

Models of consumer protection regarding the law applicable to international consumer contracts and suggestions for Brazilian law

Modelos de proteção ao consumidor no que diz respeito à lei aplicável aos contratos internacionais de consumo e sugestões para o Direito brasileiro

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Abstract: This article addresses three models identified in determining the law applicable to international consumer contracts. Through a methodology of comparative legislation, the European (also adopted in Quebec, Argentina, Japan and the Dominican Republic), the Brazilian and the Chinese (which is similar to the Panamanian) models are presented. It is intended, after the review of these models, verify if Brazilian existing model is the best one, and, if it is not, make a suggestion to improve the protection of the vulnerable part in these situations.

Keywords: Consumer Law - Private International Law - International Consumer Contracts - Applicable law.

Resumo: O presente artigo aborda três modelos identificados quanto à determinação da lei aplicável aos contratos de consumo internacionais. Através de uma metodologia de legislação comparada, são apresentados os modelos europeu – adotado também no Québec, Argentina, Japão e República Dominicana –, o modelo brasileiro e também o modelo chinês, que é semelhante ao panamenho. Pretende-se, após a análise desses modelos, verificar se o modelo existente no Brasil é o melhor e, caso contrário, sugerir um aprimoramento da proteção da parte vulnerável nessas situações.

Palavras-chave: Direito do Consumidor - Direito Internacional Privado - Contratos internacionais de consumo - Lei aplicável.

1. Introduction

Consumer Law has been experiencing a major rise in various legal systems around the globe. Because of globalization and the uncontrolled growth of consumerism, due in large measure to persuasive advertising

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techniques and the ease of online commerce, the disparity of forces between consumer and supplier has called for ever greater intervention in legislation to protect vulnerable part of such relationships. However, due to the increase in tourism and cross-border trade relations, there is also a growing need to determine the applicable law in the event of disputes involving consumers and suppliers.

Three major models for determining the law applicable to such litigation emerge: substantive-comparative approach; substantive-comparative approach with the creation of a special connecting factor to consumer protection; and procedural and alternative approach.

Thus, the present work intends to present and analyze said models, with their advantages and disadvantages, as well as their application in different legal systems and the position of international organizations regarding the subject, intending to show which of them is most protective to the consumers in a globalized world and if Brazilian law protects consumers in an adequate way.

2. Substantive-Comparative Approach

The substantive-comparative model is based on European standards regarding consumer protection in cross-border relations. Consumer protection, although not present in the policies of the European Union with the deserved prominence from the outset, is of undeniable importance. This is because, according to data from the European Union itself, there are currently more than 508 million consumers (EUROPEAN COMMISSION, 2016, p. 3).

It is an expressive number, whose expenditure represents more than half (57%) of the GDP of the European Union (EUROPEAN COMMISSION, 2016, p. 3). It is therefore of absolute relevance that such citizens, as

consumers, enjoy adequate protection in their consumer relations (WARD, 2009, p. 134).

The preamble to the Treaty of Rome, which constituted the European Community, provided for its end “the constant improvement of the living and working conditions of their peoples” (EUROPEAN COMMISSION, 1957). Its article 2 provided for the mission to promote “an accelerated raising of the standard of living” in the States . However, there is no express protection to consumers . This was because at that time consumers were considered solely in their economic sense , in exchange for the production of goods and competition policies. At that time, the legislation advocated directly fair competition and only indirectly the consumer (MARQUES, 2000, p. 51).

The founders of the European Community had in mind that

[...] the joint action of the free movement of factors of production (which in theory would lead to their optimal distribution) and the defense of free competition, supplemented by Community policies on agriculture, trade and transport, would enable the Community consumer to increase its incomes and to choose between an offer of superior consumer goods in variety, quantity and quality at lower prices (MOLINA DEL POZO, 1997, p. 657).

However, this did not occur. It is clear that the consumer experienced the effects of economic growth, but his position vis-à-vis suppliers has become more vulnerable . The elimination of borders and barriers to the movement of goods has brought with it new consumer issues. The consumer was faced with problems such as understanding a label written in a language other than his own, as well as how to proceed administratively or judicially against a producer from another member country.

The origin of consumer protection policy dates to the Summit of Heads of State and Government in 1973 (PEGADO, 2009, p. 78). In its final communication, member states expressed the view that economic expansion should translate into improved quality and standard of living. This

declaration is considered to be the beginning of Community consumer policy.

The Program of Action for Consumer Information and Protection was approved in 1975. The program recognizes five fundamental consumer rights: protection of health and safety, protection of economic interests, compensation for damages, information and education in terms of consumption and representation.

With the success of the program, a second program was developed for the period 1980-85, and action programs have since been implemented. In 1990, the first Triennial Action Plan was approved, whose main themes were representation and active participation, consumer information and security. In 1993, with the Treaty of Maastricht, " it seems legitimate and well-advised to consider that an authentic and genuine consumer policy can claim the European Community" (FROTA, 2007, p. 129) .

