

Chapter 24

Consumer Protection in E-Commerce in Brazil: The Updating of the Consumer's Protection Code

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24.1 Introduction

The globalization and the international commerce resultant from the cultural, social, and economic development of mankind do bring worries.¹ One of the most characteristic results of globalization is the creation of the Internet,² a fact that links the global community together in a virtual world by means of the communication provided by the international network, which has extinguished the space, as mentioned by Jayme,³ and has represented a real rupture with the past.⁴

¹Jayme (2003), p. 85.

²Lorenzetti teaches that “The Internet is ‘an international network of interconnected computers, allowing tenths of millions of people to communicate among themselves, as well as the access to a huge quantity of information all over the world’. Some legally interesting features can be observed: it is an open network, as anyone can access it; it is interactive, as the user generates data, navigates, and establishes relations; it is international, in the sense that it allows transcending the national barriers; there is a multiplicity of operators; it has a self-referring system configuration which lacks a center that may called ‘authority’, operates in a decentralized way, and builds the order as of chaotic rules; has the aptitude of generating its own rules on base of custom; presents an acceleration of the historic time; allows communication in ‘real time’, and a ‘de-territorialization’ of the legal relations; decreases drastically the cost of transactions”. Lorenzetti (2004), pp. 24–26.

It is said that the Word Internet has been first utilized in 1974. Mercosul.com (Org.) (2000), p. 6.

The Internet can be also defined as follows: “[...] international interconnected computers network, that allows its users a quick and dynamic exchange of matters [...]” Motta et al. (2005), p. 242.

Martins asserts that the Internet is one of the most emblematic faces of globalization. Martins (2010), p. 3.

³Jayme (2003), p. 86. In that text the author points out the feature of ubiquity inherent to the E-commerce. The text has been also published in Jayme (2005), pp. 3–20.

⁴Wald (2003), p. 61.

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Such communication, facilitated by the Internet, determines a greater vulnerability of those who communicate.⁵ Among those are the consumers who relate to suppliers of products and services,⁶ entering into remote contracts, connecting themselves by the Internet, which is a new environment of interpersonal relationship.

The Internet has come about in a system of interconnected computer networks in the United States of America, in the Cold War period, along the 1960s, for military and industrial protection purposes.⁷ The world computer network had and has the feature of assuring the quick access to information, not having a unique center for data issuing and receiving. It has appeared as a necessity for distributing information in a decentralized way. In a war time, that was especially important due to the possibility of any attack that would destroy the center of command of the military operations. With the Internet, data might go on being retransmitted, irrelevant of the specific communication points that could be obliterated. Subsequently, the computer interlinking network started to be utilized in the American universities and research laboratories. In a third moment, it has spread around the world. Thus, a great amount of information has become available to people and institutions that could access the network.

The Internet is a world computer network operated by people interacting and communicating, exchanging messages, files and texts, data, images, sound, and voice. Once utilized by companies, the Internet has enabled negotiation without

⁵Marques (2004), p. 72.

⁶The concept of supplier is in art. 3rd of the CDC. Marques says of the concept of supplier in Marques (2006), pp. 393–426.

See also, Pasqualotto (1991), p. 52, abr.

For the comments on art. 3rd of the CDC, see Nunes (2007), pp. 108–124.

In the same way, see Filomeno (2007), pp. 46–50.

Bessa explains the concept of *equated supplier*, beside the *generic concept* of supplier of art. 3rd of the CDC. The author explains that the Consumer's Defense Code indicates and details in other parts, other than in art. 3rd, activities carried out by suppliers of products and services that are subject to the law. Therefore, the definition of *equated supplier* takes into consideration the preponderance of the supplier's activity, and not the configuration of a supplier with all the requirements of the *caput* of art. 3rd. Bessa (2007), pp. 84–87.

⁷Martins asserts that the origin of the Internet “dates back to the 1960s, during the Cold War, when the North American government started the Arpanet project (precursor of the Internet, created by ARPA—Advanced Research Projects Agency, in the sense of a connection among military and industrial computers, in 1969, via the telephone network, so as to prevent a possible nuclear attack, and, in face of such preoccupation, not one only control center to be destroyed existed”—Martins (2010), p. 33.

The same way, it is asserted that the creation of the Internet occurred in 1960s, in the United States of America, although being recognized as a global phenomenon only in the 1990s, with the creation of the World Wide Web, or simply www, which basic idea has been created by Tim Berners-Lee in 1989. Mercosul.com (Org.) (2000), p. 5 e 7.

frontiers, both in the business-to-business (B2B)⁸ and in the business-to-consumers (B2C) relationships.⁹

More than an effective change in the relationship systems, the Internet requires a necessity of transposing and adapting concepts and, wherever applicable, making adequate the existing law,¹⁰ to be complemented by the specific regulation of the innovative aspects of the computer world network, in a civil-constitutional approach, pursuant to the principle of prohibiting retrogression (or of no regression), considered implicitly by the Brazilian Constitution of 1988.¹¹

Under such approach, a Jurists Committee has been instituted by the Federal Senate Presidency,¹² with the purpose of supplying subsidies for the updating of the Consumer's Protection and Defense Code, among other aspects, in the e-commerce subject matter. Such Committee has elaborated a Draft Bill, which on August 2, 2012, has gone through the Federal Senate, identified as Senate's Bill n° 281 of 2012, which "Amends Act n° 8078 of September 11th, 1990 (Consumer's

⁸The *B2B* is also known as *e-biz*, defined as "the exchange of products, services, or information between companies, more than between companies and consumers". Mercosul.com (Org.) (2000), p. 34.

