

E-COMMERCE AND ANONYMOUS CONSUMERS AND TRADERS

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SUMMARY: *1. Introduction. 2. Capacity and contractual identity. 3. Brief considerations about the Brazilian legal reality and the European community on ecommerce. 4. Conclusion.*

1. Introduction

A 14-years-old Brazilian teenager on vacation in Italy, using his smartphone and visiting a well-known business-buying site based in the United States of America, acquires an European supplier product, manufactured by Chinese producer no identified, with scheduling of delivery in Brazil and having a clause of election of foreign jurisdiction. Is this a valid contract?

In addition to discussions about the place of the transaction and definition of jurisdiction to resolve any conflict in these businesses, there are discussions about the validity of this economic operation and the non-identification of the producer.

In the present times, the participation of infants in social life is increasing, giving opinions, choosing, protesting and even realized contracts. Unavoidable, then, are the questions: Are the manifestation of the will of these people protected and recognized by the legal system? Would the general rules of disability reach the universe of the most current and complex life situations? How to work with producer / supplier anonymity?

The codification movement recognizes that every person is capable of rights and duties – a capacity that is not confused with the personal exercise of rights and which is not restricted to the personality (in this sense, for example, how many depersonalized entities have capacity

negotiation). In turn, are possible contracts without a juridical transaction?

How to explain the efficacy of a compulsory relationship according to which a subject, absolute or relatively incapable, using a computer, a tablet, a smartphone, buys and acquires several products or services, satisfying the most diverse desires.

In times of an economy of speed, a plural and hypercomplex society, markets without frontiers, cyberspace, an incorporeal reality, consumption on demand, of Netflix experiences, Spotify, Zipcar, Cloud Computing, Facebook, Instagram, Snapchat, Second life, it seems inevitable to rediscover the contract and its agentes.

The artificial intelligence is a reality, the interactions go beyond known B2B (business to business), B2C (business to consumer), G2C (government to citizen), C2C (consumer to consumer), reaching H2T (human to thing) and T2T (thing to thing).

We contract the most diverse goods, things, services, utilities, needs and non necessities. We live the world of contracts.

But would the contracts really be juridical transactions?

How to explain the reality of contracts by depersonalized subjects, people and not people, capable and not capable, identified and anonymous.

Today, capacity to contract no longer seems to adjust to the negotiating capacity, to the will qualified by the right. Capacity for law and capacity in fact differ, as well as negotiating capacity and equity capacity.

See:

The Brazilian Civil Code, in its art. 104, determines that the validity of the legal business requires capable agent. Full capacity, in the Brazilian model, is reached at 18 years of age.

But how explain the contracts made by various minors? Existing, would they be valid or invalid, effective or ineffective?

How, by electronic means, ensure this requirement of validity?

According to art. 1425 of the Italian Civil Code, *il contratto è annullabile se una delle parti era legalmente incapace di contrattare*.

In times of intense negotiability, how to guarantee the security of commercial transactions, how to guarantee the viability of the most di-

verse contracts, when does not have the possibility to identify the subjects and their own capacity.

Enzo Roppo has already said that the contract is the legal-formal instrument of economic operations. Before form, there is the economic substrate¹.

It seems increasingly distant the contracts between presents, the possibility of the contract face-to-face. How to preserve private autonomy in the face of these dynamic and virtual ways of acting? No more hand-shaking, but clicks have different effects.

It also highlights the discussion about situations of anonymity or the uncorrected and complete identification of the supply chain.

Here I am for several contracts in their electronic form, including related contracts. I made a few clicks. I acquired air and land transportation on the Internet, also, I negotiated my lodging and other activities through this means. The support was not presential or material, in reverse, immaterial. The terms of use of the shopping sites themselves configure standardized contracts.

Without a compulsory digital ID, I registered with my personal data, filled in some forms, but did not have the proof or the certainty of my negotiating capacity. The IP address is relevant, but can say nothing about the actual user. We all contract and are connected, but not everyone can invariably contract.

Without entering into the possibilities of virtual crimes, what is the certainty that I contracted with subjects with capacity and suitability and who guarantees to my contractors that I would not be a subject, although endowed with the attributes of technology, devoid of intellectual or patrimonial capacity and, of legitimacy. Appearances are worth, but appearances deceive. The virtual identity can be represented by an avatar, virtuality that distance itself from reality or legal possibilities.

The Internet is global, the interests are varied, laws are local and / or regional and not all markets are integrated. As you can see, the complication factors are diverse.

¹ See V. ROPPO, *Il contratto*, 2nd ed., Milano, 2011.

