justice. Recurso Especial n°. 1.143.216/RS. (Mar 24. 2010).

it to set compensations based on it. However, there is an increasing application of this princple by the articles 113, 187 and 422 of the Brazilian Civil Code. Ten years later of its enactment, on can affirm that good faith became an important legal principle in Brazilian law, able to accurately solve many problems related to the lack of consistency, information and cooperation, which create damage to people, and that, from an economic standpoint, cause "transaction costs". So, the recognition of the principle of good faith as a general clause was welcome because it allowed courts to punish opportunistic behavior in private relations in general. Brazilian law, at least in this matter, keeps up with the legal thinking on the subject. But this does not imply, for now, the use of good faith as a means of creating new duties, as happened in other countries, so it can be seen in the analysis of Brazilian case law. Considering the risks in the implementation of a legal institution or a new way of codifying private law, Brazilian courts, fortunately, have been applying the principle of good faith correctly, in order to avoid abuses or distortions that could cause a negative impression of this important concept both for scholars and judges.

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