⁹Ballarino refers that, besides the *B2B* and the *B2C* contracts, there are the *P2P* (*peer to peer*), which "are those entered between subjects of the 'degree', mainly known by the exchange of music files according to the modalities of *Napster*". Ballarino (2006), p. 203.

¹⁰Professor Doctor Cesar Viterbo Matos Santolim, a Pioneer in the treatment of the legal aspects of E-commerce, in his excellent Master's Dissertation, defended at the School of Law of UFRGS in 1993, subsequently published as a book, *Formação e eficácia probatória dos contratos por computador*. São Paulo: Saraiva, 1995, sustains that the consumer's protection in E-commerce can occur by applying the principles already enshrined in that sphere, i.e. objective good faith, transparency, confidence, probity, vulnerability, obligational solidarity, and private autonomy. Santolim (2005) p. 55, jul./set.

We can say that Santolim has been inspired by the magnificent Clovis do Couto e Silva, *magister emeritus* at the School of Law of UFRGS, who pondered: "Certainly, the legal world has shortcomings, but this means that it is in a constant evolution, making its principles dynamic, in contact with the social necessities, so as to comprehend situations not foreseen before". Couto e Silva (1976), p. 113.

Junqueira asserts that to the electronic contracts are also applicable the principles of obligatoriness, autonomy of the will, consensualism, and good faith. Junqueira (1997), p. 111.

Following the steps of Santolim and Junqueira, Elias affirms that to those contracts entered via the Internet are applicable, besides the already mentioned principles, the one of loyal cooperation, and the one of information. Elias (2008), p. 70.

¹¹On such theme, Sarlet (2009).

¹²The Jurists Committee has been created on December 2, 2010 by Act n° 305 of the Chairman, who has been reelected until March 31, 2012, by Acts of Chairman n° 308 of 2010, n° 115 of 2011, and n° 206 of 2011. In such period, the Jurists Committee has been presided by the Minister of the Superior Court of Justice (STJ) Antonio Herman de Vasconcellos e Benjamin, and as members Professor Doctor Claudia Lima Marques (Relater-General), and by the professors doctors Ada Pellegrini Grinover, Leonardo Roscoe Bessa, Roberto Augusto Castellanos Pfeiffer and Kazuo Watanabe, and has been advised in the technical-legal area by the legal-technician Wellerson Miranda Pereira. The Report-General of the Committee may be read at Brasil. Senado Federal. Atualização do Código de Defesa do Consumidor: anteprojetos: relatório. Brasília, DF, [2012]. See, mainly p. 27 et seq.

Defense Code), for to improve the general provisions of Chapter I of Title I, and provide on E-commerce.”¹³

The synopsis of Bill n° 281 of 2012 on e-commerce shows the following explanation:

[...] establishing that the legal rules and businesses should be construed and integrated in a manner more favorable for the consumer, and provide on general rules for the consumer's protection in the E-commerce, so as to reinforce their trust and guarantee an effective defense, preserving the safety in transactions, protection to self-determination and privacy of personal data; the rules apply to those activities developed by suppliers of products and services by electronic means, or similar; establishes that consumers can cancel remote contracting within seven days as of accepting an offer, or receipt or availability of a product or service; provides that should a consumer exercise the right to cancel, the accessory credit contracts are automatically terminated, without any cost to consumer; typifies as a penal infringement the act of publishing, hosting, exhibiting, disposing, utilizing, sharing, donating, or in any way assign or transfer personal data, information or identifiers, without the express authorization of their owner and informed consent, save legal exceptions.¹⁴

On March 14, 2012, on the eve of the Consumer's World Day, the Minister of the Superior Court of Justice Antônio Herman de Vasconcellos e Benjamin has handed to the Senate's President, Senator José Sarney, the Report-General of the Jurists Committee for the Updating of the Consumer's Defense Code, with the propositions passed by the members of the Jurists' Committee to be analyzed by the Environment Committee, Consumer's Defense and Inspection & Control (CMA). The main themes approached by the jurists in the three bills were e-commerce, overindebtedness, and class actions. Minister Benjamin has then affirmed: “The proposed updating is surgical. The CDC is a landmark of citizenship, although, after 20 years, it needs to be renewed.”¹⁵

Since August 15, 2012, Bill n° 281 has been going through Congress. It was approved by the Plenary of the Senate and was sent to the House of Representatives in November 2015. During its processing, Bill n° 281 went through several changes, and many provisions are quite different from its original proposal. However, the main objective remains the same.

Bill 281/2012 comes to reinforce the aspect of a more favorable protection of the consumer, not only in the general consumption relations but also in regard to e-commerce.

¹³Senate Bill n° 281/2012 amends Act n° 8078, of September 11, 1990 (Consumer's Defense Code), so as to improve the general provisions of Chapter I of Title I, and provide on E-commerce. Available at: <http://www.senado.leg.br/atividade/rotinas/materia/getPDF.asp?t=177192&tp=1>. Access on: 7 April 2016.

¹⁴Senate Bill n° 281/2012 amends Act n° 8078, of September 11, 1990 (Consumer's Defense Code), so as to improve the general provisions of Chapter I of Title I, and provide on E-commerce. Explanation on synopsis. Available at: <http://www.senado.leg.br/atividade/rotinas/materia/getPDF.asp?t=177192&tp=1>. Access on: 7 April 2016.

¹⁵Brazil. Federal Senate. Jurists Committee presents report on the CDC updating. Available at: <http://www12.senado.gov.br/noticias/materias/2012/03/14/comissao-de-juristas-encerra-primeira-etapa-do-cdc>. Access on: 30 Jul. 2012.

