NEGOTIATION AND SOCIAL MEDIA

NEGOCIAÇÃO E REDES SOCIAIS

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Abstract:

The goal of the Code of Civil Procedure (Law 13.105/2015) is to extinguish the competitive pattern of all kinds of subject matters, regarding costs and time to reach a verdict. Furthermore, lawyers and law clerks must pursue a new model of professionalism, including continuous collaborative or integrative bargaining (art. 3, §§2 and 3). Consequently, social media players are invited to join the game.

Keywords: Negotiation – Social Media – Brazilians Precedents – Competitive Pattern – Collaborative or Integrative Bargaining.

Resumo:

O Código de Processo Civil (Lei 13.105/2015) busca desestimular o comportamento competitivo em todas as áreas do ordenamento jurídico em razão do custo e duração do processo para a sentença final. A competição deve ser observada casuisticamente porque, dependendo da particularidade do caso, as partes apenas almejam a sentença final de forma rápida e eficiente para a obtenção da solução, incluindo casos de família e questões oriundas de redes sociais (bullying, assédio, organizações criminosas, perseguição à autoridades etc). Além do CPC/15, os advogados e operadores do direito devem adequar-se ao novo modelo profissional, a fim de incluir o comportamento colaborativo ou integrativo no cotidiano (artigo 3º, §§2º e 3º). Em consequência,

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as redes sociais também estão convidadas a participar deste novo modelo colaborativo ou integrativo.

Palavras-chave: Negociação – Rede Social – Precedentes Brasileiros – Comportamento competitivo – Colaboração e Integração.

Summary: 1. Introduction. 2. Negotiation. 3. Collaborative or Integrative Bargaining. 4. Social Media and Brazilians Precedents. 5. Conclusion. 6. References.

Sumário: 1. Introdução. 2. Negociação. 3. Negociação Colaborativa ou Integrativa. 4. Mídias Sociais e Precedentes Brasileiros. 5. Conclusão. 6. Referências.

1. Introduction

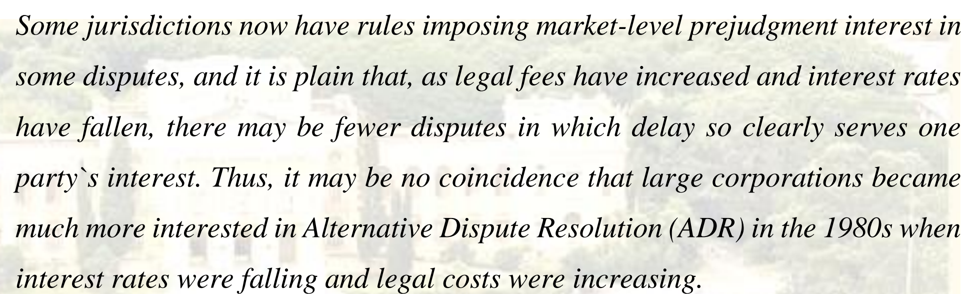
Lawyers and law clerks are trained to be competitive in every sort of issue since college; this attitude can be defined almost as an obsession with their clients' interests, since they do not accept to lose anything. Despite having a good competitive education, the parties are not satisfied with the results of lawsuits. Usually, the focus to address the problem is the legislation guidelines, liability, complaint and Trial Court`s chores, such as applications to fill out, evidences, closing arguments, deliberations and sentences. This lack of understanding of collaborative bargaining has been changing in the world, such as in German, which has included mediation, arbitration and conciliation hearing in the beginning of lawsuits since 1970[23]. Consequently, either to settle a case or to go to trial, the parties prefer integrative bargaining because it is a cheaper and faster way to solve the problem.