In a report presented at the United Nations Conference on Trade and Development held on 3 and 4 July 2017 in Geneva, the following ecommerce challenges were identified:

- Weak Internet infrastructure, including speed and reliability
- Unstable communications network
- Relatively low online connectivity and insufficient electricity supply
- Language barriers
- Deceptive information and marketing practices with respect to both goods and services and prices
- Misleading advertising
- Lack of clear and sufficient information on both the identity and location of traders, as well as goods and services, prices and guarantees
- E-commerce offers made by anonymous traders
- Drip pricing practices, where the final amount due is not known until the whole process is complete
- Uncertainty on merchantability of goods
- Monetary refunds for non-satisfactory products
- Non-fulfilment of return or refund policies announced on trader websites
- Long and tedious refund process
- Expenses for returning goods to be covered by consumers
- Data security and online scams, identity theft and frauds
- Irreversibility of electronic payments
- Security of online and mobile payments and chargeback options
- Unclear information on chargebacks and withdrawals
- Denial by e-commerce websites of responsibility for online payments that are blocked by banks or payment gateways
- Fraudulent and fly-by-night operators who take money from consumers without providing products or services
- Protection of personal data and privacy
- Electronic identification and authentication tools
- Late or non-delivery of products or delivery of defective, wrong or spurious products
- Non-provision of promised services or offered gifts
- Non-compliance with legally established cooling off periods
- Insufficient or non-existent customer care

- Denial of after-sales service
- Lack of consumer awareness of their rights and duties, as well as those of businesses
- Lack of basic information technology skills and financial literacy
- Concerns about dispute resolution procedures
- Resistance to or delay in providing redress by financial institutions upon receiving consumer complaints, requiring intervention by consumer protection authorities
- Competent jurisdiction and applicable law with regard to cross-border e-commerce disputes.

In the scope of this conference, we can highlight the challenges involving the mechanisms of identification of suppliers and consumers (Electronic identification and authentication tools and E-commerce offers made by anonymous traders).

2. *Capacity and contractual identity*

In the economic sphere or in the case of patrimonies situations, it is possible to recognize the validity and effectiveness of contracts concluded by the incapacitated – unrepresented or unassisted –, separating the agreements from the negotiating basis and defining them as a common activity. The contractual relations of fact – denomination of the German doctrine – often originate of will reflected and socially recognized.

Frédéric Zenati-Castaing and Thierry Revet², commenting the French model of full exercise capacity at age 18, also recognize the validity of contracts made by minors that do not cause them any harm and are socially accepted. In that same sense, Philippe Malaurie³.

The Brazilian legislation itself also allows the child to be held liable for an unlawful act. The art. 928 of the Civil Code provides that the incapacitated person is liable for the damages he causes if the persons

² F. ZENATI-CASTAING, T. REVET, *Manuel de droit des personnes*, Paris, 2006. p.128.

³ P. MALAURIE, *Les personnes: la protection des mineurs et des majeurs*, 4. éd., Paris, 2009, p. 258.

responsible for him do not have an obligation to do so or do not have sufficient means.

The young age, as is seen, it does not disqualify the will of the subject of law and does not remove its responsibility.

The Brazilian Civil Code itself, in art. 181, disciplines that no one can claim what, by an annulled obligation, paid an incapable one, if it does not prove that it reversed to the benefit of the amount paid. In turn, art. 180 provides that a minor, between 16 (sixteen) and 18 (eighteen) years of age, may not, in order to avoid an obligation, invoke his age if he intentionally concealed it when he was asked by the other party, or if, he declares himself to be greater.

Thus, it could be concluded that if the contract was entered by an absolutely incapacitated, under 16 (sixteen) years, even if he concealed his age, the business could be declared null and void. Caution is required.

The problem is compounded by the electronic contracting. How can the offeror, the tenderer or the supplier be able to ascertain the ability of the purchaser, the recipient, the user or the consumer if the information exchange take place digitally and depersonalized?

The conclusive behavior of the recipient of the proposal can be extracted from electronic operations that denote the knowledge of the contracting.

Contracts, by electronic means, seem to address any person and not person. Imagine, for example, depersonalized entities or autonomous imputation centers (bankrupt estate, estate, condominium, de facto societies and others). Is the identification of the supplier and of the consumer legally required?

How to make sure that the contractor has – or not – capacity for fact or exercise, if in the electronic environment, depersonalization is the rule. If the interested party, after satisfying all the electronic requirements of the standard ecommerce program, has created the legitimate expectation in the offeror of the validity of the acceptance, it can not be subtracted from the economic effects of this economic operation, under penalty of violation of confidence in the economic transactions.

The identification of the acquirer or acceptor of the proposal is significant, not only for the discussions involving capacity or incapacity,

but for the definition of the legal regime applicable to the business relationship. Is the purchaser – or not – the consumer? These are, for example, business between businessman and consumer (B2C) or businessman and entrepreneur (B2B).

In the fact society, even if the acquirer or acceptor is incapacitated, if he did not express this situation or could not be perceived, with emphasis on contracting by electronic means, the presumption of validity of the contract based on the principle of trust prevails.

For example, how to disregard the economic operation, consubstantiated in the acquisition of a product (soft drink, juice, snacks) by a minor of sixteen (16) years, by placing money in a machine, especially when the acquired thing was consumed by the own smaller? Is this not a socially acceptable situation?