From among the rights assured by the CDC, regarding electronic contracts, are the provisions of article 31.¹⁶ That is so because, certainly, one of the main functions of the Internet is to provide the means of presenting and offering products and services. Therefore, the offer and presentation of products via the Internet must assure correct, clear, precise, and ostensive information about the features, qualities, quantity, composition, price, guarantee, terms of validity, and origin, among other information, as well as the risks they present to the consumers' health and safety. Such rights should be also assured in contracts by the Internet.

Regarding safety, Bill 281/2012 has added subparagraphs XI and XII to article 6 of the CDC, as follows:

Art. 6th. The basic rights of consumers are:

[...]:

XI – self-determination, privacy, and safety of personal information and data provided or collected by any means, including electronic;

XII – freedom of choice, mainly in face of new technologies and data networks, being prohibited any form of discrimination and harassment to consumption.¹⁷

In a seminar in Rio de Janeiro about e-commerce regulation in Brazil, dealing with subparagraph XII of article 6 of the Consumers Defense Code, Guilherme Magalhães Martins¹⁸ provoked the audience with the following questions: freedom of choice of whom? Freedom of expression of whom? There is a need to discuss these principles and to apply them always in the perspective of the protection of the consumers' rights. By the time discussing the end of net neutrality, it is important to think about it.

Santolim ponders that “By mentioning, besides the ‘privacy’ and the ‘safety’, also the ‘self-determination’ of information, as a ‘basic right’ of consumers, the Bill focuses exactly on the dynamic perspective of the utilization of the acquired information by the supplier.”¹⁹ With such, the author wants to say that “any application of such information for producing new information should be the object of a previous authorization by consumer.”²⁰

¹⁶See comments on art. 31 of CDC by Benjamin, Antônio Herman de Vaconcellos e. Das práticas comerciais. In: Grinover, Ada Pellegrini et al. *Código Brasileiro de Defesa do Consumidor*: comentado pelos autores do anteprojeto. 9. ed. rev., atual. e ampl. Rio de Janeiro: Forense Universitária, 2007. pp. 282–289. See also, Nunes (2007), pp. 396–411.

For an analysis on the application of art. 31 of the CDC by the courts, see Marques, Claudia Lima; Benjamin, Antônio Herman de Vasconcellos and; Miragem (2006), pp. 482–494.

¹⁷Senate Bill n° 281/2012 amends Act n° 8078, of September 11, 1990 (Consumer's Defense Code), so as to improve the general provisions of Chapter I of Title I, and provide on E-commerce. Available at: <http://www.senado.leg.br/atividade/rotinas/materia/getPDF.asp?t=177192&tp=1>. Access on: 7 April 2016.

¹⁸Martins, Guilherme Magalhães. Information and Safety (Lecture). Consumer's protection in E-commerce (Pannel). Seminar on regulation of E-commerce in Brazil. Rio de Janeiro and Palácio (2012).

¹⁹Santolim (2012), p. 73 et seq.

²⁰Santolim (2012), p. 73 et seq.

In those two subparagraphs added by the Committee, “There is a strengthening in the consumer’s protection,”²¹ based on trust, and yearning for all phenomena of remote distribution. The idealizers of the Bill have provided an equalization of purchases made outside the business place, at home, and remotely so as to impart more safety to relations,²² thus purchases made by the site, being the consumer or not in the supplier’s place.

24.2 Innovations Brought by Senate Bill n° 281/2012 to the Consumer’s Rights in Brazil: The E-Commerce

The main change wanted by Senate Bill n° 281/2012 includes regulation of e-commerce to the Consumer’s Defense Code. The addition of art. 44-A to the text of CDC inaugurates Section VII of Chapter V (The Commercial Practices) of Title I (The Consumer’s Rights). This Section VII is called “The Electronic Commerce” and it aims to regulate consumer protection in e-commerce in Brazil.

Article 44-A determines that Section VII “provides general protection rules of the consumer in the E-commerce, aiming at reinforcing their confidence and assuring an effective protection, reducing the asymmetry of information, the preservation of safety in transactions, the protection to self-determination and privacy of personal data,” more or less repeating the provisions of article 6, XI, of the Bill.

Article 44-A provides the confidence, freedom of the other party, the weaker party, and mentions good faith. It is a rule of overture and aims at reinforcing such confidence, guaranteeing the effective consumer’s tutelage, providing the application of the rules of the CDC to the electronic media or similar media, foreseeing the technological advancement, which is a positive thing.

Article 44-B determines the minimum information for the consumer to be given access to the supplier. Such provision dialogues with articles 31 and 33 of the CDC, bringing them over to its core, incorporating them; considering that article 44-B will be applied jointly with articles 31 and 33 of the CDC, always by legal determination, in contracts entered into by electronic means, article 44-B imposes a series of requirements to be fulfilled by the supplier of the products and services that they wish to market with consumers by electronic means. Such requirements are information that should be made available in a clear place, of easy viewing, in the supplier’s webpage.

Article 44-B is inspired by the general good faith clause and the supplier’s duty to inform. It is qualified information that the supplier must give to consumers so as to impart safety on the business to be entered by the parties: the information about the supplier that uses an electronic or similar means.²³

²¹Santolim (2012), p. 73 et seq.

²²Marques (2012).

²³Marques (2012).

Santolim points out that the proposed article 44-B “considers a set of information about the supplier, in the E-commerce, that should be made available to the consumer.”²⁴ The author points out that it is about the “application of the principle of good faith (objective), in its sub-principle of transparency, and that it is good for to impart a minimum necessary of certainty about the very existence of the other party.”²⁵

Article 44-C provides for the specific information that should be presented about the features of the products and services offered by electronic or similar means.