The Community standard on consumer protection and information falls into the five major areas where Community activity is distributed in the Second Action Program: consumer protection (food, agriculture, cosmetics, textiles, dangerous substances, specialty products pharmaceuticals, motor vehicles, manufactured goods); consumer protection (misleading advertising, consumer credit, liability for defective products, off-premise sale) justified by the consumer's disadvantage vis-à-vis the supplier, the need to protect him from defective products, consumer misleading advertising , the need to allow the consumer an appropriate choice; consumer protection; information and education; and promotion of consumer interests.

The current action program aims to consolidate and enhance product safety through effective market surveillance; to improve consumers' education, information and awareness of their rights, to develop the evidence base for consumer policy and to provide support to consumer organizations, including taking into account the specific needs of vulnerable

consumers; to develop and reinforce consumer rights in particular through smart regulatory action and improving access to simple, efficient, expedient and low-cost redress including alternative dispute resolution; and to support enforcement of consumer rights by strengthening cooperation between national enforcement bodies and by supporting consumers with advice (EUROPEAN PARLIAMENT AND EUROPEAN COUNCIL, 2014).

The protection of consumers in the European Union has been based on the policy provided for in the Treaty on the Functioning of the European Union, deserving a specific chapter.

However, since consumer relations are increasingly complex and are not restricted solely to their consumer aspect, there is also a provision for the protection of consumers in other policies, such as agriculture and competition. Currently, European consumer policy provides:

[...] a set of common rules that applies to all sales of consumer products and services, online and offline, across the EU; a level playing field for businesses and a ban on unfair commercial practices; access to low-cost, fast and easy dispute resolution mechanisms; a reduction in product safety risks across Europe thanks to more efficient cooperation and market surveillance; information, advice and support on consumer issues; protection for vulnerable consumers such as children (EUROPEAN COMMISSION, 2016, p. 3).

It can be seen, therefore, that there has been a great evolution in European Union law since the Treaty of Rome, and there is even a forecast, among consumer protection policies, of protection of the most vulnerable consumers. Since the 1990s, action plans have been instituted, which direct consumer policy to the specific protection of some aspects. The Multiannual Program for the period 2014-2020 is currently in force and its objective is:

[...] to ensure a high level of consumer protection, to empower consumers and to place the consumer at the heart of the internal market, within the framework of an overall strategy for smart, sustainable and inclusive growth. The Programme will do so by contributing to protecting the health, safety and the legal and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests, and supporting the integration of

consumer interests into other policy areas. The Programme shall complement, support and monitor the policies of Member States (EUROPEAN PARLIAMENT AND EUROPEAN COUNCIL, 2014).

Regarding the law applicable to contracts involving consumers, the Rome I Treaty states that the law applicable to consumer contracts is that of consumer domicile , since such contracts are established considering the commercial or professional activity of the supplier in that country , leaving little room for choice of law, which can only occur in the cases provided for in Article 6 (2) .

In addition to the European Union, some other legislation follows this model. In the province of Quebec, Canada, the choice of applicable law cannot deprive the consumer of the protection afforded by the mandatory provisions of the law of the country of residence of the consumer. In the same sense, the Law of Private International Law of the Dominican Republic determines jurisdiction of the Dominican courts for the resolution of disputes regarding consumer contracts, when the consumer has his domicile there.

The new Civil and Commercial Code of the Argentine Nation, following the same example, determines the cases in which consumer contracts are governed by the law of the domicile of the consumer: if the conclusion of the contract was preceded by an activity performed at the consumer's home; if the supplier has received the application at the consumer's home; whether the consumer was induced by the supplier to travel to a foreign State in order to make the application; and whether the travel contracts comprise the costs of transport and accommodation.

In Japanese law, on the other hand, the European model also has influence, but is given focus to the manifestation of the consumer regarding mandatory rules.

3. Substantive-Comparative Approach and the conception of a special connecting factor to Consumer Protection

Consumer protection in Brazilian legislation derives from the Federal Constitution of 1988, centered on the Social State of Law, which aims to guarantee the rights of citizens and their dignity, “supreme value that attracts the content of all fundamental human rights”, which can be seen in the predictions about the existence of dignity as the purpose of the economic order, social justice as an objective of the social order and guarantees of education, development and preparation of people for the exercise of citizenship (SILVA, 2013, p. 107). The dignity of the human person, therefore, is the central axis that should guide the interpretation of constitutional principles.

As an accomplishment of this objective, art. 5, which deals with fundamental rights and guarantees, provides for a positive action by the State in complying with these guarantees and sometimes an abstention of individuals, avoiding relations that violate such rights. In addition, and in respect to the foundation of free initiative, it foresees that the economic order must guarantee everyone a dignified existence, being limited to the protection of the consumer.

Among the fundamental guarantees is the provision of consumer protection, to be promoted by the State. In compliance with this provision and with the provisions of art. 48 of the Transitory Constitutional Provisions Act, in 1990 the Consumer Defense Code (CDC) was sanctioned (BRASIL, 1990). The CDC is a norm of public order and social interest, whose premise and basic principle is the vulnerability of the consumer. In this way, it radiates to other norms of the Brazilian legal system the protection afforded to the weak part of consumer relations.

