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LEGAL PROTECTION OF INVESTMENTS¹

PROTEÇÃO LEGAL DOS INVESTIMENTOS

Fábio Ulhoa Coelho

Abstract: The objective is to discuss theoretically the groundings of the relationship between Legal Protection of Investment (LPI) and general interests. This discussion aims to evidence the legal certainty as a very important component of the LPI. Additionally, the article proposes that reducing the LPI to an individual protection is not the correct approach to the matter. The rule of lower LPI as a barrier to entry of new competitors is also discussed. The article shows how those groundings were adopted by the Brazilian Commercial Code. The conclusion presents basic elements of an empirical legal study model destined to measure the LPI.

Keywords: Legal protection of the investment. Legal certainty. Competitiveness.²

Resumo: O objetivo deste artigo é discutir os fundamentos da relação entre a proteção jurídica do investimento privado e os interesses metaindividuais. Essa discussão evidencia a segurança jurídica como um importante componente da proteção jurídica do investimento privado. E revela ser incorreto reduzir a proteção jurídica do

1 Artigo recebido em 21.04.2015 e aceito em 07.12.2015.

2 Brazilian Commercial Code bill.

investimento privado à proteção de interesses individuais. Discute também como a baixa proteção jurídica do investimento privado representa uma barreira à entrada de novos competidores. O artigo mostra que aqueles fundamentos foram adotados pelo Projeto de Código Comercial brasileiro. A conclusão apresenta os elementos básicos de um modelo empírico (jurimétrico) para a mensuração dos níveis de proteção jurídica do investimento privado.

Palavras-chaves: Proteção jurídica do investimento privado. Segurança jurídica. Competitividade. Projeto de Código Comercial Brasileiro.

Summary: 1. Introduction. 2. LPI and legal certainty. 3. LPI and general interests. 4. LPI and competitiveness. 5. LPI and the Brazilian Commercial Code bill. 6. Measuring LPI.

1. Introduction.

A country that does not protect the investment does not protect its people.

Entrepreneurs not only make economic calculations when they examine the opportunity of new investments. They make legal calculations as well, based on the Law in force and how it has been applied by the courts in a given jurisdiction. Therefore, the legal protection of the investment (LPI) offered by the countries is one of the most important weapons in the global competition for the investments.

In the globalized economy, entrepreneurs have the entire world to invest. If an entrepreneur³ regards the LPI in his own country as unsatisfactory, investing in other jurisdictions will be very easy to

³ Entrepreneur is defined here as the person or the company or corporation that invests money and other resources in a specific economic activity.

him. On the other hand, consumers usually have free access only to their domestic consumer market⁴. The goods and services prices are indirectly related to the LPI level: the greater the law protects the investment, the cheaper the prices are. So, when a country adopts legal measures aiming to increase the LPI, it will eventually protect the consumer's interests.

This article is structured in six sections including the present brief introduction (section 1). My initial objective is to discuss theoretically the groundings of the relationship between LPI and consumers' interests. This discussion aims to evidence the legal certainty as a very important component of the LPI (section 2). Additionally, it proposes that reducing the LPI to an individual protection is not the correct approach to the matter (section 3). In sequence, the rule of lower LPI as a barrier to entry of new competitors is discussed (section 4). Secondly, the article shows how those groundings were adopted by the Brazilian Commercial Code bill that has been under review by the National Congress since 2011 (section 5). Finally, the article presents the first elements of an empirical legal study model destined to measure the LPI (section 6).

2. LPI and legal certainty.

LPI presupposes sophisticated and appropriated labor, tax, corporate, commercial and intellectual property Laws. It depends not only on the adequacy of statutes, acts and other general rules to business demands. The content of the norms is surely important. However, Law in force abstractly considered is not sufficient to guarantee effective protection to the investment. Legal certainty is also a condition of the LPI.

⁴ The consumer market related to an Economic Community must be considered here as equivalent to domestic consumer market.

Legal certainty is an extremely complex subject involving issues from psychological perceptions to the strength of institutions. I simplify it here by reducing legal certainty to the idea of predictability of judicial rulings. I adopt the premise that “the greater the predictability of judicial decisions, the greater the legal certainty”.

A judicial ruling is predictable when it applies the Law according to the precedents. When the judge adopts a new interpretation of the Law, the judicial decision is unpredictable. In civil law jurisdictions, the predictability is also related to the observance of the often referred to “doctrine” (interpretations by notable legal scholars). The court pronounces an unpredictable decision when it interprets the Law differently from the doctrine.

