

INTRODUÇÃO AO DIREITO CONTRATUAL COMPARADO

Estudo Comparado entre Sistemas "Common Law" e "Civil Law"

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INTRODUCTION TO CONTRACT LAW:

• Estudo Comparado entre Sistemas "Common Law" e "Civil Law"

- Breve relato histórico:
- *Société de Législation Comparée* (1869) - fundada por Laboulaye - França
- 1º Congresso da "*Société de Législation Comparée*" - 1900 - (Raymond Saleilles): "a ciência da comparação tem por objetivo extrair de um grupo de institutos legais uma base comum, ou, ao menos, alguns pontos de contato capaz de estabelecer uma unidade entre eles."
- *International Academy of Comparative Law* (1924)
- **Rome (1928) - UNIDROIT** - Institut International pour l'Unification du Droit Privé United Nations Organization - objetivo: **Unificação do Direito Privado.**



ESTUDO COMPARADO ENTRE SISTEMAS "COMMON LAW" E "CIVIL LAW":

• O que significa "estudo comparado"?

- "The scholarly study of the similarities and differences between the legal systems of different jurisdictions, such as between civil-law and common-law countries". (GARNER, B. A. *Black's Law Dictionary*. 7th ed., West Group, 1999, p. 858)
- "Legal differences between the laws of different nations or peoples, are not necessarily attributable to historical accident or contingent circumstances. Legal unification, therefore, is a much more promising project if its development which, moreover, share historical experiences and political philosophy" (ZIMMERMANN, R.; REIMANN, M. *The Oxford Handbook of Comparative Law*. Oxford University Press, 2006. p. 541)

• É um método ou ciência?



ESTUDO COMPARADO ENTRE SISTEMAS “COMMON LAW” E “CIVIL LAW”:

- É ciência (RODOLFO SACCO) – há muitos métodos que podem ser utilizados na comparação, tais como, estruturalismo, funcionalismo, etc.
- Comparação como uma ciência dentro da Ciência do Direito:
 - - comparar e avaliar diferenças entre modelos legais
 - - conhecer profundamente os modelos legais a serem comparados
 - - levar em consideração aspectos culturais, economicos, politicos e sociais dos modelos a serem comparados
- Objetivos: unificação do Direito
- Ex. União Europeia (depois da 2ª Guerra Mundial)

CONTRATOS SEGUNDO SISTEMAS DA “COMMON LAW”:

- A contract is a **legal mechanism** that outlines the specific responsibilities and obligations pursuant to a **relationship** between two or more parties. (Elad Gafni)
- **VARIOUS KINDS**: Contracts can **range** from marriage contracts to unspoken agreements between patrons and store owners. (Stephanie Boydell)
- A contract **represents** the **agreement** that is made between two or more parties. (Daniel Albahary)
- **CONTRACTUAL PARTIES**: The parties to a contract may be public or private entities (**person-person**; **person-corporation**; **corporation-corporation**) but a good contract will set out who is bound. (Jonathan Laski)
- Because of the doctrine of **privity** of contract, the contract and its terms are binding only on those parties, both in terms of its **specific performance** and **liability** accruing from a **breach** of its terms... (Johanna McNulty)
- **FORM/PROOF**: a contract can be articulated **orally** or in **writing**, but the latter is preferred as it can serve as a more tangible **proof** of an agreement during **litigation**. (Ivana Sud)

CONTRATOS SEGUNDO SISTEMAS DA “COMMON LAW”:

- **Defeitos do Consentimento**: Each party who agrees to take part in the contract must be fully intellectually **capable** of entering into a contract and **comprehending** the terms of the agreement. As well, each party must enter into the contract of their own **freewill** and not under any **duress** of any kind. (Suzie Kotzer)
- It must be entered into **voluntarily**, without **coercion**, by someone who has reached the age of majority and is **mentally capable** of understanding what they are agreeing to. If the terms of a contract are not honoured, **lawyers make money**. (Meghan Murtha)
- **Princípio da obrigatoriedade do contrato (“binding effect”)**: As contracts are legally binding, either party that **breaches** it is subject to **legal ramifications**. (Nicholas Saint-Martin)

FORMAÇÃO DOS CONTRATOS NOS SISTEMAS

"COMMON LAW":

• OFFER (OFERTA)

- a proposition put forward by an **offeror** to an **offeree**, indicating a willingness to enter into an agreement on certain terms, *coupled with an intimation that s/he is willing to be bound by that proposition* (IAN KERR, Ottawa University)
- can be made to a **single person (bilateral)** or to **several people (multi-lateral)** or to the **"world at large" (unilateral)**
- generally, a proposition becomes an offer **only when it is communicated** (whether verbally, in writing or by conduct) to the offeree



FORMAÇÃO DOS CONTRATOS NOS SISTEMAS

"COMMON LAW":

• Invitation to Treat

- a proposition indicating a general commercial intent
- lacks the requisite intention to enter into legal relations
- (i.e., a desire to enter into contractual negotiations and *perhaps* a contract *if* a suitable agreement can be reached)
- **The distinction between offer // invitation is important in the following way:**
 - when an offer is made, it can be accepted. Once accepted (assuming an exchange of consideration has occurred), a contract comes into being
 - it is NOT possible to "accept" an invitation
 - the distinction between offer // invitation is often difficult to apply in actual cases



FORMAÇÃO DOS CONTRATOS NOS SISTEMAS

"COMMON LAW":

- generally, **a mere quotation of one's lowest price is not an offer**, because it is said to lack an intention to be bound to that price. According to the courts, the matter must be determined via an examination of the intention of the author of the statement (in light of the circumstances of the case and the language used)
- generally, **the display of goods (including price tags) is thought to be an invitation to treat**. According to the decision in *Boots Cash Chemists*, there is no such thing as an offer-for-sale in a retail self-service store rather there is only an offer-to-purchase.
- most **ads are invitations to treat** - in order for an ad to be an offer, it must express a clear intention to enter into legal relations .