Such provision goes on imposing a series of obligations to the supplier of products and services utilizing electronic or similar means: “it means the application of trust [. . .], emphasizing the necessity that the electronic means be not only efficacious as an instrument for accessing the market for the supplier’s profit, but for preserving the possibilities of protection to the consumer’s interests.”²⁶

The contents of the proposed article 44-D also point out the protection of trust in the e-commerce. Such provision governs the conducts imposed on suppliers in the sense of enlarging the consumer’s access to the whole business carried out. One should emphasize the preoccupation of the Jurists Committee in the sense of supporting the characteristic of integrity of the electronic registration, “requirement without which one could not recognize the effectiveness evidence of a ‘document’, in its legal sense,” as emphasized by Santolim.²⁷ The contextual preoccupation, which is the basis for such provision, is the question of a contract’s lasting support.

Article 44-E imposes a list of supplier’s obligations when contracting electronically with consumers: (1) before signing the contract, the supplier must send the content of the contract (its clauses) to the consumer, written in Portuguese, in an accessible language, and can be easily viewed on the supplier’s webpage; (2) the supplier must send immediate confirmation of receipt of acceptance of the offer; (3) the supplier must offer a contract via a durable medium, understood as any instrument, including electronic, that offers guarantees of reliability, intelligibility, and conservation of contractual data while still allowing ease of reproduction (printing or copying); (4) the supplier must provide a form or a facilitated and specific hyperlink to consumer fulfillment in case of exercise of the right to retract. Article 44-E also provides that if the supplier does not fulfill these obligations, the cooling off period should be extended for another 14 days.

Article 44-F aimed at forbidding the practice of spamming. Such provision proposes to ban the sending of nonrequested electronic message to certain addressees.

The Committee has adopted the *opt in* model, which means that “the consumer who wishes receiving the messages should say in advance in that sense, nevertheless recognizing also the *opt out* modality [. . .].”²⁸

²⁴Santolim (2012), p. 73 et seq.

²⁵Santolim (2012), p. 73 et seq.

²⁶Santolim (2012), p. 73 et seq.

²⁷Santolim (2012), p. 73 et seq.

²⁸Santolim (2012), p. 73 et seq.

Thus, a supplier should not send electronic messages to consumers unless the consumer has already opted for receiving them or has already entered into a contractual relationship with the company. In other words, a supplier cannot send over electronic messages to consumers if there is no previous relationship and must stop sending them if consumer says he does not want to receive the e-mails anymore.

Behind such discussion lays the subject of prohibiting the sale of costumers' records and the "follow the money" rule, which is a way of reinforcing the safety of consumers' data.

That is, if the supplier can send e-mails over to the consumer, the messages stop being nonrequested, stop being illegal, either because there has been a previous consumption relationship or because the consumer has authorized them. The text is not clear.

Article 44-G provides that the supplier of product or service through the Internet or any other electronic commerce mode will only ask the consumer to provide the information necessary for the completion of the contract; any other information in addition to the indispensable one will be optional, and the consumer must be given advance notice of this condition.

The same way, it is important to point out the guarantee provided in article 49 of the CDC, where there is a provision for right to retract, which purpose is protecting the consumer's will,²⁹ for such will to be calmly decided and reflected, protected from the aggressive techniques of home sales, out of the business place and remote. Such right, expressly guaranteed by the CDC, influences positively the protection of a consumer who contracts by electronic means, as Internet contracting is deemed a remote contracting. Article 49 is the subject of an updating by the Senate Bill n° 281 and deserves to be applauded.

Article 49 of the CDC mentions expressly those contracts celebrated out of the business place, or celebrated by the telephone, and it provides a seven-days cooling off period to the consumer. The Bill cared about not holding itself just for the electronic means idea for it is a concept that is widening itself.³⁰ Communication through the Internet is similar to the one by telephone. Therefore, one may say that the legal relations established in a virtual environment are also regulated by such rule,³¹ because they are remote contracting, entered into out of the business place. However, there being an updating of the provision, should the Congress pass the text of Senate Bill n° 281/2012, the mentioning in electronic contracts will become clear and express, and there should remain no doubt that article 49 will be applicable to contracts celebrated by electronic means.

²⁹See the comments on art. 49 of the CDC in Nery Junior (2007), pp. 559–564. See also Nunes (2007), pp. 565–572. For an analysis of the application of art. 49 of the CDC by the courts, see MARQUES, Claudia Lima; BENJAMIN, Antônio Herman de Vasconcellos and; MIRAGEM, Bruno Nubens Barbosa. *Comentários ao Código de Defesa do Consumidor: artigo por artigo*. 2. ed., rev., updated & enlarged. São Paulo: Revista dos Tribunais, 2006. pp. 670–683.

³⁰Marques (2012).

³¹Marques (2006), p. 856.

According to its present text, article 49 sets two cumulative requirements for a consumer's contract right to retract: (a) the seven-day term has been complied with, and (b) the contracting has been held out of the business place. By such provision, the Code's elaborator aimed at safeguarding the situations where a consumer who did not have access to the product or service and, therefore, the term is designed to verify the correspondence between the consumer's expectation and the real product purchased due to its increased vulnerability, resulting from the distance between the contracting parties.

By the light of the doctrine and jurisprudence, a contract out of the business place is being deemed as entered into when (a) the product is delivered at the consumer's home and (b) the contracting of the product or service is carried out by telephone.