In addition to distributive benefits, the United States have adopted settlements in view of the costs of litigation and better outcome for plaintiffs. JOSÉ CARLOS BARBOSA MOREIRA[24] described American precedents that can also cause regret behavior, since judges have just emphasized law and precedents without considering the issues related to the

[23] BARBOSA MOREIRA, Jose Carlos. *Breve notícia sobre a reforma do processo civil alemão.* Revista de Processo, vol. 111/2003, p. 103/112.
[24] MOREIRA, José Carlos. Temas de Direito Processual Civil (Nona Série). São Paulo: Saraiva, 2007, p. 309/312.

litigator's feelings and personality or the parties' actual interests. For example, when President Clinton settled Paula Jones suit about sexually harassment without assuming guilty to avoid impeachment claims, it means that it was not just about money. On the other hand, JONATHAN R. COHEN[25] emphasizes the "safe apology technique" that can prevent antagonistic behavior and even litigation lawsuits because the injured parties want to repair the damaged relationships, nonetheless the offender is still obligated to compensate damages.

Moreover, RONALD J. GILSON & ROBERT H. MNOOKIN[26] advocates a change in the payoff structure in litigation:



> *Some jurisdictions now have rules imposing market-level prejudgment interest in some disputes, and it is plain that, as legal fees have increased and interest rates have fallen, there may be fewer disputes in which delay so clearly serves one party`s interest. Thus, it may be no coincidence that large corporations became much more interested in Alternative Dispute Resolution (ADR) in the 1980s when interest rates were falling and legal costs were increasing.*

Collaborative or integrative bargaining has been affecting the daily lives of Brazilians citizens as well, reframing the options to be creative and focus on clients' real interests, such as in the universe of social media.

2. Negotiation

Firstly, lawyers and law clerks need to understand that negotiation is everywhere, and therefore in our daily lives and simple things, even in personal life. For example, when a couple is talking about possible cities to visit on vacation, there is a negotiation to decide

[25] COHEN, Jonathan R. *Advising Clients to Apologize, 72 S. CAL. L. REV. 1009-69 (1999). In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 344/349.

[26] GILSON, Ronald & MNOOKIN, Robert H. *Disputing through agents: cooperation and conflict between lawyers in litigation. 94 Colum. L. Rev. 509. 534-40 (1994). In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 50/53.

details of the trip. Consequently, negotiation is a great tool for any subject and it is not just for ”romantics” lawyers and law clerks who tend to work with mediation or conciliation hearings.

Secondly, strategies of negotiation are described by GARY GOODPASTER[27] as (i) competing; (ii) compromising; and (iii) collaborating or problem solving.

Competing is focus on “gain over the gain” because the purpose is to have control over the situation to earn as much as possible, without thinking about the relationship between the parties.

Compromising is focus on “win-some-lose-some” or “give-and-take bargaining” because to go to trial is worse than to settle the case. Accordingly, it is good to emphasizes that negotiation is not a charity demand; nonetheless, it is the best option for the parties. Sometimes it is not just about money.

Collaborating or Problem-Solving is “win-win bargaining” or “positive-sum” that the parties want to gain their own interests, yet they are also concerned with the opponent’s gain. For example, the settlement is based on a situation in which both parties win, regarding with their own interest, i.e., healthy insurance after retirement, public apology or adequate policies for dealing with abuse of women or minorities in companies. In this particular case, lectures and more information about prevention, punishment and eradication of any kind of violence, such as intrusive or aggressive behavior or physical threats, avoiding new victims. On the other hand, the settlement of abuse can be done by civil cases in Brazil, which means that criminal matter is going to be charged by public prosecutor to its conclusion. GARY GOODPASTER[28] describes negotiation styles, since each person has their own characteristics. For example, lawyers who work with mediation tend to be much more collaborative than lawyers who work for investors and stock exchange professionals. Usually, lawyers and law- clerks in business or corporate areas can be really competitive because is all about money and “gain over the gain”.

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[27] GOODPASTER, Gary. *A primer on competitive bargaining. 1996 J. Disp. Resol. 325-30. In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 10/13.

[28] GOODPASTER, Gary. *A primer on competitive bargaining. 1996 J. Disp. Resol. 325-30. In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 10/13.

JOHN S. MURRAY[29] develops this analysis by offering the litigator's characteristics, such as (i) competitive lawyers behave cooperatively only if it helps achieve their goals; and (ii) collaborative lawyers can be competitive yet not antagonistic.

