OBJECTIVE GOOD FAITH: ITS INTERPRETATION FOR THE JUDICIAL POWER AND THE IMPLICATIONS OF BLOCKING CONTRACT BEHAVIOUR

BOA-FÉ OBJETIVA: É A INTERPRETAÇÃO PARA O PODER JUDICIÁRIO E AS IMPLICAÇÕES DO BLOQUEIO DO COMPORTAMENTO DO CONTRATO

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ABSTRACT

Knowing the role of the other in the established legal relationship, its implementation will be guided predictability, with a sense of security firms, this article aims to focus on the objective good faith and especially the contradictory behavior that needs a stabilization agreements and social relations. Seeking to demonstrate that the contract and the dividend relations as a whole, rather than the firmness of "pacta sunt servanda" need the commitment of the parties not to act reckless and fickle than ever practiced. Thus, the sense of security to both sides, will be full, reaching the goal yearned for autonomy of contractual will.

KEYWORDS: Good Faith Aims; Judicial power; Lock Contract Behavior; Autonomy of the Will.

RESUMO

Sabendo do papel do outro na relação jurídica estabelecida, a sua realização será guiado previsibilidade, com senso de empresas de segurança, o presente artigo tem por finalidade concentrar-se na boa-fé objetiva e especialmente no comportamento contraditório que necessita de uma estabilização de contratos e relações sociais. Buscando demonstrar que o contrato e as relações de dividendos como um todo, ao invés de a firmeza de "pacta sunt servanda" precisam do empenhamento das partes de não agir de forma imprudente e inconstante do que nunca praticou. Assim, a sensação de segurança, de ambos os lados, vai estar cheio, atingindo a meta que ansiava por autonomia da vontade contratual.

PALAVRAS-CHAVE: Boa Fé Objetiva; Poder Judiciário; Bloqueio do Comportamento do Contrato; Autonomia da Vontade.

INTRODUCTION

The expression "principle" induces base, beginning. His mention refers the human being to understand a situation under the direction of bias, as if she could not be conceived or continued without this sense of organization.

There are principles for its insertion into the legal text which unquestionably have this notion base. This is what happens with the objective good faith, set in a preliminary way to the title of the Civil Code dealing with contracts, certainly the interpreter to indicate that this vector is paramount to all celebrated covenants.

There are other not so expressed, which can be derived from the understanding of a legal system and even other positivized principles. It is what happens to the two levels of jurisdiction, not written in the Constitution, but gauge able around the appeal system provided for it. Manifestos or extracted from the system analysis, it is a very special class rule of law.

The use of the principles provides non immobilization of concepts ready, resulting from standardization of institutions, especially of law Civil.Com they break up

the static typified rules, using consistently legal positivism, which cannot consist of simple subsumption of fact the norm.

The mobility required by the legal system has made the doctrine copied to the common law system settings. Him and sensitive systems to the social fact, there are harsh, unchanging and unattainable clauses (hard law) and others, flexible (soft law), moldable to specific cases.

The last setting is fully concerning the principle of objective good faith. She, for example, does not have the scope to change a statute of limitations, but it can conform to the interpretation of a particular case, giving it the contours compatible with the new order dictated by the Civil Code, where the private is no longer so absolute.

This is a vector which currently has great relevance in the legal system, the application of which is inexcusable. Its inclusion in the Civil Code is in Chapter alluding to contracts, but no such indicator suggests its use only in that field, because the obligations in general, ownership, family relations and even tort, can take their lessons.

1. THE HISTORICAL ACCOUNT OF OBJECTIVE GOOD FAITH

The objective good faith goes back to the Roman period, with initial reference in the expression fides, which were threefold: "The historical elements known dãoconta the early fides in prisms diversified semantic. Refer-three: fides of the Cross, the fides-fact and the fides-ethics".(MENEZES CORDEIRO, 1997. p. 54)

Subsequently, the expression fides weakened after treated separated from other elements little represented. Menezes Cordeiro reveals contradictory situations involving the institute, to the point of their banality to the Romans.

