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DUTY TO MITIGATE LOSS : A BRAZILIAN PERSPECTIVE

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Abstract : *This article deals with relevant legal aspects of the harm mitigation doctrine, focusing on the benefits of its application, demonstrating its importance and collaboration, taking into account the scenario of the country's law, where a balance is sought in civil relations as a whole, but especially in contractual relations that have received a re-reading of their institutes, with the insertion of a new range of principles in the Civil Code. Among the points discussed, we highlight the moment of the breach of contract due to default with the performance of the "duty to mitigate loss", the way it has been applied in other countries and a Brazilian jurisprudential analysis on the subject.*

Keywords : *Brazilian Law, Contract Law, Contractual Relationships, Civil Code, Duty to mitigate loss.*

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TABLE OF CONTENTS

INTRODUCTION

The man is a contractualist being par excellence. It is axiomatic the presence of contracts in the everyday life of a common Brazilian citizen, as well as the paradigmatic and theoretical change that the subject has been suffering with the new perspective of Brazilian Civil Law inspired by the constitutional phenomenon of post-positivism.

The "duty to mitigate loss", also called "duty to mitigate damages", is a new legal principle that concerns to put limit in the damages that an injured party may receive from a breach of contract. In an elucidating way, this is a doctrine that has roots in common law, but which has become an interpretative parameter when there is a relation between contractual law and civil liability.

This principle has been increasing over the past few decades, civil judges have adopted this doctrine in lease disputes. Of course, not all jurisdictions have adopted the theory, but several judges have decided that it is a default rule for landlords in both residential and commercial leases, for example.

It is from this perspective that we seek, preliminarily, to analyse the concept and the foundation of the doctrine object of this study, giving an approach and focus to the dialogues of common law and civil law sources. We also bring the discussion and try to verify the applicability and the importance of duty to mitigate loss, in the law based on the principle of objective good faith.

It stresses that this work is based on the Brazilian Civil Code, proposing to study the minimization of damages by the creditor in Brazilian law, in the perspective of a contractual law that adds to the classic principles of economic liberalism, new principles based in ethics, sociality and concreteness.

Therefore, we used the bibliographical method, because initially the work will be developed from information provided by legislation and doctrine, to analyse the mentioned theory making a parallel between civil liability, contractual law and the doctrine of avoidable damages, in order to consider this relationship as a starting point for new perspectives in Brazilian civil law.

I. THE DUTY TO MITIGATE LOSS

The Roman word *contrahere* etymologically refers to the settlement of lasting relationships, now under the contemporary view of the noble jurists Sztajn and Zylbergsztajn, a contract means a way of coordinating transactions, promoting efficient allocation of risk, as well as efficient incentives and cost savings transaction.

It remains to be seen that there has been a long evolution of the contractual instrument, not only in terms of its concept, but also its incidence and species. Nevertheless, the idea of an agreement of will remains carried out, without any blemish that, preferably, will be extinguished through its regular compliance.

The general rule is that obligations arise to be duly complied with, however, in the face of the factual reality, situations of default are extremely common.

When faced with default, the legal sphere has as satisfactory options: the enforced fulfilment of the default obligation or the compensation for damages caused by the debtor. In countries with a German Roman positivist tradition, among which we can cite Brazil, there is a preference for the first legal way.

The order to do or not to do the agreed obligation, despite of being the most used way is not always possible in the concrete case. Thus, appearing in the sphere of civil responsibility the duty to indemnify, as prescribed in the Brazilian Civil Code in its article 927: *"Art. 927. He who, by an unlawful act (articles 186 and 187), causes harm to another, is obliged to repair it"*.

The function of civil responsibility in the words of the civilian nobleman Cavaliere Filho (2006) is based *"on the desire to compel the agent, the cause of the damage, to repair it is inspired by the most elemental sense of justice. The damage caused by the unlawful act breaks the previously existing legal-economic balance between the agent and the victim"*.