Negotiation can be defined by the players (lawyers, law clerks and parties), as well as by general characteristics of the lawsuit itself.

RUSSELL KOROBKIN[30] describes the reservation point (RP), which means that lawyers should clearly know their clients' interests, including the amount they can pay during negotiation, because this is going to be the "bargaining zone" or "the zone of possible agreement" (ZOPA). The author gives a good example, as follows.

> *For example, suppose Esau, looking to get into business for himself, is willing to pay up to $ 200.000 for Jacob's catering business, while Jacob, interested in retiring, is willing to sell the business for any amount over $ 150.000. This difference between Esau's and Jacob's RP's creates a $50.000 bargaining zone. At any price between $ 150.000 and $ 200.000, both parties are better off agreeing to the sale of the business than they are reaching no agreement and going their separate ways.*
>
> *(...)*
>
> *In contrast, if the seller's RP is higher than buyer's RP, there is no bargaining zone. In this circumstance, there is no sale price that would make both parties better off than they would be by not reaching a negotiated agreement. Put another way, the parties would be better off not reaching a negotiated agreement. If Jacob will not part with his business for less than $150.000 and Esau will not pay more than $100.000 for it, there is no bargaining zone*[31].

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[29] MURRAY, John S. *Understanding competing theories of negotiation. In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 18/21.

[30] KOROBKIN, Russell. *A positive theory of legal negotiation. 88 Geo. L. J. 1789 (2000). In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 13/17.

[31] KOROBKIN, Russell. *A positive theory of legal negotiation. 88 Geo. L. J. 1789 (2000). In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 14.

Another important aspect of negotiating is to be prepared to reach the reservation point (RP). RUSSELL KOROBKIN[32] emphasizes the studies and preparation for their own clients' interests, plus the other parties' interests to have the reservation point (RP) or "the zone of possible agreement" (ZOPA). Sometimes the parties do not express their real interests clearly, and, consequently lawyers need to go way beyond the conversation, such as in a divorce matter in which the woman wants to maintain the last name of her ex-husband to preserve the children's and the family's identity.

Effective negotiators recognize the Best Alternative to a Negotiated Agreement (BATNA) and Worst Alternative to a Negotiated Agreement (WATNA) for the both parties. RUSSELL KOROBKIN[33] gives a good example:

> *This is of critical importance because without a precise and accurate estimation of his RP the negotiator cannot be sure to avoid the most basic negotiating mistake – agreeing to a deal when he would have been off walking away from the table with no agreement.*

In search for a more complete understanding of negotiation, BARBARA GRAY[34] describes how emotions are essential because parties are human beings, and involve their feelings after the injury. Moreover, sometimes parties want to vent emotions to the offenders, which can define the issue to be addressed in the negotiation. On the other hand, a skillful negotiator can manage this path during a mediation or conciliation hearing, avoiding that the parties' feelings get out of control.

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[32] KOROBKIN, Russell. *A positive theory of legal negotiation. 88 Geo. L. J. 1789 (2000). In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 13/17.

[33] KOROBKIN, Russell. *A positive theory of legal negotiation. 88 Geo. L. J. 1789 (2000). In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 16.

[34] GRAY, Barbara. *Negotiation with your nemesis. 19 Negot J. 299-310 (2003). In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 314/320.

Furthermore, CHRIS GUTHRIE[35] increases the path of negotiation with the theory of regret about litigation decisions turning out poorly, which means that lawyers should realize the type of litigant, litigant's personality, type of case and procedural posture in order to have the big picture of plaintiffs' manners. He continues explaining that (i) the Economic Theory incentivizes the settlement with financial facilities because it is expensive to go to trial; (ii) the Framing Theory describes that plaintiffs are able to settle, while defendants are more inclined to litigate; and (iii) the Regret Aversion Theory describes civil justice system as a settlement environment due to financial incentives and by offering emotional support.