> "The fides lose significant force. Your use of this drive. Their presence in various situations and even contradictory, prove it. Such an occurrence - any text attests - is revealed, particularly where it is not possible, given the word "fides" isolated complete any significance: only in the context gains a significant sense." (MENEZES CORDEIRO, 1997. p. 69)

The addition of the suffix *bona* to the idea of fides gave strength to the institute. According to Judith Martins-Costa, it was a revolutionary feature in relations in ancient Rome, as abandoning formalism:

> “The reason of bona fides to be born and develop in this particular field needs to be better explained. It seems to be indeed a paradox that, in the most important business from the perspective of everyday practice, as the purchase and sale, the lease and the articles of association, and also the mandate, be the Roman law marked by dash apparently polar opposite to its essential formality. The ancient Roman experience is essentially defined by the formalism because it is still "primitive," that is launched in the magical world, or semi-magical fashion.” (MARTINS-COSTA, 2000. p. 75)

Forward she explains that this increase was not legal, but due to the commercial experience of the Romans by the Mediterranean Sea, that keeping in touch with other people, identified similarities in the commercial practices of the people. Another historical proof of the incidence of natural law acting in favor of easing the rules.

In Canon Law was significant the presence of principles and may not be different with good faith. He was placed in the context of the Catholic religion with sacred connotations, such as the respect for contracts and private property.

> “Concepts such as ownership or contract obliges not only because they have as underlying certain profane sanctions, but mainly because they are located on a scale which reflects the implementation of God's law. Worth. The good faith belief that technical and legal concept evolved in Roman law, to a commonplace rhetorical, not escape this movement. Inside the Canon Law, won an axiological dimension, understood in the spirit of Christian thought.” (MENEZES CORDEIRO, 1997. p. 159)

The normative force of principles is also observed in the Middle Ages. The legal systems of the time were guided by two spheres, one with more flexible and another supplementary feature, dealing special situations, working in synergy.

> “The lawyer of the Middle Ages did not operate on a system, but on a set of legal systems different from each other. You can configure the relationship between jus commune and multiple sets, represented the rights of customary origin, and own iura, as the representation of relations between two major groups: the first one, jus commune, with a large, open mold common, which acts, in most cases, secondary or supplementary form, and the second, made up of various "micro-clusters", also among themselves distinct, occurring among all dialectical inter-relationship.” (MARTINS-COSTA, 2000. p. 73)

In Germanic law, adherent to the positivist matrix, or good faith won legislative provisions, certainly not to hover doubt of their existence. It was the influence of new cultural trends, imposing spice to a rigid system of rules.

> “Good faith emerges from the German civil law as a product of the dominant jusculturais influences in its preparation. With regard to the objective good faith, strictly separated from the subjective through its own designation in addition to the naive-antiquarian cultural substrate - that the language habits established, proven, so it’s not inocquable - represented by the persistent references to bonaefideiiudicia , there is the influence of the liberal jusracionalism, with its good faith in contracts.” (MENEZES CORDEIRO, 1997. p. 330)

In France the situation was no different. Root similar to the German system, the French also relied on more typified for the resolution of real cases standards, in a spirit of respect for private relations.

> “In the eighteenth century, Europe lived a climate conducive to the need for legal certainty. In France this period, the social and economic structures were in extremely rapid evolution, but had not occurred, although the passage of the "old" to the future kind of bourgeois society. This definitely will put in place only in the nineteenth century, around 1815, about when, closed the Napoleonic wars, begin to be faced the problems of establishing and preserving peace - a peace that will be fragile and short-lived.”(MARTINS-COSTA, 2000. p. 179)

It should be clarified that even this need for a legal system that would ensure legal certainty and freedom of choice, good faith has not been forgotten, stating expressly the Napoleonic Code in Article 1134. This vector, however, I was there to ratify that contracts concluded in the private spheres of autonomy and freedom, had in good faith strengthened compliance.

> “So firm it is freedom of choice as a central principle verdadeiroeixo of contract law and all the obligatory material, whether it scatters throughout on the theory of legal acts. And this principle is so strong that the final diction Article 1134 - "They (the conventions) must be performed in good faith" - left or right muted or envisaged as well as reinforcement of formula the obligation of freely agreed convention.” (MARTINS-COSTA, 2000. p. 204)

This model from the "Ancien Regime" was copied by the Brazilian civil law, which has roots in the two aforementioned systems, played good faith in its subjective form, but without the power to influence the patrimonial root that dictated the Code.

