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Civil liability for hidden defects in the sale of used vehicles[1]

Liability for hidden defects in the sale of used vehicles

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SUMMARY

With the advancement of business modalities in current times, platforms and applications have boosted business, with legal operators being responsible for monitoring social demands in order to guarantee legal security in these relationships. Contracts for the purchase and sale of vehicles used by individuals are an important vector of commerce, which is why it is necessary to find out which legal framework will protect this specific business. Therefore, this work analyzes the possibilities of applying the Consumer Protection Code and the Civil Code.

Key words: Purchase and sale contract. Civil responsability. Redibitory addiction.

ABSTRACT

With the advancement of business modalities in current times, platforms and applications have streamlined business. It is up to legal operators to monitor social demands in order to guarantee legal security in these relationships. Contracts for the purchase and sale of used vehicles by private individuals are an important vector of trade, therefore requiring an investigation of the legal framework that will protect this specific business. This work, therefore, analyzes the possibilities of application of the Consumer Defense Code and the Civil Code. **Keywords:**Purchase and sale contract. Civil responsibility. Redibitory defect.

1. INTRODUCTION

The purchase and sale contract is one of the largest instruments for the circulation of wealth in our society, in addition to being characterized as a diffuse contract, whose application extends to different branches of Law, such as Civil Law, Business Law, Administrative Law , between others.

This society is the result of transformations in social relations, in addition to being a factor that generates these changes. With the evolution of commercial activities, consumer relations and circulation of goods, a new dynamic challenge presents itself to contemporary Law in order to keep up with such demands, with the objective of ensuring legal security for businesses, while seeking to build tools for correcting of possible imbalances between the contracting parties.

Therefore, this work aims to analyze civil liability in the contract for the purchase and sale of used vehicles, a type of transaction that has gained space in the market through commercialization through digital platforms and business applications between individuals.

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Therefore, there will be a brief presentation of the theory of the purchase and sale contract, followed by the conceptualization of civil liability in the legal system and its application in the Civil Code and the Consumer Protection Code, finally concluding an analysis of the defects hidden in that type of contract, when the object is a used vehicle and when the contracting parties are individuals, with the aim of verifying which normative body can/should be used to resolve the problem.

1.1 METHODOLOGY

The exploratory bibliographic method and hypothetical-deductive analysis guide this work, embodied in a bibliographic review on the proposed topic, using specific legislation, academic journals, analysis of jurisprudence and scientific articles published online with free access.

2 THEORETICAL FRAMEWORK

2.1 PURCHASE AND SALE AGREEMENT

It is called *buy and sell* the bilateral contract by which one of the parties (seller) undertakes to transfer ownership of a thing to the other (buyer), in exchange for a certain price in money (GONÇALVES, 2010).

The purchase and sale contract is not subject to a special form, unless otherwise provided, and may be concluded in written or verbal, public or private form. The art. 108 of the Civil Code (2002), however, provides for the need for a public deed when the legal transaction has as its objective real estate worth more than thirty minimum wages, an obligation that is also present in transactions involving the acquisition of rural properties by a foreigner, regardless of the value, as provided in art. 8th of Law No. 5,709/71.

On the other hand, it is worth highlighting the existence of hypotheses in which the law confers the effectiveness of a public deed on certain private instruments, as is the case with the rule contained in § 5 of art. 60 of Law No. 4,380/64.

Regarding classification, the purchase and sale contract is an onerous, translational, bilateral and generally commutative contract. Costly, as both parties benefit from an economic advantage. Translative, because it is an instrument for the transfer and acquisition of property. It is bilateral or synagmatic, since the parties respectively assume obligations. It is, as a rule, a commutative contract, as the parties know in advance the content of their provision (CASSETARI, 2011).

The purchase and sale contract consists of three elements: thing, price and consent. The first must be susceptible to economic appreciation, determined or determinable and of current or future existence.