The Brazilian Civil Code itself, in its art. 113, stipulates that legal transactions must be interpreted in accordance with good faith and the uses of the place where they are celebrated. Discipline is even included the detailed silence. According to art. 111, silence implies consent, when circumstances or uses authorize it, and it is not necessary the declaration of expressed will. Based on the theory of trust, it also provides art. 138 that juridical transactions are voidable when the declarations of will emanate from a substantial mistake that could have been perceived by a normally diligent person, given the circumstances of the transaction.

According to Karl Larenz⁴:

The obligatory effect of the behavior of the user is not based, once again, on the fact that it is imputed to the subject as an expression of the will to be forced, but in the fact that, without taking into account the will of the agent, the behavior will be understood, according to the uses of the traffic, as justification of an obligation. It is the typical social “response” or “reaction” to supply and therefore has the socially typical meaning of a source of obligation. No one can dispense with the legal consequences of his own act. The consequence of the typical social behavior of the agent, unaffordable, independent of his will and therefore

⁴ K. LARENZ, *O estabelecimento de relações obrigacionais por meio de comportamento social típico*, Trad. Alessandro Hirata, in *Revista Direito GV*, São Paulo, v. 2, n. 1, jan./jun. 2006, p. 60.

impossible to eliminate by him, is to be the obligated agent, through the receipt of fact from the benefit, to the custom consideration or according to tariffs.

The OECD policy guidance for addressing emerging consumer protection and empowerment issues in mobile commerce provides examples of situations in which problems could arise when children access mobile devices and purchase products without the knowledge or consent of their guardians (see http://www.oecd-ilibrary.org/science-and-technology/oecd-policy-guidance-for-addressing-emerging-consumer-protection-and-empowerment-issues-in-mobile-commerce_230363687074). Children can make such purchases without having to provide appropriate authentication before making payment commitments. To address this issue, the OECD policy guidance provides for certain measures that stakeholders may take, such as providing parents with the ability to set a ceiling that would limit the amount of charges that children could accrue using mobile telephones. The OECD consumer policy guidance on mobile and online payments recommends that Governments, businesses and other stakeholders take measures to enable parents or guardians to monitor and limit children's mobile and online payments for goods and services.

3. Brief considerations about the Brazilian legal reality and the European community on ecommerce

In Brazil, the Consumer Defense Code does not discipline ecommerce. Fit the Decree No. 7.962 of 15 March 2013 regulates ecommerce contracts, with respect to off-premises contracts and establishing minimum detailed information requirements, underlining that information should be clear and accessible, to avoid misleading advertising.

It seeks greater protection of consumer expectations by including the necessary identification of the supplier, highlighting the necessary information for its location and contact.

In the scope of European Union, the Directive 2000/31 / EC on electronic commerce stands out, with emphasis on the consumer's right to full information.

By Legislative Decree n. 70 of 9 April 2003, Italy has transposed Directive 2000/31 into the internal market, with particular reference to electronic commerce

The Codice Del Consumo itself (Decree No. 206/2005), in its art. 31, has specific concern with minors. Also, in the distance contracts, it is also necessary to identify the supplier, including his geographical address (article 49).

The art. 2250 of the Italian Civil Code also requires that the corporate companies, in their corporate website, indicate as much information as possible, highlighting the headquarters and registration of the constitutive acts.

A basic and differential issue between Brazil and the European Community is the extent of the concept of consumer.

According to art. 2 of the European Directive 2000/31, "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession.

In Brazil, the legal entity can also be considered a consumer (Article 2 of Law 8078/1990).

The challenge remains, it seeks to fully identify the supplier, forgetting the equal identification of the consumer, highlighting the need for technical instruments to assess their real contractual capacity.

4. Conclusion

How to route the solution to this contemporary complexity?

The way seems to be the cooperation and harmonization of legislation.

If we experience network contracts, we need to share and optimize solutions.

If the Internet is global, we need common solutions.

The General Assembly, in its resolution 70/186, decided to establish the Intergovernmental Group of Experts on Consumer Protection Law

and Policy, within the framework of an existing commission of the Trade and Development Board of UNCTAD, to provide the international institutional machinery for the guidelines for consumer protection. The functions of the Intergovernmental Group of Experts are detailed in guideline 97. UNCTAD, through the Intergovernmental Group of Experts, provides an international forum for dialogue, networking and exchanging experiences and best practices in the area of consumer protection. The first session of the Intergovernmental Group of Experts was held in 2016, with more than 300 participants from consumer protection authorities, civil society, academia, legal practices and business associations.

As highlighted in the European Directive 2000/31, n. 58, in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, Uncitral) on legal issues.

If we advance in the contractual annexed duties, with the search of the full identification of all suppliers that are part of the contractual network, we still need to improve mechanisms for identifying the consumer, assessing their real contractual capacity, and protecting the most vulnerable.

Even if the undeniable advances in technology are recognized, in practice, there are real difficulties in identifying the subjects of electronic contracts. How to harmonize the contract law? The challenge remains.