> “For the social organization of the country, the rationality of farmer’s and traders was processed through this class, the tinted with pigments of their prejudices. Adjusted, then, materially and spiritually, the economic and social situation of the country, for the support they received from rural and mercantile bourgeoisie, transfounding the legal system to sap his illustration, organizing legislation inspired by the foreign law, which, although it was, by sometimes above the national reality, corresponded in fact, the interests have the care and development is devoted.” (GOMES, 2006. p. 25)

Timidly, some progress was still suggestible, even in step with socialist ideas, from the German / Mexican constitutions, and even with the creation of the International Labour Organization. One of the most grateful examples, resulting from the increased iron transport was Decree 2,681 / 12, establishing the responsibility to "presumed guilty". It was, however, a shy expression, without the power to influence the new code that was already in place.

> “It appears therefore that, in the Civil Code drafting period, some attempts to introduce social legislation were made through legislative proposals on the subject of industrial accidents in which permeates the breath of new ideas that conquered ground in countries earlier in Europe. But this movement does not have any influence in the Civil Code which was elaborated simultaneously. The prevailing mentality kept true to legal individualism, more consistent, then to the degree of development of the productive forces of the country.” (GOMES, 2006. p. 33)

Thus it came to the civilian system designed in the country until the past decade. Unless reasons jurisprudential exceptions by avant-garde courts, such as Rio Grande do Sul, they had been decisions that opted for the safety of the closed system of concepts, something definitely broken with the new Code and the purposes of Article 422.

2. THE NEW SYSTEM PRESENTED BY OBJECTIVE GOOD FAITH

The act of good faith, according to Menezes Cordeiro, give yourself initially into two camps. First, in acting in situations not clearly defined by the legislature, but the naked eye close down opposition to the legal system. Also in the transition chances of customs and new social situations where the absence of special rules, serve as the vector resolution factor issues.

> "It is understandable therefore that the good faith emerge with force in areas not governed by the encodings for delay of the legislature, as in general conditions, or technical failure or language or even, for inconvenience, as the abuse of rights. It is understood, too, interest in it made in periods of radical change of social and economic data. The place of good faith in the creation and adaptation of law, dogmatic needs of the system is ensured."(MENEZES CORDEIRO, 1997. p. 46)

In addition to these assumptions, we can not forget the consideration of good faith in situations governed by the Code, serving as interpretation of the vector institutes brought it. Remember that at the exhibition, Menezes Cordeiro comes of good faith in a very broad concept that may be carried forward by all parties of the civil systems.

> "The tip of the figures are civilístic you are associated: the blame on the formation of contracts, abuse of law, the modification of obligations by changing circumstances and complexity of the obligatory content. Old institutions and creations of Christian legal thinking to have as reference: possession, acquisition of fruits, the improvements and the putative marriage."(MENEZES CORDEIRO, 1997. p. 17)

With this mechanism, the legal system gains flexibility because it acts within the goals dictated by the Code (objective elements, terms and penalties), working the legislature, with the aid of good faith, in the analysis of specific cases:

> "When stricter regulations are the forecasts will be more inflexible entire system smaller, so will your guests. In this sense, often the positivado system will be in harmony with what you want discipline, all this leading to injustice and social crisis."(CARPENA, 2001. p. 95)

This method, however, more than flexibility and the warranty of fitness for a legal system to concrete situations, is characterized by the strengthening of the judge's role

in the analysis of the sample, being it the actual pickup of the sense of good faith in this case.

> “Through the general clause of good faith, there was a break with the idea that all problems encountered could find easy subsumption under the legal provisions of the law. Are attributed to the judge largest interpretative powers, facilitating that the same prediction legal ownership adapt to new social realities.”(LEITE, 2013, p. 25)

The legalization of the phenomenon that expresses the code is not exclusive of the principle of objective good faith in relation to contracts. In other Code institutes, their presence is essential as a means of understanding the act of the parties in situations involving non-contractual situations, for example, in tort

> “For this reason, it is understood that the good faith emerge with force in areas not governed by the encodings for delay of the legislature, as the general general conditions, or technical failure or linguistic or even for inconvenience as the abuse of rights.”(RÊGO, 2009, p. 11)

This is because the Civil Code can not bring all the required information by the interpreter. Social and technological innovations are such and there would be legislative system able to review every year the social advances, criminalizing modernism arising.