3. Collaborative or integrative bargaining

Effective negotiators should expand options and avoid problems and to be a good listener. Besides that, they should also understand the difference between issues and interests in the negotiation. Weakness or lack of self-confidence is not a characteristic of collaborative lawyers, because they want to settle a fair and correct agreement.

One of integrative bargaining goals is to reconcile the parties with a solution that satisfies everyone. Parties should establish their interests to be achieved or something to be compensated to come up with creative solutions.

DEAN G. PRUITT[36] describes five methods for achieving collaborative or integrative bargaining, such as (i) expanding the pie; (ii) nonspecific compensation; (iii) logrolling; (iv) cost cutting; and (v) bridging.

Expanding the pie is about increasing the available resources. Giving creative wisdom with new alternatives is crucial to the collaborative process. Litigation lawyers should be open minded to, sometimes, strike down precedents and regulations that are not the best option for both parties and to settle the case.

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[35] GUTHRIE, Chris. *Better settle than sorry: The regret aversion theory of litigation behavior. 1999 U. III L. Rev. 43-90. In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 334/344.

[36] PRUITT, Dean G. *Achieving integrative agreements. In Max Bazerman & Roy Lewicki. eds., Negotiating in Organizations 36-44 (1983). In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 121/124.

Nonspecific compensation means information about what is valuable to the other party and information about how difficult it is going to be for the other party to make concessions (consequently, the riskier the demands, the higher the compensation).

Logrolling is to understand that parties have different priorities between issues or interests. Remember that interests and priorities are subjective, hence parties and lawyers should exchange information.

Cost cutting occurs when one party achieves its goal, even though the other party's costs are reduced or eliminated.

Bridging demands a reformulation of the problem according to underlying interests of both parties.

Briefly, negotiation can be defined as "thinking outside the box". CARRIE MENKEL-MEADOW[37] describes that

> *Gardner himself has speculated on the intelligences that might be marshaled for effective negotiation and legal problem solving: linguistic, logical, interpersonal, intrapersonal, and even spatial, are obvious candidates. Consider how we narrow the domain of legal problem solving by focusing so much of our education and knowledge base on only one or two of these intelligences.*

Negotiation requires BRAINSTORMING techniques, which means that parties and lawyers work creatively together to be able to generate ideas to achieve their goals and to improve their relationship. Patience and time are very important to begin and to have a brainstorm. For example, jumping to conclusions or closing off a discussion breaks down the negotiation process and brainstorming.

Negotiation and brainstorming also demand creativity, consequently parties and lawyers must get criticism out of the process. For example, the parties can have different religions; support different politicians with their own perspectives about environment and lifestyle (capitalism/socialism); or being fans of different soccer/basketball teams.

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[37] MENKEL-MEADOW, Carrie. *Aha? Is creativity possible in legal problem solving and teachable in legal education. 6. Harv. Negotiation L. Rev. 97 (2001). In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 136/139.

JENNIFER GERARDA BROWN describes creativity options related to lawyers and precedents:

> *Presenting the new, creative solution as an old idea rather than a new one may make it more acceptable to the other side. Lawyers, as we know, love precedent. Idea Arbitrage gives a creative solution a kind of pedigree or set of credentials it might otherwise lack if presented as a brand new idea.*
> *(...)*
> *It also seems clear that the nature of the negotiation will strongly determine the kinds of creativity-enhancing techniques that are useful. (...) Our field needs more work on creative thinking specific to the negotiation of conflict in order to improve legal education and the representation that clients eventually receive.*

The current question is: what motivates people in negotiation?

Effective negotiators realize the importance of patience and persistence to settle a case because some parties and lawyers want to avoid negotiation without any specific reason. For example, the opponent and respective lawyer are used to go to trial, so negotiation process is a new path, which means lack of confidence and knowledge.

WILLIAM URY[38] mentions five steps of negotiation: (i) go to the balcony (control your own behavior); (ii) step to their side (good listener to understand the other party`s needs, avoiding bad feelings and trying to agree wherever is possible); (iii) reframe (stay away from problems, stick together to the interests); (iv) build them a golden bridge (get involved with the opponent`s interests and help them to think that the outcome was their idea); (v) bring them to their senses (demonstrate good results with the possible settlement, that go to trial is going to be worse for costs and time; and show your Best Alternative to a Negotiated Agreement (BATNA).