In a diametrically opposite sense, the duty to repair is limited. Initially, it urges to assert the relevance of the unpredictability, since it is unenforceable the benefit arising from a supervening alteration of the circumstances with which the debtor did not act with any form of guilt in feeling *latu sensu*. In a similar way, it is not possible to condemn reparation to damages for which there is no certain evidence. Finally, it is necessary to speak about avoidance of damage, to which this article will detail.

In this perspective, the duty to mitigate loss, also called the theory of avoidable damages, in the conceptualization of the indoctrinators Cristiano Chaves and Nelson Rosenvald, is the duty that the creditor contractor has to adopt the swift and adequate measures so that the damage of the debtor is not aggravated.

As an example, let's imagine the lender who goes to a car shop and makes the purchase of one of the products. When taking the vehicle to his house on the same day, the buyer perceives a deep scratch in the body of the car, however, it acts with desiderata, and only after months it decides to return to the establishment. The scratch that at first could be solved with a simple service of painting, due to the action of the time and external factors undergoes oxidation process being necessary the exchange of the whole door of the movable good.

Keep in mind that because of a warranty breach the buyer is allowed to recover consequential damages resulting from the defect, in other words, the difference between the actual and the represented value of the goods. Moreover, the courts have, also, been considering indirect consequences as recoverable by the party. However, the general principle of the law of damages says that the injured party cannot recuperate for injuries which he could have avoided by the use of reasonable care.

In this view, we can cite the words of Grismore[3]: *"The promise is, in general, entitled to recover the economic equivalent of the performance promised, at the time and place fixed in the contract, plus any losses incurred or gains prevented through not receiving it, less any savings that have resulted to the promise from not having to perform his own undertakings under the contract".*

Furthermore, idealize a situation where the glazier places glass windows in a room of an apartment, where it is easily possible to see flaws, but the owner of the apartment, only after a heavy rain that spoiled his sofa, seeks to claim damages. Finally, it is also hypothetical to imagine the case that a common citizen makes a loan with a financial institution, and due to the fact that he has lost his job he fails to regularly pay the instalments, remaining in arrears, but the bank only charge after a few months, when due to interest and monetary corrections the debt already reaches sumptuous values.

In all of the examples described above, the duty to mitigate loss applied at its maximum effectiveness would be able to minimize or even nullify the losses caused by simple diligent and

[3] GRISMORE, CONTRACTS, § I91 at p. 306 (1947).

speedy attitudes of the creditor, promoting a greater likelihood of a friendly solution as well as a lower economic.

At this point, it is necessary to emphasize that the economy is a collective good, and the unnecessary expenditure of resources in its most diversified forms, represents going in opposite sense to the fundamental constitutional objective that guarantees the national development.

Amartya Sen (2010), in his work entitled *"Development as Freedom"*, highlights the importance of the binomial freedom and responsibility as something that should be used in association with the purpose of preserving the common good and life in society: *"The path between freedom and responsibility is twofold. Without substantive freedom and the ability to accomplish something, one can not be responsible for doing so. But to actually have the freedom and capacity to do something imposes the person's duty to reflect on doing it or not, and this involves individual responsibility. In that sense, freedom is necessary and sufficient for responsibility".*

In short, the causal link of the damage to be reimbursed when the duty to mitigate the damage itself is not put into practice, is the individual responsibility, not the default, since the latter, by its own forces, would be unable to produce such results.

The current legal situation requires and has sought alternative solutions to conflicts other than the classic jurisdictional procedure as a way of trying to energize a judiciary that today represents a legal insecurity for society, for not being able to give quick answers to the desires of those who are looking for factors such as increasing demand, expansion of the judicialization culture and lack of infrastructure.

The fact is that once implanted in the common sense of the national people, it must make the minimum damage and thus the problem as a whole smaller, making personal efforts even in situations where it is a victim of the breach of the contractual instrument, all methods of alternative conflicts proposed by the National Council of Justice, such as conciliation, mediation and arbitration, should have a better operability and even decrease costs for public coffers.