> “First, it is important to understand the notion of relative self-reference system because the obligatory right, the social flow, especially to the economic interests as a springboard, be paralyzed with the classification in law of certain models and *fattispecies*. (MARTINS-COSTA, 2000, p. 29)

There is no mathematical answer to all questions necessary for the pacification of conflicts, whether in the Civil Code or even in special legislation. Remember the issues involving the biolaw that after consensus establish the legal class, has a new scientific discovery to create a new chaos to the right.

The contractual and obligatory right to difficulty is not diverse. For more legal certainty claim that the specific assertiveness behaviors and institutes, there will always be room for concepts derived from the social fact.

> “In addition to the difficulties referred to in determining the content of objective good faith, the concept is the most controversial within the current private law, comprising several definitions, which makes it even more problematic. Among the most common meanings relate: correctness, loyalty, consistency, care, cooperation, fairness, justice, decency, common sense of ethics, solidarity and loyalty.”(CARPENA, 2001, p. 86)

There is no justification for the limitation of these concepts and institutes in certain securities of the Civil Code. Although the objective good faith is inserted in Chapter alluding to contract law, impossible not to imagine that other behaviors are not linked to it. Today, talk is no longer a code typical behavior, but a global legal system, harmonized with the use of principles.

> “In this respect, it can be said that the civil law abandoned the rigid model, systematized by closed formulas and concepts in order to promote the adoption of a more flexible model foundation in general terms, taking into consideration axiological and principalogical issues. Thus, if modern finds that current logic that exists in the Civil Code that is permeated by principles, which lead us to a comprehensive understanding of the legal system, which then, in turn, to present in a unique way.”(MIRANDA, 2013, p. 99/116/103)

Not that there obstacle to the use of objective good faith before that. On the contrary, even if the vector was not inserted in Article 422 of the Civil Code, its role as a structural vector was undeniable, that can be applied to legal relationships.

> “however, it is worth asking if, for example, the principle of good faith was not contemplated by the positive of the Civil Code would be the contractual relationship of operators authorized to despise her. Obviously not, with a view to structuring role of this principle, which, prior to positive law, since the bona fides Roman, was always the general law, or at least, general civil law.”(NALIN, 2007, p. 365)

This was practiced by some courts and in a timely manner some jurists, already comprising the objective good faith as a historical and vector resulting from the natural law. Sensitive to the importance of it in Brazilian law, they dared to invoke this principle for its Roman base or because of its compatibility with the Natural Law system.

Some of this spirit occurred as a result of the Consumer Protection Code, integrated into the system in 1990. By means of express rules or principles, the consumerist diploma consecrated situations mitigating the then current values, honoring new thinking of the relations that order.

> "The entry into force of the Consumer Protection Code, founded in solidaritists principles of the Federal Constitution, significantly alter the contractual theory, hitherto individualistic, liberal and linked to the autonomy of the will and the obligation of contracts."(LEITE, 2013, p. 132)

The phrase that best expresses this phenomenon is the relativity. Contracts and obligations enforceable under all the evidence in the light of the Civil Code, compliance had mitigated or even excluded because of the incidence of the Consumer Protection Code.

> "The very positive contractual system realized relativize the classic principles of private contractual order, establishing, for initial force of the Consumer Protection Code, an innovative principialogical regime on the matter as a whole, which is also a process of constitutional origin. The Consumer Defense Code emphasizes the principles of transparency, trust and fairness in objective good faith, which already seemed to be a trend of civil law under its recoding."(NALIN, 2006. p. 19)

Later, with the term of the new Civil Code glared up understanding contrary to the incidence of objective good faith to legal relations. Previous jurisprudential positions before seen as eccentric, became historical reference in breaking the old paradigms.

However, the inclusion of objective good faith in the new Civil Code, the judge did not remove the role of interpreter and materializing the effects of the principle in this case. As noted, "objective good faith" isolation of that is mere concept; however, incident to a contract or obligation is an instrument of renewal. This requires sensitivity and responsibility to the magistrate as the main element of interpretation of objective good faith.

3. THE ROLE OF THE JUDGE: FLEXIBILITY vs. TRIVIALITY. THE IMPORTANCE OF SEALING CONTRADICTORY BEHAVIOR.

As referred to above, the expression "fides" was trivialized by the Romans the extent of its prestige. This phenomenon would be repeated today if the vector was not embraced by the judiciary and made into law.