In this sense, the Code of Civil Procedure, in force since 2015, has specific rules regarding territorial jurisdiction for the adjudication of consumer disputes, when the consumer is domiciled in the country. In turn, the question of applicable law was not covered by the new Code.

However, Bill no. 3,514/2015, which is primarily concerned with e-commerce, has a specific rule regarding the law applicable to consumer contracts, changing the Law of Introduction to Brazilian Law (LINDB), as well as altering art. 101 of the CDC and allowing the choice of the applicable law in case of actions referring to consumer contracts, provided that more favorable to the consumer.

4. Procedural and Alternative Approach

In this last model, it is possible to choose the applicable law, provided it is made by the consumer and is limited to laws that have traditional connection elements. It is the model adopted by China, for example, that allows the consumer to choose the applicable law in some cases², respecting the public interest that prohibits the choice of a law that harms the consumer³.

In the same sense, Panama's Private International Law introduces a regime of law applicable to unequal contracts⁴ and innovates by inserting in its article 8 a set of fundamental international principles, including the best interest of the consumer⁵. In his art. 95, the law determines as law

² “Article 42: A consumer contract is governed by the law of the consumer’s habitual residence. Where the consumer chooses the law of the place where the commodity or the service is provided, or where the business operator does not engage in any business activity in the habitual residence of the consumer, the law of the place where the commodity or service is provided shall be applied” (PEOPLE’S REPUBLIC OF CHINA, 2010).

³ Social public interest is not defined in either the Civil Code or the Contract Law, but it is generally understood in China to mean social morals and public order. For purposes of application of foreign law, the social public interest has an elastic nature and provides the people's courts with much discretionary power to make decisions on an ad hoc basis. For example, if application of a foreign law would adversely affect state ownership in the form of stocks or shares in a company, or the application would be deemed detrimental to the consumer interest, the foreign law may not be applied by Chinese people's court on the ground of social public interest (ZHANG, 2006, p. 320).

⁴ “Article 89. Unequal or adhesion contracts are understood as contracts in which the weaker party does not have the power to negotiate the essential clauses of said contracts. The clauses that fix the price, the conditions of execution of the contract and the clauses of conflict resolution will be understood as essential or adhesion clauses. The imposition of one of these clauses will be understood as the means of verifying an unequal contract” (REPÚBLICA DE PANAMÁ, 2014 - free translation of the author).

⁵ “Article 8. The fundamental principles of the international community are part of the rules of application of the judge, such as the best interests of the child and the interest of the consumer, which they deprive on any other aspect; equality, fairness, good faith and bargaining loyalty, legal security

applicable where the transaction was concluded referring to the consumer contract, opening space for consumer choice in some cases.⁶

5. Final Considerations

The need for protection of the global consumer has demanded the action of the states in order to, among other measures, determine the applicable law in cases of conflict of laws due to international consumer contracts.

Thus, there are three main models for determining the applicable law in these cases: the substantive-comparative approach, adopted by the European Union and followed by Québec, the Dominican Republic, Argentina and Japan; the substantive-comparative approach with the creation of a special connecting factor to consumer protection, based on Brazilian law; and the procedural and alternative approach, with particular emphasis on China and Panama.

Aware of these provisions, the International Law Association (ILA), in the year 2016, during the Johannesburg Conference, presented its “Guidelines on the best practices on law applicable to international protection of consumers”, with suggestion for the adoption of standards with the best practices on especial rules on applicable law to international consumer contracts. The committee's final suggestion was as follows:

Final Suggestion of the Committee of a mixed Model Rule:
Article 1. Consumer Contracts

over acts, the basic territoriality of the law, the personality of the rules on the State, capacity and family law, proportionality, rights acquired without fraud Naturally competent right, protection of the weakest party, international obligations *erga omnes* and rights derived from *ius cogens* and environmental responsibility and those universal principles of justice applicable” (REPÚBLICA DE PANAMÁ, 2014 - free translation of the author).

⁶ “Article 95. Consumer contracts are governed by the law of the place where the transaction concluded. At the consumer's choice, he may resort to the jurisdiction of his domicile, to the place of conclusion of the contract or to which he is most favorable, depending on the principle of the best interest of the consumer. The most favorable law is the law of repair and protection most appropriate to the interest of the consumer” (REPÚBLICA DE PANAMÁ, 2014 - free translation of the author).

1. An international consumer contract shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
 - a. pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
 - b. by any means, directs such activities to that country or to several countries including that country, and in both cases, the contract falls within the scope of such activities.
2. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be governed by the law chosen by the parties and in absence of choice, by the law of the country where the goods or services were supplied.
3. The parties may choose the law applicable, provided that this law is more favorable to the consumer.
4. The parties may choose between the law of the habitual residence of the consumer, the place of conclusion or the place of performance of the contract, and in this case, the more favorable to the consumer is the law that assures the protective remedies or redress more adequate to the interest of the consumer in the dispute.

It is understood that the model presented is an adequate suggestion for consumer protection in international consumer contracts. As it is seen, Brazilian Bill no. 3,514/2015 is in the same way that the International Law Association, showing the need to approve the Bill in order to protect consumers.

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