Although, if it is not possible to apply the theory of avoidability in the preventive or alternative sphere of law, there is room for it regarding the process of jurisdiction in its traditional way through positive and negative behaviours.

1.1 POSITIVE ASPECT OF THE THEORY OF AVOIDABLE DAMAGES

After the instrumentalization and formation of the process, during the knowledge phase it is possible, through the positive aspect of the theory of avoidable damages, that the debtor provides evidence in order to reduce the indemnity quantum of merit or even attest that there is no indemnity to be paid.

If the creditor has been diligent, and damages that were fortunately avoided even in the face of default, should be deduced from the conviction, under penalty of illicit enrichment, which is expressly forbidden by the national legislation and must be reimbursed in the manner of article 884: *"He who, without just cause, is enriched at the expense of another, will be obliged to repay the unduly received, made the monetary values update"*.

1.2 NEGATIVE ASPECTS OF THE THEORY OF AVOIDABLE DAMAGES

In the same way that the loss that did not exist must be deducted from the debt, that in which its occurrence was a logical consequence of the negative conduct of the creditor that resulted in the breach of the annexed duties of cooperation and information and the very lack of interest of this one of avoiding it, they must also be mitigated, because what gave him cause was not the no fulfilment of the obligation, but the lack of it.

Making clear that it is not an apology or defence of default, but the idea that the debtor should not be held responsible for what contributed effectively to the causal link, for although in popular culture the defaulter is seen as the risk of failure is intrinsically inherent in every negotiation, as demonstrated by Otavio Luiz Rodrigues Junior, a Brazilian law scholar, by reviving the memory of a classic scene from the literature of William Shakespeare's The Merchant of Venice, where the character Shulock speaks of an evil payer: *"This is another bad business companion I have arranged: a bankrupt, a prodigal, who barely dares to show his head in the Rialto; a beggar who was once vain on the market; he who cares for that letter"*.

The retro "letter" mentioned, the debtor offers as collateral a part of his own heart, showing the disproportionate sacrifices imposed in the past of the commercial world.

II. COMPARATIVE LAW

The Law in the *lato sensu* has already been seen as a closed area of knowledge due to the fact that it varies according to time and space and therefore is a pure and simple expression of phatic reality.

Despite the variables, it is also true that there are elements common to all men and therefore Legal Science as a process of social adaptation. In Vittorio Scialoja's (1964) view, comparative law aims to: "*give the scholar guidance on the law of other countries, determine the common and fundamental elements of legal institutions and record their evolution, and create an adequate instrument for future Reforms"*.

It is worth pointing out that there are differences between common law and civil law in the approach to compensatory damages, nevertheless, they often predict instruments that lead to similar results.

2.1. COMMON LAW

The common law system is applied in countries of Anglo-Saxon origin, this is based on customs and repeated decisions made by its Courts, which we call precedent, in this way law acts as a mirror of customs and social rules.

The theory of avoidability is already widely accepted and consolidated in states adopting the common law system. There are no clear records of their origin, but their application by the American and British Courts is unquestionable.

It is important to mention that the common law system search to avoid waste of economic resources by the inertia of the creditor through reasonable effort. In this way, the main interest protected by this system is not the individual, but the collective aspect. The common law see damages as the primary remedy for non-performance of contract.

Moreover, in England prevails that the element of time must be considered, in other words, *"as the period of time between breach and expected performance lengthens, so do the opportunities by which the innocent party may avoid or materially reduce the damages arising from the breach"*. In this way, this principle indicates that it is the duty of the party to take such steps

when reasonable. *"Thus it would seem that upon repudiation of a forward contract in a favourable market, the buyer must cover or the seller must unload to avoid or reduce his damage"*.

On the other hand, as others legal doctrines, the United States inherited the principle "duty to mitigate loss" from English law. Although, in America it is necessary to analyse the precedents position and logic, because the innocent party has no obligation to make a forward contract in mitigation.