Without the coping and the sample, the objective good faith is purely formal. State that certain act was committed without regard to the vector can represent anything, the effects of this failure are not judicial protection object.

> “The thinning of language, thus achieved should not, however, disregard it to be in the presence of formal conceptualizations. In themselves, they do not give the criterion of good faith in the case to decide. It is necessary to extend the research to the subject of the material dimensions, questioning the values and views called to fill the indeterminate appeal to good faith.”(MENEZES CORDEIRO, 1997. p. 1196)

Unlike other code criteria, the incidence of objective good faith presupposes an analysis of data and the seizure of facts. State that there Bridal impediment sibling is possible by the birth certificate of confrontation. Even supposing questioning of the situation by moving away from judicial review (Article 5, XXXVI), would not make illegal the justice of the peace by not allowing this link.

With the objective good faith the phenomenon is different. The form of conclusion of the contract or business, its effects, the situation of the party and other elements require in-depth understanding, not existing as a priori, say the vector offense, unless identical question has already obtained judicial scrutiny.

> “The general clause introduced in the regulatory framework which incorporates a further criterion of legal relevance, in view of which the judge selects certain facts or behaviors to confront them with a certain parameter and seek, in this comparison, certain legal consequences that are not predetermined.”(RÊGO, 2009. p. 63)

This filter is not discretionary. Own Article 422, it is clear objective basis commotion principle of probity, ally in the understanding of objective good faith. In an admittedly open system, there are ways to meet objective based on loyalty, ethics, probity, proportionality, reasonableness and the various related vectors.

> “For its indeterminacy, puts up the key issue of whether the good faith implies discretion. A definitive answer is intended to point to the existence of material

> to be used in its implementation, to the extent thereof, and with the possibility to monitor compliance in the Decision of the hierarchy, which, between them, is discovered."(MENEZES CORDEIRO, 1997. p. 1190)

Through this exhibition, of course the work of the judge never demanded such responsibility. How true superpower, the general clause of good faith, coupled with the provisions of the Consumer Protection Code, where applicable, allowed an extremely open line to the exercise of jurisdiction.

> "The weight of the judge's function, in view of new light that for him opens, After The Civil Code is much higher compared to its previous condition before the civil case. Funny how few managed clauses might cause such a change in civil judicial activity, is fundamental, however, observe the immense amount of social responsibility that today, more than ever, brings the judiciary."(NALIN, 2007, p. 383)

He went to live an appointment system for intervention in the world of private relations. Advances have occurred with true humanization of civil relations, going to consider vectors as the minimum net worth and dignity of the human person.

As a result, some privatist absurd, as the prison due to the search action of conversion and fiduciary arrest in deposit, stopped existing. This seed was still planted in the 90s, when the first decisions daring to counter this abuse privatíst imprint.

See, for example, one of the first positions of the STJ regarding this matter:

> "CONSTITUTIONAL. CIVIL PRISON. "HABEAS CORPUS". FIDUCIARIA SALE ON WARRANTY. INTERPRETATION OF ART. 66 OF LAW N. 4,728 / 65, AS AMENDED BY THE DECREE LAW N. 911/69, IN FACE OF ART. 5, LXVII, THE CONSTITUTION IN FORCE. CRITICAL TO ORDER A JURISPRUDENCE SET TIME CONSTITUTIONAL LAPSES (ART. 153, PARA. 17). KNOWN AND PROVIDO.I APPEAL - THE PATIENT CELEBRATED A TRANSFER AGREEMENT ON WARRANTY FIDUCIARIA. GOOD (VEHICLE) NOT FOUND IN POWER FIDUCIANTE.SEU RECORD WAS NOT IN THE DMV. THE CREDITOR FIDUCIARIA FILED A LAWSUIT SEARCH AND SEIZURE, LATER TRANSFORMED IN DEPOSIT OF ACTION. THERE WAS JUDGED IN TRANSIT. JUDGE DETERMINED THE ARREST OF CIVIL DEVEDOR.II- DISPOSAL OF THE INSTITUTE ON WARRANTY FIDUCIARIA TRANSLATES INTO A TRUE "ABERRATIO LEGIS": THE CREDITOR TRUSTEE NOT AND OWNER; THE DEBTOR NOT TRUSTOR AND TRUSTEE; INVOLUNTARY THE WELL FIDUCIADO DISAPPEARANCE NOT FOLLOW THE RULE MILLENNIAL "RES PERIT DOMINO SUO". MAYBE I COULD SET ON "PAWN SINE TRADITIONE KING" NEVER IN "DEPOSIT". THE ORDINARY COMMITMENT IS ALWAYS WITH LEGAL ORDER LEGISLATOR ESTABELECIDA.NA TRUTH, WHAT THE LAW (DECREE-LAW NO. 911/69, TO CHANGE THE ART. 66 OF CML) DID WAS TO STRENGTHEN THE GUARANTEE CONTRACT BY CIVIL PRISON, WHICH CONTRARY ALL OUR LEGAL TRADITION THAT HAS