Assuring the rights to retract in e-commerce is a way of protecting the consumer and preventing abusive practices by suppliers.³² This is because, according to Almeida: "Under the name of cancellation rights, are comprehended all the hypotheses where the law assigns one of the contracting parties (consumer) the ability to, in a certain time period and without consideration, be released from a contract, by means of a unilateral and unmotivated declaration."³³

The rationale of article 49 of the CDC is that the supplier assumes the risks of the commercial practice out of the business place,³⁴ and mainly when it is e-commerce. This does not escape the purpose of the whole CDC's microsystem of protecting the weakest party, more vulnerable in the consumption relation. In other words, "if the physical contact with the product, by its delivery, arises a feeling like cancelling the purchase act, the consumer's right to cancel the contract must be acknowledged when the contract is cancelled."³⁵

One may say that, in e-commerce, there is an extrinsic vulnerability linked to the consumer's technical fragility. The intrinsic vulnerability is related to psychical aspects. They are incidental vulnerabilities, unfavorable circumstances that make consumers even more susceptible of enduring damages, deprived of the full real capability of deciding what is best for them, because of the nonpersonalized and nondialogued conduct of the e-commerce.

About the application of article 49 of the CDC to contracts entered into by the Internet, the Court of Justice of Rio Grande do Sul has decided that "There being a purchase made out of the business place—via Internet—the consumer's right of cancellation is applicable, as provided by art. 49, caput, of the CDC."³⁶

³²Marques (2006), p. 870.

³³Almeida (2005), p. 105.

³⁴Carvalho (2001), p. 106.

³⁵Coelho (2006), p. 34, dez.

³⁶See the synopsis of judgment: Synopsis: Consumer. Purchase and sale outside the business place. Exercising the right of cancellation. Payment by debit on the credit card. Cancellation. Persistence of collections. Passive legitimacy of seller, once it is impossible to identify the true causer of damage. Exegesis of art. 7, paragraph, of the CDC. Purchase made by the Internet. As the right of cancellation of the business has been rightfully exercised, by reason of its characteristics

To exemplify, let us mention a judgment of the Court of Justice of Rio Grande do Sul that applied article 49 of the CDC to a contract entered into via the Internet based on the fact it was carried out outside the business place: “Redressing of damages. Consumer. Purchase and sale of cell phone made via Internet. Right of cancellation exercised as per art. 49 of the CDC. Nuisance for confirming the contract cancellation. Collection of payment installments in the credit card invoice which lasted up to the phone withdrawal. Right of restitution of paid values. Inexistent pain & suffering. Judgment maintained. Appeal not provided.”³⁷

Nery Junior says that the right to retraction exists *per se*, “without the necessity of any justification for the consumer’s attitude.”³⁸ That is, the cancellation clause should focus fully on those cases where the consumption contract is entered into outside the business place. The consequence of exercising the right of cancellation is the client’s satisfaction,³⁹ which should increase the volume of consumption transactions held in the net.

Santolim has a different opinion; he examines the question of the consumer’s right of cancellation in contracts entered into via the Internet and concludes that it is not necessarily a relationship “outside” the business place “as this must be

(art. 49 of the CDC), the collection of the parts related to the undone business is undue. Right to declaration of extinction of contract and unenforceability of installments. Judgment confirmed by its own fundamentals. Appeal not provided. Rio Grande Do Sul. Civil Appeal Panel. *Civil appeal n° 71000955773*, of the 3rd Civil Appeal Panel. Appellant: Terra Networks Brasil S.A. Appealed Party: Luciane Ávila. Relator: Eugênio Facchini Neto. Porto Alegre, 3 de outubro de 2006. Available at: http://www.tj.rs.gov.br/site_php/jprud2/ementa.php. Access on: 30 Aug. 2008.

There are cases where art. 49 is applied to contracts entered via Internet. See: Synopsis: Consumer. Preliminary rejected. Purchase of air conditioner via Internet. Exercising the right of cancellation of purchase (art. 49 of the CDC) after 15 minutes of its concretion. Installments credited in credit card invoice. Request of returning the values not answered by respondent. Ordered to reimburse the unduly collected amount in double. Hypothesis of bad contractual execution, which, in general, does not give raise to indemnification for moral damages. Such amount estranged from condemnation. Appeal partially provided. RIO GRANDE DO SUL. Civil Appeal Panel. *Civil appeal n° 71001388974*, of the 1st Civil Appeal Panel. Appellant: [Americanas.com](http://www.americanas.com). Appealed: Marcelo Ramos Azevedo. Relator: Heleno Tregnago Saraiva. Porto Alegre, March 27, 2008. Available at: http://www.tj.rs.gov.br/site_php/jprud2/ementa.php. Access on: 30 Aug. 2008.

Synopsis: Consumer. Purchase of home theater device via Internet. Exercising the right of cancellation (art. 49 of the CDC). Requesting replacement of purchased item for another of higher quality. Complementation of value by deposit into current account. Item delivery delayed. Business undoing requested. Necessity of returning the amount demonstrably paid for such title. Hypothesis of bad contractual execution, which, in general, does not give raise to indemnification for moral damages. Appeal partially provided. RIO GRANDE DO SUL. Civil Appeal Panel. *Civil appeal n° 71001116813*, of the 1st Civil Appeal Panel. Appellant: Globex Utilidades S.A. – Ponto Frio. Respondent: Patrick Jan Georg Klemm and Aline Leal Fontanella. Relator: Ricardo Torres Hermann. Porto Alegre, April 19, 2007. Available at: http://www.tj.rs.gov.br/site_php/jprud2/ementa.php. Access on: 30 Aug. 2008.

³⁷Rio Grande (2010).

³⁸Nery Junior (2007), p. 560.

³⁹Almeida (2005), p. 109.

approached for its existence in the computers network, and not physically.”⁴⁰ The author defends the restricted application of article 49 of the CDC in contracts entered into by the Internet; he sustains that such provision should be employed in electronic contracts only when a deficit of reflection and/or deficit of consumer’s information is proven.⁴¹ That is, according to Santolim, not every supplier who offers his products and services via the Internet instigates a consumer to buy by impulse. Therefore, the application of article 49 of the CDC would not be justified in all and any electronic contracts.