Despite the point of view above, some other authors have another perception about negotiation, including some exotic characteristics.

[38] URY, William. *Getting past no: dealing with difficult people. 137-46 (1991). In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 189/194.

There is a cyclical process in negotiation that JANOS NYERGES[39] describes about lawyers behavior in collaborative or integrative bargaining, such as (i) love and cherish own trade (strong sense of professionalism); (ii) have courage (command respect); (iii) “the eagle`s eye must be the lawyer’s” (speed of assessment of the situation); (iv) there is no problem, only opportunities (to bend over backwards); (v) act honestly under the circumstances (intellectual and moral); (vi) love the opponent (respect the other side); (vii) put himself in the shoes of the opponent (to understand the reservation point, but focus on your own goals); (viii) lead the opponent to be a partner (helps the trust); (ix) discover the other party`s goals before negotiating; and (x) energy and focus to achieve the goals, respecting the intellectual capacity of any opponent.

JANOS NYERGES[40] continue saying that:

> *The good negotiator sees such crises coming, and is prepared to meet them. The better negotiator prepares for such crises, taking good care that the stakes and risks on the other side are greater than his or her own.*

Finally, collaborative or integrative bargaining is about listening each other, understanding all needs and interests, coming up with creative solutions, demonstrating BATNAs and WATNAs to get the ZOPA, and, consequently, to reach good agreement for the both parties.

4. Social Media and Brazilian Precedents

Given the characteristics of negotiation, can the parties and lawyers be collaborative in social media matters?

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[39] NYERGES, Janos. *Ten Commandments for a negotiator. 3 Negot J. 21, 21-26 (1987). In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 21/25.

[40] NYERGES, Janos. *Ten Commandments for a negotiator. 3 Negot J. 21, 21-26 (1987). In* Negotiation and Settlement advocacy. A Book of readings by Charles B. Wiggins and L. Randolph Lowry. Reprinted with the permission of the Southern California Law Review. Pages 21/25.

First of all, ANTONIO CARLOS MARCATO[41]`s study explains the duration of proceedings, because in Brazil it takes a long time to come to the end of it. The European Convention on Human Rights and the Federal Constitution of Brazil enforce effectiveness and reasonable duration of the process, however that is not what has been happening.

Secondly, RICARDO DE BARROS LEONEL`s study provides important reflection about Civil Procedure rules and Constitutional rules, specially about the reasonable duration of the process set forth in the Federal Constitutional of Brazil (article 5, LXXVIII, of the Federal Constitution), which gives it a constitutional degree with more protection and care about its conclusion.

These two studies focus on negotiation, therefore speeding up the period of lawsuit, which is crucial to the parties' solution. Sometimes Brazilian lawsuits can last for over fifteen years, depending on the appeals or other dilatory actions of lawyers and the Court`s law clerks.

In summary, precedents are also a useful tool to speed up the lawsuit. In summary, Brazilian precedents are being used for important subject matters to find a faster solution, including multiple cases that overload Courts' offices. Nevertheless, Brazil adopted the *civil law system*, which means that only law could prevent and solve the cases with solutions, but precedents have become increasingly important since the enactment of the new Code of Civil Procedure (Law 13.105/2015).

Knowing about negotiation and about Brazilian rules and the use of precedents in this country, the question is: can Brazilians use negotiation in lawsuits cases, especially with social media subject?

In short, the study of social media can start with the European system, since it is more advanced in terms of regulation and rules about it, such as (i) Directive *95/46*/EC on the protection of individuals with regard to the processing of personal data; (ii) European Convention on Human Rights; (iii) *Regulation* (*EU*) 2016/679 of the Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data; (iv) the Consumer Rights *Directive 2011/83*/EU is a

[41] MARCATO, Antonio Carlos. Algumas considerações sobre a crise da justiça. Available at: [http://www.marcatoadvogados.com.br/wp-content/uploads/2015/07/arquivo66.pdf]. Access on 4/23/ 2017.

consumer protection measure in EU law; (v) the Unfair Terms in Consumer Contracts *Directive 93/13/EEC* is an European Union directive governing the use of surprising or onerous terms used by business in deals with consumers; (vi) *Directive 2000/31*/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('*Directive* on electronic commerce'); etc.