> DEEP ROOTS IN WESTERN LEGAL SYSTEM. A "CIVIL PRISON FOR KEEPER DEBT INFIDEL" ART. 5, LXVII CLAUSE, THE CONSTITUTION, SO BE THAT TRADITIONAL (DC, 1265 ART.) .III - ORDINARY APPEAL RECOGNIZED AND APPROVED. (RHC 4.288/RJ, Rel. Minister ADHEMAR MACIEL, SIXTH TERM, ruled on 13/03/1995, DJ 19/06/1995, p. 18750)"(BRAZIL)

The boldness of the Minister Adhemar Maciel was commendable that a historical and legislative construction of the depositary's figure and the owner, literally "desconstructs" the law placed. If the interpretation was purely legalistic, the order would be revoked and there would be the advancement of Law 13,043 / 2004, definitively establishing that in the face of non-delivery of the goods sold in trust, debt entails mere execution.

Then the undeniable relevance of certain judicial interference as germ legislative changes, thus reinvigorating the system. Not olvide, however, that these events should be exercised according to the procedural law, avoiding excesses.

> "Thus, the legislative form of general clauses which now guide the Civil Code can serve as a social change tool, although no offense to fundamental principles of civil procedure such as "dainércia" the impartiality and, above all, without this proves in unconscionability discretion of the judge."(NALIN, 2007. p. 384)

Another example of great intensity regarding the general clauses is Article 51 of the CDC, recognizing the void by operation of law of unfair terms. The power given by the provision to authorize the revision of contractual clauses (even without the parties') has surpassed not only the procedural limits, but put the judiciary as real question facing the future of the contractual relationship involving consumption.

This exhibition worth extract the principle of objective good faith even though figure as relativity factor to legal relations, including the strengthening of vectors Consumers can not ignore the existence of some closed for the calendar system.

> "The discretion is abusive lack of reasoning or rationale that occurs at the classical subsumption system without pre-construction the normative content for the case when it is before a general clause. Undoubtedly, the Civil Code is not provided with only general conditions, but a mix of these and also of an ad hoc rules and should be aware of the magistrate to the normative model with which it is dealing, not to incur the decision later invalidity."(NALIN, 2007. p. 385)

Such caution is indispensable to business confidence that dares to invest or expand operations in Brazil. The flexibility arising from civil principles, especially of objective good faith is very welcome, plus the creation of alternative solutions need to be thoroughly evaluated.

It is imperative that the use of objective good faith, especially from the judiciary, consider the situation. The evolution of open systems and the possibility of refinement of the obligations and contracts for objective good faith is worthy of highlight. However, the trivialization of their use, such as "hand to the glove" in favor of the supplier has a very negative setback.

> “And maybe this is the most arduous and noble mission delegated by the constitutional legislator to scholars and operators of the legal system: finding harmonious balance point at which they are actually guaranteed free enterprise, private property and freedom of labor development - to be values not be avoided in a society that aims at sustainable development - but with replacement chained patrimonialist matrix primarily on the property, for an existentialist matrix, anchored in human dignity.”(GALLI, 2009, P. 81)

This is because the objective good faith does not sit well with the default, ugliness and acts aimed at procrastination of the fulfillment of an obligation when it is lawful and enforceable without justifiable exception.

> " In another haul , this new approach can not and should not extrapolate the systematic modern hermeneutics itself to under the guise of mitigating the contractual classic principles , suffer from the opposite end and apply the newly displaced principles of its legal framework and promoting legal uncertainty for seal the pure and simple breach of contract . " (AHRENS , 2008. p . 136)

The best demonstration of this mismatch lies in the fact that the objective good faith prohibits conduct that threaten the achievement of the contract , consisting of actions they take the other party truly " assault " .