When conservative entrepreneurs make legal calculations, they presuppose that the Law in force will be strictly applied by the courts and the precedents will be observed⁵. They trust in legal certainty. A small margin of unpredictability is generally tolerated because nobody knows how to anticipate 100% of the judicial rulings. There is definitely a “predictable unpredictability”.

The tiny margin of predictable unpredictability is incorporated into the conservative entrepreneurs’ legal calculations and does not disturb their economic decision. A legal uncertainty environment results from the increase of the predictable unpredictability. When the number of unpredictable judicial decisions extrapolates the normally small margin presupposed by the conservative entrepreneurs’ calculations, legal certainty disappears.

The conservative entrepreneur avoids doing business in countries without legal certainty. He feels more comfortable where the rules are clear and effective. A country without legal certainty tends

⁵ According to the risk aversion grade, entrepreneurs can be grouped in two categories: conservative (high grade) and bold (low grade).

to turn away conservative investments. It is attractive to a different kind of entrepreneurs – the bold ones.

Legal uncertainty raises risks. As risk makers, bold entrepreneurs are looking for riskier opportunities. As gains are proportional to risks, a country without legal certainty is the right place to do business when the objective is pursuing higher level of profits.

Therefore, LPI sculpts the kind of investment the country attracts. Higher LPI decreases the risks and consequently is more convenient to the conservative entrepreneurs. Lower LPI increases the risks and draws the attention of bolder entrepreneurs.

Why should a country be concerned about its LPI level if it attracts investments even while offering a lower LPI and a legal uncertainty environment to entrepreneurs? It must heighten the LPI to protect its people. The next section deals with this subject.

3. LPI and general interests.

LPI appears to be a concept related exclusively to an individual protection. Indeed, the idea of protecting the investment suggests giving protection just to entrepreneurs. This initial suggestion probably originated in the current concerns against the individualism. In the last century, the European-centered Law surpassed its original individualistic tendency⁶. The supremacy of general over the individual interests is now generally accepted, but this notion corresponds to a recently built value. We still have to defend this value.

LPI is not a concept inspired by Adam Smith's liberalism. It is not a simple resurrection of an outdated notion. On the contrary, LPI is a protection of a genuine general interest, i.e. the consumers' inter-

⁶ European-centered Law is defined here as the law in force in Europe and in the former European colonies in America, Oceania and parts of Africa and Asia.

ests in reduced prices and better quality of goods and services. LPI is convergent to the European-centered Law conquests.

Lower LPI, as established in the previous section, does not hinder all investments. A country is able to attract investors even without a high level of LPI. But only or mainly the bolder entrepreneurs will be interested in doing business in this country. This bold entrepreneur looks for risky investments, because higher risks have always been associated with the perspective of higher gains. We can say that they are definitely not worried about legal risks.

In short, bold entrepreneurs must spread the elevated risks through the prices of the goods or services they sell in the consumer market. They will not obtain the higher profits they are looking for unless they spread the increase of the legal risks. Therefore, in countries with low level of LPI, consumers tend to pay more for the same product or service than in countries with high level of LPI. The prices are increased by rates associated with the legal risk.

I emphasize that even the conservative entrepreneurs are forced to change their concepts when doing business in a lower-LPI country. Everyone must be prepared for unpredictable judicial decisions. To guarantee their projected profit margin, all the entrepreneurs employ the same economic logic. In a lower-LPI country even the conservative entrepreneurs raise the prices of their goods or services.

The emphasis on the LPI's relevance to a general interest introduces a discussion about values. Albeit it has not been usual, contextualizing the matter of legal certainty into a discussion about values is indispensable to understand the intricacy of the matter.

I have proposed that the most important aspect related to legal certainty issue is the ideology. I adopt the functional meaning of "ideology", elaborated by Tércio Sampaio Ferraz Jr.⁷. According to this

7 VASCONCELOS, Arnaldo. *Teoria da norma jurídica*. 2ª ed. Rio de Janeiro: Forense: 1986. p. 155; FERRAZ, JR., Tercio Sampaio. *Direito, retórica e comunicação*. São Paulo: Saraiva, 1973.

concept, ideology is the “valuation of values”. Society not only cultivates its values. It also values them. There is a hierarchy of values. It is precisely this hierarchy that represents ideology in its functional meaning.