The object of purchase and sale, susceptible to the transferability of the domain (effects of art. 481), is a current thing, that is, existing or potential existence concerning future things, whether corporeal or incorporeal. In the latter case, the legal transaction will be void, and the thing will not come into existence, except in the case of the contract being random, in accordance with Article 458 of the CC and subsequent articles.

As regards the price, it must be fixed in money, otherwise the transaction cannot be completed as a purchase and sale. Furthermore, the price must be right, real and true.

Finally, consent, which is nothing more than the agreement between the parties about the object and the price, in accordance with art. 482 of the CC, which states that “purchase and sale, when pure, will be considered mandatory and perfect, as long as the parties agree on the object and price”.

In this sense, the purchase and sale contract is merely consensual, as the transfer of the domain or property depends on specific ways, resulting from it, but autonomous (registration of the title to

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real estate – art. 1,245; tradition for movable assets – art. 1,267, both of the Civil Code).

The Brazilian system adopted the Roman system, according to which *traditionibus non nudis pactis dominia rerum transferuntur.* However, it departed from the French system, in which mere consent, expressed in the purchase and sale transaction, transfers control from the seller to the acquirer (ALMEIDA, 2018).

2.2 PRINCIPLES IN THE PURCHASE AND SALE CONTRACT

To better understand contract law, it is necessary to present the principle-logic that governs it, as Rodrigues (2004) teaches, for which the principles underpin social life, preserving its essence from the affects of individuals, with the objective of preserving the social structure itself.

Thus, the following principles stand out: the Dignity of the Human Person, the Autonomy of Will or Consensualism, the Mandatory Force of the Contract, the Subjective Relativity of the Effects of the Contract, the Social Function of the Contract, Objective Good Faith and the of Material Equivalence.

The Principle of Human Dignity, included in the constitutional text, is, in itself and through its implementation, a basic institute of private law. As the cornerstone of the constitutional legal order, it is also part of public law. As a fundamental guarantee, it imposes a new meaning on some civil dogmas, in particular: autonomy, goods, patrimony, person and property. (GAGLIANO; PAMPLONA FILHO, 2010).

Lemisz (2010), on the Principle of Dignity of the Human Person, states that there is great difficulty in theorizing a legal concept in this regard, since its definition and delimitation are broad, as it encompasses diverse conceptions and meanings, as well as its meaning has a construction linked to the development of the axiology of man throughout history.

The Principle of Consensualism or Autonomy of Will deals with the broad freedom that the parties have to contract or not, to establish the clauses that will be present, to define the object of the contract, that is, how, what, when and with whom contract, which may go beyond what is stipulated in the Civil Code, as long as the legal provisions are respected.

In other words, autonomy of will comes in two distinct forms: freedom to contract and freedom of contract (WALD, 2010). It is worth highlighting, however, the lesson of Lorenzetti (1998), who teaches that the current legal order has not left the ability to create contractual arrangements, comparable to legal ones, in the hands of individuals, without any intervention.

The principle of Mandatory Force of Contracts – also called *Pacta Sunt Servanda*, Principle of Binding Force of Contracts, Principle of Intangibility of Contracts or Principle of Obligation of Conventions – finds its basis of existence in the will that generates contracts (MARQUES, 2004). Despite not being positive in the Brazilian legal system, the bond that unites the contracting parties is protected by the system because it is considered a general principle of Law, of a transcendent universal nature, due to the valid stipulation of its content, establishing rights and obligations of the parties. , thus resulting in a binding agreement.

The Principle of Subjective Relativity of the effects of the contract, in turn, establishes that the obligation assumed by the contracting parties is binding only on them, without affecting others, that is, third parties (RODRIGUES, 2004).

The 2002 Civil Code contains the Principle of Social Function in its art. 421: "The freedom to contract will be exercised in accordance with and within the limits of the social function of the contract." In other words, this principle irrigates and directs contracts so that they are socially fair, in their social, economic, environmental and cultural aspects,

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defining contractual freedom and the respective effects on society and not just on the relationships between the parties that are part of the stipulated contract (GAGLIANO; PAMPLONA FILHO, 2010).