These are the " venire against factumproprium " , the " supressio " , the " surrectio " and " tu quoque " , elements indispensable for the understanding of objective good faith.

> " Whereas the good faith relates to the substance of a given obligation , a series of rights (subjective or potestative) or legal positions that formally , be granted to the parties cease to be so because of the circumstances . Good

> faith , to enforce compliance with ethical and legal standards , seals practices , many of them known to Latin maxims that contradict these parameters. They are , among others, the seal " venire against factumproprium " , " suppression " , " surrectio " and " tu quoque . " (DA SILVA, 2006. p . 137)

This chapter will take care of the first element approach , which can seal will be understood as the contradictory behavior. The " venire " binds to the principle of trust , the contracting parties establish conditions and they want to achieve , within a reciprocal fiduciary relationship.

This foundation of stability can not be broken , especially when a contractor acts differently to the intention previously expressed opposite each other . The contractual relationship can not be room for insecurity and situations of the parties take the necessary tranquility to the attainment of its objects.

> " The prohibition against the venire factumpropriumsurge by influx of the principle of trust. Ensures the maintenance of confidence situation legitimately established in the contractual legal relations. The ban originates from the Canon Law , inadmitindo up the adoption of contradictory behavior. It is a consistent rule , through which seals that act at some point in some way and , subsequently , adopt - a behavior that frustrates , goes against that conduct taken in the first place. " (Duarte , 2004: . 425)

There are no eternal agreements , with the possibility of modification, either by voluntary forms (termination, renewal , etc.) or involuntary (death, unpredictability and theory etc.) , perfectly acceptable in law. It is this hypothesis that the " venire " deals .

The principle of action object is the prohibition of action to take by surprise the other party . It relies on the achievement of the contract or certain portion in the promised manner and may not find , however, different situation from what was sure.

> " Perhaps the clearest example of this mortgage is a ban on " venire against factumproprium " , also known as the doctrine of own acts and characterized as the sealing work in order to counter the previous conduct of the party against the other , crystallizer , this , of legitimate expectations on the maintenance of the practice. Change your mind or way of acting in the space of legality, is widely possible attitude and backed the fundamental rights of first generation. However, when this activity becomes the basis for other people's actions , so that this suddenly change the act , denaturing the legitimate expectation generated in the other part , is sealing object. " (DA SILVA, 2006, p. 138)

It is a complex process , consisting of checking any behavior on the part opposite the retainer . Sudden and antagonistic to what previously was committed

changes are aferíveis warnings by the judge , to the point of emphasis to seal the contradictory behavior.

The jurisprudence is grateful for examples invoking this situation , being a heated debate with the STJ demonstration of the way the principle of " venire against factumproprium " can be used in relation to the case. It is the decision rendered in Special Appeal 1279241 / SP , dealing with health treatment costing obligation experimental level , whose menu is as follows:

> “SPECIAL APPEAL. INSURANCE. HEALTH INSURANCE. INTELLIGENCE OF ARTS. 10, I, E 12 OF LAW 9,656 / 98. COVERAGE EXPERIMENTAL.EXCLUSÃO TREATMENT. Silly that. LACK OF MEDICAL TREATMENT CONVENCIONAL.INDICAÇÃO. INSTITUTION OF RECOGNIZED HEALTH. PROVIDO.1 REMEDY. Law 9,656 / 98 guarantees to policyholders and beneficiaries and health plans to fruition, at least, tests, medications, anesthetics, medical gases, transfusions and chemotherapy and radiotherapy sessions, as a prescription. Thus, insurers and operators are required to cover the said means, treatments and services necessary to find a cure or disease control presented by the patient and listed on the International Statistical Classification of Diseases and Related Problems Health, the World Health Organization .2. The joint interpretation of arts. 10 and 12 of Law 9.656 / 98 leads to the realization that, in the case of taxable conventional treatment with a satisfactory response perspective, can not the patient at the expense of the insurer or health plan operator, opt for experimental treatment. On the other hand, in situations where conventional treatments are not sufficient or efficient, a fact attested by doctors following the case, existing in the country, experimental treatment in scientific reputation institution recognized, indicating for the disease, the insurer or operator should bear the cost of treatment to the extent that this happens to be the only real interest to the contractor by setting the minimum treatment guaranteed by art.12 of Lei.3. Thus, the restriction contained in the art. 10, it, of Law 9,656 / 98 should only be applied when there is effective conventional treatment for segurado.4. Basis of divergence in the formation of the majority .5. Special feature provided.(REsp 1279241/SP, Rel. Ministra MARIA ISABEL GALLOTTI, Rel. p/ Acórdão Ministro RAUL ARAÚJO, QUARTA TURMA, julgado em 02/10/2014, DJe 07/11/2014)”