During a public hearing held in the Court of Justice of Rio Grande do Sul, in Porto Alegre in 2011, organized by the Jurists Committee for the Updating of the Consumer’s Defense Code,⁴² Santolim has mentioned that such debate will be surpassed in case the Congress accepts the modification proposed by the Jurists Committee in the text of article 49 of the CDC.

The new text of article 49 of the CDC, as appearing in Senate Bill n° 281/2012, proposed by the Jurists Committee, is the following:

Art. 49. A consumer may cancel the remote contracting, within seven days as of accepting the offer or receipt or availability of a product or service, whichever occurs the last.

Par. 1st. If the consumer exercise the right of cancellation foreseen in this article, the eventually paid amounts, at any title, during the reflection term, should be returned at once, monetarily indexed.

Par. 2nd. By remote contracting it is understood the one carried out outside the business place, or without the simultaneous physical presence of consumer and supplier, mainly at home, by telephone, by mail order, by electronic means, or similar.

Par. 3rd. It is equated to the contracting foreseen in Par. 2nd hereof, that one where, although carried out at the business place, the consumer did not have the previous opportunity to know the product or service, for not being on display, or for the impossibility or difficulty of accessing its contents.

Par. 4th. The withdrawal formalized within the period provided for in the *caput* implies the return of the product with all accessories received by the consumer and invoice.

Par. 5th. If the consumer exercises the right of cancellation, including withdrawal of funds or financing transaction, credit ancillary contracts shall be automatically terminated and must be returned to the credit provider the total amount financed or granted supplied to him, plus any interest due until the effective date of return, taxes and fees, which are charged only when applicable.

Par. 6th. Without prejudice of the consumer’s initiative, supplier should communicate at once the manifestation of the exercise of cancellation to the financial institution of credit card administrator, or similar, so that:

I – the transaction should not be entered into consumer’s invoice;

II – the amount should be reversed, in case the invoice has been already issued at the moment of communication;

III – if the price is fully or partially paid, be entered as a credit of the respective amount of the invoice immediately after the communication;

⁴⁰Santolim (2004), pp. 93–94.

⁴¹Santolim, Cesar Viterbo Matos. The principles of consumer’s protection and E-commerce in the Brazilian Law. *Revista de Direito do Consumidor*, São Paulo, v. 14, n. 55, p. 79, Jul./Sep. 2005.

⁴²Santolim (2012), p. 73 et seq.

Par. 7th. Should the products supplier fail to comply with the provisions of par. 1st or par. 6th, the paid value should be returned in double.

Par. 8th. Supplier should inform clear and ostensibly, the adequate, facilitated and efficacious means available for the exercise of the right of cancellation of the consumer, which must contemplate, at least, the same ways used in the contracting.

Par. 9th. The supplier should send over to consumer an individuated and immediate confirmation of receipt of the notice of cancellation.⁴³

In a different positioning from Marques,⁴⁴ who sustains the unrestricted application of article 49 of the CDC, because of the distance between the supplier and the consumer, which emphasizes the consumer's vulnerability, Almeida affirms on the fundamentals of the right to cancelation: "The most common of the indicated fundamentals is the granting of the time necessary for a reflected consent, a cooling off period, that protects consumers against the risk of rushing provoked by the psychological persuasion and pressure, by surprise and seduction of the aggressive methods of marketing. As a cumulative or alternative fundamental to the protection of reflection, it is invoked the neutralization of the deficit of information of consumer, in situations that make difficult seeing the product and check its quality, of the institutional unbalance inherent to the circumstances of situational monopoly. Acting as a compensation for the psychical and informative inferiority, and safeguarding the formation of a will free of influences, the right of cancellation would work as an instrument for the realization of the material and effective contractual freedom. [...] Thus, the right of cancellation appears as a substitute, either of coercion, or of willfulness, depending on how one keeps more in view, the protection of reflection, or of information."⁴⁵

Coelho presents a criterion of thoughtfulness as to the application of article 49 of the CDC to contracts entered into via the Internet. Says the author: "Such disposition (art. 49 of the CDC), should we remain in its literality, would be applicable to the E-commerce. But it is not appropriate to establish that any consumption act made via Internet could be cancelled by a repenting consumer, within 7 days. Think of any financial operation made by Internet-banking, such as a fund application, money transfer, or loan contracting. It is not reasonable supposing that, 7 days after, a consumer could unilaterally undo the operation just because he repented of his act. On the other hand, it is undeniable that the physical contact (visual or tactile) of consumer with a product he intends to buy transmits him information that no Internet page is capable of supplying. The most true an electric appliance photo can be, and presents details; however much he turns it 360°, the physical contact of

⁴³Art. 49 of the Senate Bill n° 281/2012. Amends Act 8078 of September 11, 1990 (Consumers Defense Code), for improving the general provisions of Chapter I of Title I and provide on E-commerce. Available at: <http://www.senado.leg.br/atividade/rotinas/materia/getPDF.asp?t=177192&tp=1>. Access on: 7 April 2016.

⁴⁴Marques (2004), p. 259.

⁴⁵Almeida (2005), pp. 107–108.

the product displayed in a store permits the consumer to have a more complete idea of what he is purchasing, should he conclude the purchase.”⁴⁶

And the author concludes: “In general, art. 49 of the CDC can be applied to E-commerce whenever there is less information on the product or service to be bought in such sales channel, than in the physical commerce. That is, there is no right of cancellation if consumer may have, by the Internet, strictly the same information about the product or service he would have if the consumption act would have been practiced in the physical and not virtual environment. That is, if the site permits consumer to listen to the CD tracks and presents all information appearing on the cover and back (that is, permits rigorously all the same consumer would be entitled to access if he would have been examining the product in a physical store), then there are no reasons to recognize the right of cancellation. On the other hand, however more information provided by the site, the Internet user has no chance to open the fridge’s door or feel the size of a TV set. In this case, if the physical contact with the product, by the delivery, causes a feeling of cancellation of the purchase act, the consumer’s right of cancelling the contract must be recognized.”⁴⁷

The inclusion of paragraph 5 of article 49 by Senate Bill n° 281 in the Brazilian Consumer’s Protection and Defense Code addresses some of Coelho’s problematics, trying to solve them.