In the same sense, the Principle of Objective Good Faith becomes an integral part of the contractual structure. The art. 422 of the CC determines that contracting parties must observe, both in concluding the contract and in its execution, the principles of probity and objective good faith. Therefore, the parties have the duty to maintain loyalty and respect, the main legal duty, which is the provision of giving, doing or not doing, as well as the secondary duties of loyalty and trust, assistance, information, confidentiality or secrecy.

The Principle of Material Equivalence seeks to preserve the balance of the contract, between obligations and rights, from negotiation to execution, so that there can be harmony between the interests of the parties. The subjective aspect of this principle concerns the identification of the dominant contractual power of the parties and the legal presumption of vulnerability. The law presumes that those adhering to adhesion contracts, tenants, consumers and workers are legally vulnerable.

This presumption is absolute, as it cannot be ruled out by assessing the specific case. In the objective aspect, it verifies the real imbalance of contractual rights and duties, both present at the conclusion of the contract and in the eventual appearance of supervening circumstances that lead to excessive burdensomeness for one of the parties (GAGLIANO; PAMPLONA FILHO, 2010).

2.3 CIVIL LIABILITY AND REMEDIAL VICES

Another necessary conceptualization to be made previously in this work is about civil liability. Understood as the obligation that someone has to assume the legal consequences of their activity, a meaning that brings within it a derived obligation, that is, a successive legal duty, namely the “prohibition of offending”, that is, the idea that no one should be harmed, due to the objective limit of individual freedom in a civilized society (GAGLIANO; PAMPLONA FILHO, 2015).

In principle, liability arises from the practice of an unlawful act, from a violation of the legal order, generating a social imbalance, however there is the possibility that civil liability also arises from a legal imposition, whether in legal activities or due to the risk of activity carried out, with the legal nature of the responsibility having a sanctioning nature, regardless of whether it materializes as a penalty, compensation or pecuniary compensation (GAGLIANO; PAMPLONA FILHO, 2015).

In Brazil, the dual rule of civil liability is in force, in which there is subjective liability, an unquestionable rule of the system prior to the current code, coexisting with objective liability, depending on the risk activity carried out by the perpetrator of the damage, *ex vi* of the provisions of art. 927, sole paragraph of the CC. All these initial considerations arise as a result of violation of the fundamental precept of *neminem laedere*, that is, that no one should be harmed by the conduct of others (ALMEIDA, 2018).

Having made these considerations, we move on to the conceptualization of redibitory defects and their consequences. These concern hidden defects in things that were received through bilateral, commutative contracts or through onerous donations. Such irregularities are considered inappropriate for the intended use, or may even result in a reduction in the value established in the contract.

Carlos Roberto Gonçalves (2011) seeks to explain redibitory defects through the theory of contractual default, based on the idea that responsibility for redictory defects is anchored in the Principle of Guarantee, which states that: “Every seller must guarantee, to the acquirer for consideration, the use of the thing acquired by him and for the purposes for which it is intended”.

Venoza (2013), in turn, states that this idea arises from the Principles of Good Faith and *exceptio non*

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adimpleti contractus, and by logical consequence, the elementary guarantee is in the sense that the transferor himself will not disturb the possession and the gentle and peaceful use of the thing by the acquirer.

When referring to the institute of redibitory vices, arts. 441 and 442 of the Civil Code, which, as previously stated, are based on the principle of guarantee. They provide that it is possible to reject the thing from the commutative contract due to defects or defects that make it unsuitable for the use for which it is intended, or reduce its value; or gives the buyer the possibility of keeping the thing, negotiating a reduction of the amount previously paid with the seller. Thus, there remain two possible alternative actions: A redibitory action so that the thing can be rejected, that is, the item must be returned; or the action*minor quantity*or estimate, so that the amount paid can be reduced.

The art. 443 says that the seller will refund the amount received, if he was unaware of the defect, and, if it was known to him, the acquirer will have the right to compensation for losses and damages, in addition to the refund of the amount paid.