Finally, the European system[42] determines certain requirements to reveal the processing of personal data, such as (i) principle of transparency; (ii) the purpose of processing personal data; and (iii) permission to do direct marketing using personal data.

From Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)[43], the answers are:

> *(58) The principle of transparency requires that any information addressed to the public or to the data subject be concise, easily accessible and easy to understand, and that clear and plain language and, additionally, where appropriate, visualization be used. Such information could be provided in electronic form, for example, when addressed to the public, through a website.*
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> *(50) The processing of personal data for purposes other than those for which the personal data were initially collected should be allowed only where the processing is compatible with the purposes for which the personal data were initially collected.*
>
> *Article 21*
>
> *(...)*
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> *2. Where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning him or her for such marketing, which includes profiling to the extent that it is related to such direct marketing.*

[42] Available at: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32016R0679. Access on em2/22/2018 at 10:46.p.m.
[43] Available at: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32016R0679. Access on1/21/2018 at 10:46 p.m.

3. Where the data subject objects to processing for direct marketing purposes, the personal data shall no longer be processed for such purposes.
(170) (...) In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

Compared to Brazil's rules for social media, Europe is way more advanced; hence, there are great guidelines for negotiation. Parties and lawyers are used to deal with certain situations and can be creative to find new solutions for different cases. As they know the path, they are confident to be aggressive so as to cause a brainstorm.

On the other hand, ALESSANDRO HIRATA`s[44] study explains that Facebook was suited twenty-two times by Max Schrems, a Law Student from Vienna, who filed a lawsuit due to the unauthorized provision of his personal data when he was a Facebook user, such as (i) pokes; (ii) shadow profile; (iii) tagging; (iv) synchronize; (v) deleted posts; (vi) posts in other user page; (vii) messages, including private one; (viii) terms and data policy, including permission to cookie use; (ix) facial recognition; (x) information request; (xi) deleted tags; (xii) data security; (xiii) applications; (xiv) deleted friends; (xv) overhead data processing; (xvi) *Opt-out system* against European Law; (xvii) Like`s button; (xviii) data processing`s duties; (xix) rules of private photos; (xx) deleted photos; (xxi) groups; and (xxii) new terms and data policy.

In addition to solving each problem involved in the lawsuits briefly described above, Ireland created a Data Protection Commissioner[45] to discuss about improvement in rules and relevant cases.

Differently from the developed Europeans' social media system, Brazil is trying to improve its law and regulations to deal with the cases.

The picture of social media rules in Brazil has been built and it is basically related to (i) Internet Civil Framework - Law n. 12.965, 4/23/2014); (ii) (Consumer Protection Code – Law n. 8.078, 9/11/1990); Civil Code (Law n. 10.406, 1/10/2002).

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[44] HIRATA, Alessandro. O Facebook e o direito à privacidade. In: Revista de Informação Legislativa, ano 51, n. 201, separata. Brasília: Senado Federal, Secretaria de editoração e publicações, março de 2014. pp. 17 – 27.
[45] Available at: https://www.dataprotection.ie/docs/Law-On-Data-Protection/m/795.htm. Access on 2/21/2/2018 at 11:32 p.m.

We speculate that the consequences of negotiation in Brazil can be challenging, due to the lack of regulation about some situations. For example, must Facebook really provide information like processing of personal data or activity to a Public Prosecutor or another party after a Court decision?