The concept may be illustrated through the values related to free initiative and to consumer protection. Two hundred years ago, the value associated to free initiative was above that associated to protection of consumers. Adam Smith’s famous proposition was widely accepted: if the full freedom of initiative and competition were assured, consumers would be naturally satisfied in their interests and rights. At that time, those two values were evaluated to give a higher importance to free initiative. Since the 1960s, the spreading out of the consumer protection movement has been changing this hierarchy in Western jurisdictions. The inversion has already taken place, and “consumer protection” is hierarchically superior to “free initiative”. The ideology of society has changed.

Judicial rulings are more or less predictable not only based on changes in rules. The predictability depends on the changes in values cultivated by society and the valuation of such values. Essentially, it depends on ideology⁸. Countries interested in improving their legal

p. 150; Id. *Função social da dogmática jurídica*. São Paulo: Revista dos Tribunais, 1980. p. 187-188.

8 A highly notable case of Brazilian courts shows that legal certainty does not depend only on the law in force. I make reference here to same-sex marriages. In Brazil, there is no law permitting same-sex marriages. The Brazilian Constitution itself sets forth a provision on marriage, which has been the same since 1988. Article 226 has had the same wording since the beginning of its effectiveness. It suffered one amendment only, in 2010, which suppressed one of the forms of dissolution of marriage (separation) and kept the other (divorce). This change, therefore, has no relevance for the issue of admissibility or not of same-sex marriages. The drafters of the Constitution were certainly not worried about defining marriage as the family union of man and woman. In 1988, for Brazilians, there would not have been same-sex marriage. By the way, law professors and books for law students had always referred to the idea of same-sex marriage as an example of a “nonexistent legal act”. But, in 2011, the Federal Supreme Court (STF), the highest Brazilian court of justice, recognized that the Constitution protects family unions regardless of the partners’ sex. Since this historical decision, same-sex

certainty must pay attention to the hierarchy of the values adopted by the society and consequently by the legal community (judges, lawyers etc). Actions destined to clarify the importance of the LPI to society as a whole will be necessary if the values associated to LPI assume a lower position than those of the values associated to labor, consumer protection and tax Laws. The perception that protecting the investment signifies protecting consumers' interests is indispensable to modify the hierarchy of values adopted by society, in the globalized economy. When the legal community does not immediately link LPI to the protection of general interests, changes in the ideology are required as a needful measure to heighten legal certainty.

The most conservative entrepreneurs would prefer investing under a legal certainty environment. When the level of the LPI is not entirely satisfactory, they can easily move their investments to other jurisdictions. In the end, lower-LPI interests only the bolder entrepreneurs and it only damages consumers' interests.

An increased LPI primarily benefits consumers' interests. Of course, the entrepreneurs' interests take simultaneously advantage as well, but it must be seen as a less important effect. The main objective is decreasing legal risks and creating the conditions to reduce the prices paid by the consumers.

LPI is a concept associated to a general interest protection. In the globalized economy, protecting investment is protecting the con-

marriages have started being formalized in several parts of the country. Therefore, if a family lawyer were consulted in the 1990s on the feasibility of filing a lawsuit for the recognition of the right of two persons of the same sex to get married, that lawyer would certainly advise the client on the absolute impossibility of being successful. Today, after a quarter-century, that lawyer would make a diametrically different evaluation. He would have to tell the client that a judicial lawsuit is completely feasible. What has changed in the meantime? It was not the general rule. The Brazilian Constitution has not changed in connection with the matter during this period. But the values cultivated by the Brazilian society have changed. Brazilians today do not repudiate relations between same-sex persons as they did five or six years ago. This case shows that foretelling the possibility of success or failure in any judicial lawsuit cannot be based on an analysis restricted exclusively to the rules and precedents, even in a civil law jurisdiction.

sumers' demand for low prices and high quality of goods and services. Increasing LPI is a way to heighten the competition – a subject discussed in the next section.

4. LPI and competitiveness.

Similar to other people, entrepreneurs may be grouped in two categories: competitive and non-competitive. The behavior of some people is constantly motivated by disputes and conquests. Their vital energy is identifying potential competitors and challenging them. On the other hand, there are people who are refractory to competition. They avoid confrontations as much as possible. The personal character of the controlling shareholder and directors is somewhat transferred to the corporation, depending on whether they are competitive or non-competitive men and women.

It is important to apprehend these different types of entrepreneurs when we discuss the relationship between LPI and competitiveness. The attitude toward changes related to LPI varies significantly according to the basic feature of each category. Non-competitive entrepreneurs, either conservative or bold, tend to fight against any improvement in LPI. Understanding this apparently discordant behavior presupposes a brief previous exploration about how lower-LPI reduces competitiveness.