The art. 444 of the Civil Code states that "The responsibility of the alienator remains even if the thing perishes in the alienee's possession, if it perishes due to a hidden defect, already existing at the time of tradition". Ignorance of such defects by the seller does not exempt him from liability, and he must refund "the amount received, plus the contract expenses".

The expression "for sale as is", common in advertisements for the sale of used vehicles, It is intended to serve as a warning to interested parties that they are not in perfect condition and therefore no subsequent complaints are possible.

The seller is, by right, the guarantor of the redibitory defects and is responsible for making good the object of the sale. When transferring to the acquirer anything of any kind, by commutative contract, he has the duty to guarantee its useful possession, equivalent to the price received. Contractual breach therefore results from a breach of the legal duty inherent to the contract (GONÇALVES, 2017).

Redibitory defects are, therefore, hidden defects existing in the thing sold, the subject of a commutative contract, which make it unsuitable for its intended use or significantly reduce its value, in such a way that the negotiating act would not be carried out if they were known, giving action to the buyer to rebid the contract or to obtain a price reduction (GONÇALVES, 2017).

For a redibitory defect to occur, it is also essential that the item is received by virtue of a contractual relationship, that the defect is serious and contemporaneous with the conclusion of the contract; A minor defect or defect occurring during the transaction does not affect the principle of warranty, according to a peaceful doctrinal understanding (FILHO, 2019).

2.4 THE (IN) APPLICABILITY OF THE CDC IN THE CASE OF HIDDEN DEFECT IN A USED VEHICLE PURCHASE AND SALE CONTRACT BETWEEN INDIVIDUALS

Having made these initial considerations, we will analyze the applicability or not of the Consumer Protection Code – CDC in the aforementioned vehicle purchase and sale contract between individuals.

Preliminarily, the patent defines the concept of consumer relationship, a legal relationship between consumer and supplier, applicable to the CDC. The code defines a consumer as any natural or legal person who purchases or uses a product or service as the final recipient, being the vulnerable part of the consumer relationship and, therefore, deserves full protection from the legal system.

Supplier is responsible for the production cycle, from the development of production and assembly activities to the distribution or marketing of the product or provision of the service (CDC, 1990).

The issue of vulnerability refers to technical knowledge that the consumer does not have

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in relation to the product or service purchased. Hypo-sufficiency cannot be confused with vulnerability, the first is in relation to the financial, technical or legal part, the second refers to the consumer who is at a disadvantage, vulnerable in the relationship, that is, he is the weakest party and must be protected .

The doctrine adds the character of habituality to the concept of supplier. The supplier, therefore, carries out a civil or commercial activity, offering products or services to the community and such an offer must be customary, as, if it is not, it constitutes a civil or commercial relationship (SIMÃO, 2003).

In view of the above, it is clear that a contract for the purchase and sale of a used vehicle established between individuals does not constitute a consumer relationship, given that the seller does not constitute a supplier, in accordance with doctrinal and legal understanding.

In the case at hand, a priori, there is no habituality in the provision of the service or sale of the vehicle, and the acquirer does not accept the idea of vulnerability in relation to the transferor, since both occupy the same position in the law, which that is, contractors of a civil business.

Consequently, any defect in the object of the aforementioned contract does not trigger the incidence of the CDC and its guarantees vis-à-vis the supplier.

In this sense, the jurisprudence is abundant:

> APPEAL – COMPENSATION ACTION – Purchase and sale of a used vehicle between private parties – Alleged defect in the engine of the car purchased from the defendant – Claim for reimbursement of the amount spent on repairs – Judgment of unfoundedness – Existence of a civil relationship between the parties – Lack of contractual guarantee – Verification of the regularity and conditions of the asset that is the responsibility of the purchaser–*Expert who asserted that the components and symptoms presented by the author's vehicle cf. The budgets analyzed were easy to detect if the property was inspected by a qualified professional and a route test was carried out prior to the purchase being completed – Lack of proof of the pre-existence of the defect and the alleged knowledge of the problem by the defendant – Burden of the plaintiff – Intelligence of art. 373, I, of the CPC – Responsibility for paying for the engine repair that cannot be attributed to the seller – Maintenance of the decision that is required – Appeal attorney fees – Denied.*
>
> (Civil Appeal no.: 035558-08.2010.8.26.0576. District: São Paulo. 28th Chamber of Private Law. Rapporteur Celso Pimentel. Judged on: 12/06/2016
>
> VERBAL PURCHASE AND SALE OF USED CAR – BUSINESS BETWEEN INDIVIDUALS - FINDING OF DEFECTS AFTER SALE - VEHICLE PURCHASED AS-IS, WITHOUT WARRANTY - ABSENCE OF GUILTY CONDUCT, OR BAD FAITH, WHICH COULD BE ATTRIBUTED TO THE SELLER - PURCHASER WHO FAILED TO TAKE THE USUAL PRECAUTIONS AT THE TIME OF PURCHASE - APPEAL THE AUTHOR'S PARTIAL PROVIDED, THE DEFENDANT'S PREJUDICED.
>
> (Civil Appeal no.: 1002346-62.2018.8.26.0005.*District: São José do Rio Preto.*25th Chamber of Private Law. Rapporteur: Hugo Crepaldi, judged on 03/04/2021)

A different situation refers to the purchase of vehicles by individuals at dealerships, given that in this format of the legal relationship there is habitual service provision and disposal of things, as well as specialty, and the vulnerability of the acquirer towards the seller would be configured, therefore there is an underlying relationship of consumption, making up a requirement for the application of consumer legislation, in accordance with jurisprudence follow:

> CONSUMER. HIDDEN ADDICTION. USED CAR (AUDI A3 2004). DEFECT IN THE POWER STAGE. ACTIVE AND PASSIVE LEGITIMACY. COMPLEXITY AWAY. I. Audi A3/2004 car purchased at a brand dealership and which, after less than 60 days of use, has a defect in the component called power stage¿, which is related to the electronic management of the engine. II. Matter of fact sufficiently elucidated by the evidence, with formal expertise being unnecessary. Complexity away. II. Active legitimacy of the author, who bore the loss resulting from the

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repair and is the user of the vehicle, not excluded because the car was registered in the name of his law firm. IV. Passive legitimacy of the trader to respond for the product's defect, in accordance with art. 18 of the CDC, making it impossible to actually consider the product and, therefore, the exclusive responsibility of the manufacturer, under the terms of art. 12 of the same Code. V. Situation in which the legal warranty of the product imposes on the merchant the duty to reimburse the consumer for the repair carried out, since it is an essential component, whose characteristic is not normal wear and tear due to use. Electronic component with an indefinite useful life, which may perfectly coincide with that of the vehicle itself. Characterized hidden addiction. Sentence confirmed by the grounds themselves. Resource not available. Unanimous.
(Civil Appeal No. 71001642065, First Civil Appeal Panel, Appeal Panels, Rapporteur: João Pedro Cavalli Junior, Judged on 06/19/2008).

In view of the above, it is evident, therefore, that it is impossible to apply the CDC in the legal relationship that is the subject of this work, considering that it does not conform to the main concepts that such a rule addresses, leaving, therefore, the application of civil legislation.

CONCLUSIONS

From all of the above, it is clear that the relationship between individuals, who enter into a contract for the purchase and sale of used vehicles, does not, in principle, constitute a consumer relationship, which rules out the application of the Consumer Protection Code. in cases of civil liability for hidden defects in the object of the contract.

This departure is due to the observation that the participants in the aforementioned legal transaction do not conform to the concepts of consumer and supplier, established in doctrine and jurisprudence, consequently resolving the demands, the result of any hidden defect in the commercial or civil rights covered by the Civil Code.

Finally, it should be noted that the topic itself is little explored in Brazilian doctrine. Although, as previously stated, social changes at the current speed, combined with technological advances and transformations in virtual consumer relations, may, in the future, bring about the need for the doctrine and the legislator to look more closely at cases similar, with the aim of preserving legal certainty.

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