The empirical results of four lawsuits about social media help to respond how Brazilians Court tend to decide. The cases are (i) *Recurso em Mandado de Segurança* (Writ of Mandamus) n. 55.050 – SP to the Superior Court of Justice[46]; (ii) *Recurso Especial* (Special Appeal) n. 1698647-SP to the Superior Court of Justice[47]; (iii) *Agravo de Instrumento* (Interlocutory Appeal) n. 2196433-50.2017.8.26.0000 to the Court of Justice of the State of São Paulo[48]; and (iv) *Tutela Cautelar Antecedente* (Preliminary Injunction) n. 1124962-79.2017.8.26.0100 to the 21st Civil Division of the Central Court of the [49].

In the first lawsuit, *Recurso em Mandado de Segurança* n. 55.050 – SP to the Superior Court of Justice, Facebook was sentenced to pay R$ 3.96 million due to its refusal to obey a judicial decision about providing the processing of personal data of people who are being suit for criminal matter. Facebook's defense sought information with the company's employees located abroad and which are subject to another regulation and did not have access to such information. The Brazilian Court did not accept that argument and Facebook had an unfavorable outcome in that case.

The second one, *Recurso Especial n.* 1698647-SP to the Superior Court of Justice, the decision was to clear the URL history and offensive videos on YouTube, and

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[46] STJ, Agravo Regimental em Recurso em Mandado de Segurança n. 55.050-SP, Reporting Judge Minister Reynaldo Soares da Fonseca, 5th Panel, Appellant: Facebook Serviços Online do Brasil Ltda., Appellee: Federal Government; Judgment Date: 10/3/2017; Publication Date: 10/11/2017.

[47] STJ, Recurso Especial 1698647/SP, Reporting Judge Minister Nancy Andrighi, 3rd Panel, Judgment Date: 2/6/2018; Publication Date: DJe 2/15/2018.

[48] TJSP, Agravo de Instrumento 2196433-50.2017.8.26.0000; Reporting Judge (a): Rodolfo Pellizari; Judging Body: 6the Chamber of Private Law; Central Civil Court – 19th Civil Section; Judgment Date: 2/08/2018; Registration Date: 2/8/2018.

[49] 21st Civil Section of the Central Court – SP, Proceeding n. 1124962-79.2017.8.26.0100, *Tutela cautelar antecedente* (Preliminary Injunction), Plaintiff: Maria Salete Nahás Pires Corrêa, Defendant: Isabel Costa and Instagram – Facebook Serviços Online do Brasil Ltda.

the plaintiff had to provide the URL address. This did not happen and YouTube had a favorable outcome in this case.

The third lawsuit, *Agravo de Instrumento* n. 2196433-50.2017.8.26.0000 to the Court of Justice of the State of São Paulo, Google was condemned to delete a video with fake news, and inform the authors of the videos about the reasons. Google had an unfavorable outcome in this case, but it has already obeyed the decision.

The fourth and last lawsuit analyzed, *Tutela Cautelar Antecedente* n. 1124962-79.2017.8.26.0100 to the 21st Civil Division of the Central Court of the Capital, the decision was that Facebook and Instagram had to inform URLs pages to solve the problem between Maria Salete Nahás and Isabel Costa, which was immediately complied with. This case can be related to negotiation because, instead of delaying the information with motions and appeals about conflict jurisdiction or cross-frontier data flow, the social media players provided the information as soon as they were aware of the judge's decision. In addition, social media players are making efforts to abide the Brazilian Law, even in cases where Facebook and Instagram are based in the U.S., Ireland or another country with a different regulation about data protection.

The empirical results provide clear lessons about Brazilians precedents in social media subject, which means that nowadays Brazilians Court have no settled understanding and standardized decisions.

5. Conclusion

In summary, negotiation is about listening the other party's needs and interests, discovering the BATNAs, the WATNAs and the ZOPA, working creatively to have a brainstorm and settle the case with good arrangements for both parties.

According to empirical research, there is a long path for Brazil to achieve the European level of laws and regulation about social media, which would give more protection of privacy, cross-frontier data flow, access to information, data protection, disclosure of information and personal data.

At the end, despite the lack of Brazilian's regulation, negotiation should be introduced and encouraged in social media matters, since the numbers of users are increasing.

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