In the *Restatement of Contracts*, which is a kind of American jurisprudential manual, which aims to provide accessibility to judicial precedents created by the respected American Law Institute in paragraphs 347 and 350 and addresses the Law Mitigate Duty of the following form:

> §347. *MEASURE OF DAMAGES IN GENERAL*
>
> *Subject to the limitations stated in §§350-53, the injured party has a right to damages based on his expectation interest as measured by*
>
> *i. the loss in the value to him of the other party's performance caused by its failure or deficiency, plus*
> *ii. any other loss, including incidental or consequential loss, caused by the breach, less*
> *iii. any cost or other loss that he has avoided by not having to perform.*
> *(...)*
>
> §350. *AVOIDABILITY AS A LIMITATION ON DAMAGES*
>
> (1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation.
> *(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.*

The American jurisprudential compilation articles cited above present a clear demonstration of the theory of avoidable damages, both in its positive aspect, by mentioning that the creditor has the right to reimbursement of the economic resources expended to minimize the damages that he calls incidental, as in the aspect negative, since the defaulting party that did not have its consideration paid as a whole may have the remainder deducted from the indemnity due.

Also, it is important to mention the burden of proof in cases like those is upon the defendant. To support this view Judge Robert L. Miller – Northern District of Indiana – in Clark v. MetroHealth Foundation, Inc., stated that in order for a defendant *"[t]o establish the affirmative defense of a plaintiff's failure to mitigate damages, the defendants had to show that: (1) the plaintiff failed to*

exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence".

2.2 CIVIL LAW

The other major model school of legal science is the civil law, also called legal positivism - this traditionally of German-Roman origin, has the law as the primary source of law.

Occurs that civil law jurisdictions have not necessarily developed or embraced a doctrine of mitigation, however they have been including mechanisms similar to mitigation, for instance they prevail specific performance over the monetary compensation of damages.

The German law does not predict the duty to mitigate loss, however they have the regime on contributory negligence, a similar system. Also, the Japanese Civil Code permit that courts can take account of a claimant's fault – but not its negligence – in determining the entitlement and scope of damages. Furthermore, other civil law countries, such as Italy, Austria, Portugal and Finland, have similar provisions.

According to Ricardo Maurício Freire Soares, Brazilian author, the legal norms are established by the competent authorities and are imperative, since they have the function of prescribing certain conduct, and are therefore legal sources, for imposing obligations and conferring rights. Through the vernacular *pacta sunt servanda* or *"the contract makes law between the parties"*, it should be noted that the Brazilian legal system is structured along the lines of the Civil Law, despite the openness it undertook in acknowledging the principle of legality and creating Democratic Social State of Law.

Thus, as explained in the first topic of this article, the most common legal solution given the obligatory break in countries with a civil legal tradition is the enforced execution of the contractual obligation, this makes the field of application of avoidance of damages is drastically reduced, because if the repair of the damage is not even evaluated and the possibility of using mitigation criteria is not accounted for either.

However, when faced with the reality of the facts or the supervening loss of the object is not possible to enforced execution, the duty to mitigate loss, not constant times in which it is used, is done in the form of concurrent fault being the creditor and debtor responsible for that damage that

has actually caused cause by making a purely monetary compensation of damages, unlike Commow Law that damages are appreciated from the principle of avoidability and not guilt in the broad sense.

III. BRAZILIAN JURISPRUDENTIAL ANALYSIS OF THE THEORY OF AVOIDABLE DAMAGES

In Brazilian Law the duty to mitigate loss applies as principle of objective good faith and the theory of abuse of rights. Although, it has commonly been applied to contractual liability, it is perfectly possible to use the theory for non-contractual liability.

This is Special Appeal No. 758.518 - PR (2005 / 0096775-4), appraised by the Superior Court of Justice filed by a Construction Company against a judgment given by the Court of the same state that already applied the concept of damage theory avoidance of merit, by stating that: *"CONTRACT OF PROMISE OF PURCHASE AND SALE. RESPONSIBILITY OF THE PROMISSARY-BUYER INDEPENDENT. APPEAL PROVIDED IN PART. The promissing party also has the duty to avoid aggravating the damage caused by the default and to seek to recover possession of the unit, abandoned by the promissory-buyer, as soon as possible. Thus failing to do so, the default is not due to the payment of the months corresponding to the inertia of the compromiser. Appeal provided in part. (REsp. nº 758.518. fl. 115)"*.