One of the latest amendments introduced was the one that included article 49-A in Senate Bill n° 281, to specifically deal with the purchase and sale of air tickets on the Internet:

Art. 49-A. Notwithstanding the right to termination of the air transport contract before the start of the journey (Art. 740, § 3° of the Civil Code), the exercise of the right to retract from the purchase of airline tickets may have its cooling off period differentiated, because of the peculiarities of the contract, by standard based on regulatory agencies regulation.

Single Paragraph. The regulation mentioned for in the *caput* should be held no later than one hundred and eighty days after the entry into force of this Act.

Article 49-A clearly restricts the consumer’s right to retract, in the case of purchase of air tickets.

Trying to increase the consumer’s protection before the work of the Jurists Committee, in her excellent book “Trust in the E-commerce and consumer protection: a survey of the legal businesses of E-commerce consumption,” Marques had suggested some complementing to the Consumer’s Defense Code, to expressly mention the contracts entered into via the Internet and other electronic means. Among them is the inclusion of an article 49bis, with the following text:

⁴⁶Coelho, Fábio Ulhoa. Direitos do consumidor no comércio eletrônico. Available at: <http://www.ulhoacoelho.com.br/pt/artigos/doutrina/54-direitos-do-consumidor-no-comercio-eletronico.html>. Access on: 1 Aug. 2010.

⁴⁷Coelho, Fábio Ulhoa. Direitos do consumidor no comércio eletrônico. Available at: <http://www.ulhoacoelho.com.br/pt/artigos/doutrina/54-direitos-do-consumidor-no-comercio-eletronico.html>. Access on: 1 Aug. 2010.

Art. 49bis. When a supplier uses, either for the conclusion, or execution, total or partial, of a contract with consumers, an electronic means, of telematia, teleshopping, or similar means of mass media, he should organize a technical mean so that the consumer may have a previous access to the contract's text, and the information imposed by articles 31, 33, 40 and 52 of this law; and may inform, quick and definitely, the occurrence of error or failure in the order or prompt cancelling of the contracting, without financial cost for such.

Par. 1st. In such cases, he should also organize a technical mode so that the consumer may keep and file the text of the contract and be given a confirmation, individuated and automatic, about the contracting success, its time and place.

Par. 2nd. When the duties of the caput hereto are fulfilled, the supplier should organize a technical mode so that the consumer may – by the same mode – communicate his repentance, in fourteen days, pursuant to the regime imposed by art. 49 of the law hereto, and be given a confirmation on the contract's termination. Should consumer not receive the information foreseen in n° 1, his term of repentance, according to art. 49, should be extended to thirty days, as of the moment he identifies the physical address of supplier.⁴⁸

Marques' inspiration for writing article 49 is in the European law, with a longer term of reflection so as to safeguard the consumers' rights; the author's suggestion was in the sense that the consumer can desist from contracting at once, realizing repentance from contracting, and increasing the term for exercising the right of cancellation.

On October 25, 2011, the European Union has adopted Directive 2011/83/EU⁴⁹ of the European Parliament and the Council, regarding the consumers' rights, which amended Directive 93/13/EEC⁵⁰ of the Council and Directive 1999/44/EC⁵¹ of the European Parliament and the Council and which has revoked Directive 85/577/EEC⁵² of the Council and Directive 97/7/EC⁵³ of the European Parliament and the Council. Such European Directive has modernized the European law.

Thus, looking for a dialogue between the concept of business place set by the Civil Code and the rule of article 49 of the CDC, both should enter into effect,

⁴⁸Marques (2004), pp. 468–469.

⁴⁹Directive 2011/83/EU of the European Parliament and the Council, of October 25, 2011. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:088:PT:PDF>. Access on: 3 Aug. 2012. A deeper analysis of this European Directive will be made in a further opportunity.

⁵⁰Directive 93/13/EEC of the Council, of April 5, 1993, ref. abusive clauses in contracts entered with consumers. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:PT:HTML>. Access on: 3 Aug. 2012. As amended.

⁵¹Directive 1999/44/EC of the European Parliament and the Council, of May 25, 1999, on certain aspects on the sale of consumption goods and the guarantees thereto. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:171:0012:0016:PT:PDF>. Access on: 3 Aug. 2012. As amended.

⁵²Directive 85/577/EEC of the Council, of December 20, 1985, ref. the protection of consumers in the case of contracts negotiated outside the business places. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0577:pt:HTML>. Access on: 3 Aug. 2012. Revoked.

⁵³Directive 97/7/EC of the European Parliament and the Council, of May 20, 1997, ref. protection of consumers rel. remote contracts. Available at: http://ec.europa.eu/consumers/policy/developments/dist_sell/dist01es.pdf. Access on: 3 Aug. 2012. Revoked.

observing that a site is a mere representation of the physical place and can be understood in the legal context as “at a distance” and/or “outside the business place.” The virtual place of business and the physical place are one and only legal reality, differing in the aspect of their representation and the means where they are inserted.

As demonstrated above, there is no consensus in the doctrine about the fundamentals of the application of the consumer’s right of cancelation to the electronic contracts. While some jurists sustain its application for being contracts celebrated outside the business place, others affirm that it is necessary because of the insufficient information or lack of information provided to the consumer on on-line contracts that justifies the reflection period or the cooling off period provided to the consumer, so he can think about the need to contract.