As it turns out, prevailed the negative coverage, considering the Rapporteur assigned to existing conventional treatment for the disease, (proven he is), it would not be plausible costing experimental therapy. The original Rapporteur, Maria Isabel Galloti, remained unsuccessful, basing diverse majority decision, making use of "venire contra factumproprium" as it assesses below:

> (WINNING VOTE) (MIN. MARIA ISABEL GALLOTTI) "[...] the responsibility for the cost of treatment should fall on the hospital which is investigating the technique to apply it in your business enterprise, and on

> the laboratories that will profit from the commercialization of the drug developed for therapeutic purposes tested in research and cannot be transfer to the health plan this burden, expressly excluded by the contract, in accordance with Law 9,656 / 98 and regulations of ANVISA. "" [...] the fact that the health plan has covered the first part of treatment before to establish a pipeline of 'venire contra factum proprium', it shows the plan good faith because it covered as far as treatment was considered experimental and not be left to pay the contractually excluded experimental part [...]".

This was also the position of another participant of the trial, the Minister Marco Buzzi, referring to the contradiction of the operator to provide treatment and then refusing to do so:

> "(WINNING VOTE) (MIN. MARCO BUZZI)Unable to certain advanced stage of coverage denial of medical treatment on the grounds that the treatment would have experimentally, when the health plan has covered earlier stages and continuity of care is guided the same methods used in these phases. This is because the refusal to fund the treatment, having been previously covered the first two cycles of the same procedure constitutes contradictory behavior."

One can not fail to highlight the brilliance with which the principle was defended by Ministers, even defeated in his understanding. The first part of the treatment was funded by the plan and of course, you had the realization of the second part! There was breach of objective good faith, acting contradictory way the plan it has undertaken in the course of the contract, a fact that unfortunately did not prevail at the end.

This paradigm provides a glimpse of the immense way to go to consolidate the objective good faith and especially the ban to contradictory behavior as basic vectors of the new law.

CONCLUSION

The importance of the principles of open system concepts is unquestionable and endorsed by the Code of 2002. They do not understand how subsidiary elements used only in case of lacuna in the law, but solid basis for hermeneutics.

Not even the most formal vector of the theory of contracts, 'pacta sunt servanda' does not override the objective good faith and the prohibition to contradictory behavior. There is unrestricted to allow the application of a covenant or a clause, when one party has full confidence that conduct already in use in other, should prevail.

> “The prohibition of venire contra factum proprium is a way to express disapproval as inadmissible exercise of rights and legal positions. In the face of contradictory behavior, the law does not cover the maintenance status generated by the first performance, that the law did not recognize, but rather the protection of the person who had the good, with justification, the action in question. The factumproprium imposes itself not as an expression of the rule pacta sunt servanda, but by expressing, in its continuity, one cautioned factor for the realization of good faith.”(MENEZES CORDEIRO, 1997, p. 769)

The main appeal is to focus on the objective good faith and especially thunder against the contradictory behavior are in need of stabilization of contracts and social relations. Knowing of the other's role within the legal relationship established, its achievement will be guided predictability, with sense of security contractors.

> “Not permitting malice, the intent to harm. From the preliminary negotiations, through actual implementation and even after the fulfillment of services by contractors, remaining a bond and reciprocal duties. There is a marked concern to protect the trust which is a result of a negotiation contact, that law seeks to protect.”(DUARTE, 2004, p. 400)

The contract and the dividend relations as a whole, rather than the firmness of "pacta sunt servanda" needs the commitment of the parties not to act in reckless and desultory fashion than ever practiced. Thus, the sense of security, from both sides, will be full, reaching the goal we longed for autonomy of contractual will.

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