The issue in dispute, in brief synthesis, is a contractual breach of a promise to buy and sell, in which the buyer remained in default and left the property. However, in the face of such a situation it took time to seek an alternative solution for the situation as well enters with a reinstated possession action. The argument of the defence before the High Court is that for not having acted with fault for the event of the conflict could not undergo any sanction even before its inertia. On the contrary, the Tribunal of Paraná, understood that the damage of the debtor could have been minimized if the company had acted diligently and therefore, deducted from the debt the instalments that existed due to the author's slowness.

In a pertinent decision, the Superior Court of Justice upheld the decision of the Court of Parana, reaffirming the position defended here that duty to mitigate loss acts as a radiating principle of objective good faith, guaranteeing the contractual balance and legal certainty to the extent that it demonstrates that there is a concern Brazilian courts to defend that social relations are permeated by the annexed duties of information and cooperation of the parties, even in the face of default, as demonstrated by the vote of Minister Vasco Della Giustina: *"Thus, objective good faith*

appears as an ethical-legal standard to be observed by contractors at all contractual stages. That is, during the various stages of the contract, the conduct of the parties must be guided by probity, cooperation and loyalty. Hence, objective good faith is a source of obligation that permeates the conduct of the parties to influence the way in which they exercise their rights, as well as the way in which they relate to each other. In this direction, the obligatory relationship must be developed with the purpose of preserving the contractors 'rights in the pursuit of the agreed purposes, without the parties' actions violating the ethical precepts inserted in the legal system. In so doing, the obligation to mitigate the damage itself or, in the case of alien law, the duty to mitigate the loss must be taken: the contracting parties to the obligation must take the necessary and possible measures to ensure that the damage is not aggravated. In this way, the part to which the loss takes advantage cannot remain deliberately inert in the face of the damage, since its inertia will impose an unnecessary and avoidable taxation on the property of the other, a circumstance that violates the duties of cooperation and loyalty" (Resp: 758518 PR 2005/0096775-4, 2010).

Finally, it is necessary to emphasize that although there are remnants of the pure contractualism of the old civil code of 1916 in the Brazilian legal culture, Law as well as men is an unfinished work built every day by all those who dedicate themselves to it.

CONCLUSION

Thus, we defend the thesis that the non-application of the duty to mitigate loss is an immeasurable loss of human sources, economic and natural resources that have a social value. Besides being an attitude incompatible with any social democratic state of law that seeks the preservation of the dignity of the human person.

In this bias, we analyse international jurisprudential understandings in comparison with common law and civil law legal schools in order to identify similarities and differences in avoidable damage theory according to the legal system implemented in the country.

On the Brazilian case, it is evident that the Judiciary begins to have its mentality modified, that the maintenance of a closed juridical order no longer make sense and was not sufficient to realize the social yearnings of those who often find an archaic and lingering Judiciary. And although the change comes accompanied by renovating principles such as the duty to mitigate loss, capable of being introduced both in the classical route of conflict resolution and in alternatives.

In this way, the bibliographic analysis contributed to strengthening the idea that it is possible to mitigate the damage and recover the contractual harmony even in the face of default. Even because the economic disadvantages of having no duty to mitigate are well known and largely accepted, also the results of that are readily apparent.

Moreover, courts can protect vulnerable creditors while preventing costly litigation and serving the public welfare by universally forbidding any contractual waiver of the duty to mitigate. Therefore, the legal system granted protection that should not be waivable by the same parties that the law is seeking to protect.

It is thus possible to conclude that, through any study hitherto outlined, duty to mitigate loss does not represent the solution to all problems, but it is certainly a path to the beginning of their end.

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