The proposed amendment in the text of article 49 of the CDC, made by the Jurists Committee for the CDC’s Updating, is in perfect consonance with the technologic advances of the contracting means and the necessary adaptation of our consumerist law. The Committee has kept the term of reflection in 7 days, as they considered that it was not the opportune moment to widen the term to 10 or 15 days, as in Europe.

The Committee has kept the 7-day term of reflection, while in Europe it is 14 days, since 2002, for financial services, and since October 2011, by Direction 83/2011.

Bill n° 281/2012 on e-commerce still foresees punctual amendments in some more articles of the CDC:

- in article 56, with the insertion of subparagraph XIII, which will provide the “temporary suspension or prohibition of offer and electronic commerce,” more polemic, based on the precautionary principle;
- in art. 59, with the addition of paragraph 4, which will determine that “Should a supplier, by electronic or similar means fails to fulfill the penalty of suspension or prohibition of offer, and of E-commerce, without prejudice of other administrative or legal measures of prevention of damages, the Judiciary will determine, by request of the administrative authority or the Public Attorney Office, within the limit strictly necessary for guaranteeing the effectiveness of sanction, that the performers of financial and payment services used by supplier, alternatively or jointly, under payment of a daily fine: I – hold the payments and financial transfers to a supplier of E-commerce; II – block the banking accounts of supplier”;
- the insertion of article 60-A imposing that the reiterated breach of the supplier’s obligations set forth in this law may give rise to the application by the judiciary of a civil penalty in an appropriate amount to the seriousness of the conduct and sufficient to inhibit further violations, without prejudice to applicable criminal and administrative sanctions and the compensation for damages, material and moral, caused to consumers; it also determines that the degree and the allocation of the civil fine must observe the provisions of article 57 of the CDC;

- the inclusion of article 60-B, stating that “Without prejudice to the sanctions provided for in Chapter VIII, based on formalized complaint by consumers, the administrative authority in their respective area of expertise and competence, may commence administrative proceedings, secured contradictory and full defense to apply, individually or cumulatively, in case of proven violation of consumer protection rules, the following corrective measures, establishing a deadline for compliance: I - replacement or repair of the product; II - return than any paid by consumers through misappropriation; III - offer compliance by the supplier, where it is included in writing and expressly; IV - return or chargeback, the supplier, the amount paid by the consumer when the delivered product or service does not correspond to what expressly agreed by the parties; V - adequate provision of information required by the consumer, where such application store relationship with the purchased product or service contracted. § 1° In the case of fixed-term failure by the administrative authority for corrective measure imposed a daily fine shall be charged in the sole paragraph of molds of art. 57. § 2° The daily fine mentioned in § 1° will be reversed, as appropriate, to the Defense Fund of Diffuse Rights or the state or local funds to consumer protection”;
- in article 72-A, in which the Committee adds a penal type, characterizing a crime against the consumption relations for a supplier who utilizes the e-commerce to “Publish, host, exhibit, license, dispose, utilize, shares, donate, or in any way assign personal data, information, or identifiers, without the express authorization of their owner and informed consent, save legal exceptions. Penalty – Imprisonment, from one to four years, and fine”;
- finally, the Committee’s amendment of the text of article 101 of the CDC, which deals with the actions of contractual and extracontractual liability, including remote supply, national and international. The international dimension of the Consumer’s Defense Code appears, and an international contract adapted to a globalized consumption society. The same way, article 101 tries to fight the clause of choice of court and arbitration in the consumption relations.

24.3 Final Considerations

In face of a diversity of factors that lead to the appearance of new contracts, and different modes of contracting, the law cannot remain tied to inert dogmas that were adequate for a certain historical period and a specific economic, political, and social order. The multiplication of contracts, as observed in the entering of contracts of adhesion, by telephone, by computing; the contract entered into by the Internet; the international contracts; and the consumption contracts illustrate that the way of thinking of law in the twenty-first century must transform into a stronger and more complete one, becoming an efficient tool in the dealing with the legal relations that are being set by the Internet.

The Brazilian society has changed from 1990 to date, the economy has changed, we have a new Civil Code, and the Consumer's Defense Code must be updated. Therefore, it has been of extreme importance the updating work of the Consumer's Defense Code carried out by the Jurists Committee, elaborating the Bill of updating on the e-commerce theme.

The legal regulation of this novel technique imposes the reexamination of traditional concepts, as always occurs when new technological developments are created. The jurist ought to, on one side, carry out the reinterpretation of the system in effect, deepening the analysis of values and principles inscribed in the core of the traditional concepts, and betake an interpretation by the light of the Constitution, remaining always attentive to new challenges; on the other side, it ought to be the mediator between the multiple interests, sometimes contradictory, that the utilization of such technology generates in face of the different categories of actors, either suppliers or consumers.

It is also for the jurist to conciliate the classical contractual principles to the postmodern, multiple, and pluralist conception of contract, overcoming the existing impasses and catalyzing the true cultural revolution that is occurring, started by the coming of the Internet. The new society requires, therefore, a new law, a new legal dogmatism.

Finally, one cannot forget to recognize the important role to be played by the judiciary in the interpretation of the consumers' protection rules so as to adapt them to the consumption carried out via the Internet. It will not be different, after the updating of the CDC: it will be up to the judges and the materializing action of precedents to contribute in a decisive way to the definition of the limits and the reaching of the provisions contemplated by the Consumer's Defense Code, dialoguing with the Civil Code and aiming at the protection of the dignity of the human being and the protection of the more vulnerable ones, by analyzing the contractual relations of consumption by the Internet.

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