FORMAÇÃO DOS CONTRATOS NOS SISTEMAS

"COMMON LAW":

- **reward offers are a special instance of a unilateral offer** made via advertisements: - they often cause certain problems when it comes to the communication requirement; - they push-the-limits of the notion of a unilateral offer.
- **Actions and fixed bids:** generally, a call for the best bid, whether in an open or closed forum is an invitation to treat • courts have held that referential bids will not be capable of acceptance in cases where the caller has indicated that it will take the highest/lowest offer.



FORMAÇÃO DOS CONTRATOS NOS SISTEMAS

"COMMON LAW":

- **ACCEPTANCE / ACEITAÇÃO**
- Acceptance means the signification by the **offeree of his/her willingness to enter into a contract** with offeror on the terms, as offered
- **ACCEPTANCE X COUNTER-OFFER** – battle of forms
- – determine whether acceptance substantially mirrors offer. If not, determine whether offeree provided notice and whether offeror objected.
- – **first shot rule** ...sometimes works with "supremacy clause"
- – **last shot rule** ...sometimes works when performance has occurred without objection



FORMAÇÃO DOS CONTRATOS NOS SISTEMAS

"COMMON LAW":

- **COMMUNICATION REQUIREMENTS:**
- **GENERAL RULE (RECEIPT RULE):** the communication of acceptance is said to be complete when (and where) it is received by the offeror.
- • this rule applies to all communication deemed to be **instantaneous** [not involving significant delays or 3rd parties]
- • paradigms for instantaneous communication tend to include **face-to-face interaction**, telephone, etc...
- **THE POSTAL ACCEPTANCE RULE (DISPATCH RULE):** for **non-instantaneous communications**, the communication of acceptance is said to be complete when (and where) it is dispatched by the offeree
- • paradigms for non-instantaneous communication tend to include the post, telegrams, over-night couriers.
- **NEW MEDIA?**



FORMAÇÃO DOS CONTRATOS NOS SISTEMAS

"COMMON LAW":

- **no universal rule - econtract**
- when offer and acceptance involve **shrinkwrap/clickwrap/browsewrap**, the issue usually boils down to whether the offeree **has reasonable notice of the terms and conditions**, not whether s/he actually read/understood them
- offerees who have been provided with reasonable notice and an opportunity to return the goods or deny the services are usually held to contract if they have acted in a manner that supports **"acceptance by conduct"**
- **REFUSAL**: offers that are refused by the offeree cannot later be accepted; the refusal of an offer results in its termination.
- **REVOKATION**: is an act of the offeror (or agent) and, in order to be effective, it must be communicated to the offeree.



FORMAÇÃO DOS CONTRATOS NOS SISTEMAS

"COMMON LAW":

- **LAPSE OF TIME**: often, acceptance will be impossible because of the lapse of some reasonable period of time since the offer was put forth.
- Courts will determine the **reasonable period of time** by investigating the nature and character and the normal or **usual course of business negotiations** leading to the sale, as well as the **circumstances** of the offer including the conduct of the parties in the course of negotiations.
- **DEATH**: of the offeror will sometimes **make acceptance impossible**, such is not the case where performance of an offeror's obligations do not require the existence of the offeror.
- **IMPLIED CONDITIONS**: some offers have express or implied conditions, the failure of which will be said to terminate the offer.



FORMAÇÃO DOS CONTRATOS NOS SISTEMAS "COMMON LAW":

- **ELECTRONIC CONTRACT** - *Electronic Commerce Act*, S.O. 2000, c. 17.
- **Momento do envio da informação eletrônica ou documento eletrônico**
- 22 (1) Electronic information or an electronic document is sent when it enters an information system outside the sender's control or, if the sender and the addressee use the same information system, when it becomes capable of being retrieved and processed by the addressee.
- **Presunção do momento de recebimento**
- 22(3) Electronic information or an electronic document is presumed to be received by the addressee, (a) if the addressee has designated or uses an information system for the purpose of receiving information or documents of the type sent, when it enters that information system and becomes capable of being retrieved and processed by the addressee; or (b) if the addressee has not designated or does not use an information system for the purpose of receiving information or documents of the type sent, when the addressee becomes aware of the information or document in the addressee's information system and it becomes capable of being retrieved and processed by the addressee.



FORMAÇÃO DOS CONTRATOS NOS SISTEMAS "COMMON LAW":

- **Lugar de envio e recebimento**
- 22(4) Electronic information or an electronic document is deemed to be sent from the sender's place of business and received at the addressee's place of business.
- Problemas possíveis: lei aplicável e jurisdição competente
- Importância do estudo comparado – uniformização do Direito Privado



FORMAÇÃO DOS CONTRATOS NOS SISTEMAS "COMMON LAW":

- **CONCEITO DE CONSIDERAÇÃO:**
- "CONSIDERATION"
- Oferta e aceitação não são suficientes para a validade de um contrato nos sistemas "common law"
- requer-se, também, "consideração", ou seja, "one must prove that something of value was given in satisfaction for a particular promise" para distinguir os contratos das meras promessas graciosas e não vinculantes
- **Currie v. Misa:** "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other"



PRINCÍPIO DA RELATIVIDADE DOS EFEITOS DOS CONTRATOS:

- **DOCTRINE OF PRIVITY**
- "a person who is not a party to a contract cannot enjoy the benefits or suffer the burdens of it."
- applies to prevent two sets of people from enforcing a contract:
 1. "strangers to the contract"
 2. "strangers to the consideration"