A variation of the law of supply and demand could explain the reduced competitiveness in jurisdictions with lower-LPI. There are presumably fewer bold entrepreneurs than conservative ones. In other words, there are fewer businesspersons interested in investing in riskier economic activities. Lower LPI adds legal risk to the economic risks already associated to a given enterprise. Consequently, there are not a great number of entrepreneurs interested in exploiting enterprises in lower-LPI jurisdictions. Business in a lower-LPI jurisdiction attracts fewer entrepreneurs and the competition in such jurisdictions tends to be naturally weaker.

One of the consequences of the lack of competition is well known: prices rise and quality decreases. It is widely accepted that the ultimate objective of the freedom of competition is to protect the consumers' interest in reduced prices and a better quality of goods and services. Once again, as a measure of attracting more business and increasing the competition, LPI provides protection to this general interest.

A different aspect of the direct relationship between lower-LPI and weak competitiveness needs to be pointed out. The lower-LPI becomes a barrier to entry of new competitors. Non-competitive entrepreneurs who have already invested in a lower-LPI jurisdiction and have already taken their market share do not receive enough incentives to demand a stronger legal certainty environment. On the contrary, their interest is the maintenance of the lower-LPI because this scenario fends off potential competitors.

Given that higher-LPI tends to reduce prices, non-competitive entrepreneurs will not easily obtain their projected gains because they made their investment when the LPI level was lower. They will probably fight against any institutional action destined to enhance the LPI level – particularly legislative reforms.

In short, when a country adopts measures to upgrade its business environment, the fundamental opposition will be between the consumers' interest in lower prices and better quality against the non-competitive entrepreneurs' interest in keeping their market share. At this moment, domestic competitive entrepreneurs and foreign conservative entrepreneurs will be important allies of the consumers.

5. LPI and the Brazilian Commercial Code bill.

The above discussions – on LPI and legal certainty, general interest protection and competitiveness – create an adequate framework to understand the groundings of the Brazilian Commercial Code

Bill (BCCB)⁹ and¹⁰ its core objective is the enhancement of the Brazilian LPI level in order to (i) increase legal certainty, (ii) reduce legal risks, (iii) change the type of investor to be attracted, (iv) strengthen the competitiveness and (v) diminish prices and improve the quality of goods and services.

The BCCB's most relevant legal characteristic is the commonly called "principleology". When the new Code is approved, it will enunciate and define the Commercial Law principles. The great importance of this characteristic can be perceived in the context of how the legal argumentation has currently been structured in Brazil. The legal argumentation based on principles has been largely adopted by legal professors, scholars and courts.

The Brazilian legal community has been strongly influenced by the theory of principles since the 1990's. According to several scholars, the movement toward the principles was triggered by the principleology Brazilian Constitution, when it was enacted in 1988. Dworkin¹¹ and Alexy¹² have been the most important theoretical references to the Brazilian legal community.

Legal professors, scholars and lawyers specialized in almost all the legal areas (such as labor, consumer protection, tax, environmental protection law etc) promptly realized the potential of the new argumentation standard. Nowadays, Brazilian legal literature in these areas has abundantly studied its own principles. Inadvertently, the "commercialists" (professors, scholars and lawyers specialized in

9 The Brazilian Commercial Code Bill is being reviewed through the Project n. 1572/11 (House of Deputies) and the Project n. 487/13 (Senate).

10 BCCB encompasses seven Chapters: (i) introductory and general norms; (ii) companies; (iii) entrepreneurial obligations, contracts and debt documents; (iv) agribusiness; (v) entrepreneurial maritime law; (vi) entrepreneurial litigation; (vii) transitory and final norms.

11 DWORKIN, Ronald. *Taking rights seriously*. Cambridge: Harvard University Press, 1978.

12 ALEXY, Robert. *Theorie der Grundrechte*. Berlin: Suhrkamp Verlag, 2006.

Commercial Law) were not sensitized enough to the importance of the movement toward “principlelogical” argumentation. As an unfortunate result, some of the main commercial Law concepts are incomplete – or even incorrectly understood by the legal community – today. The comprehension of the companies as a legal entity, for instance, has been severely impaired because the commercialists have not created arguments evidencing that this concept is a relevant aspect of the principle of freedom initiative. Several courts have applied the “piercing of the corporate veil doctrine” even in cases in which there was no fraud at all¹³.

The legal uncertainty environment was partially caused by the commercialists’ negligence. Reinforcing what I said above, ideology matters. When two or three generations of legal students simply do not listen to a single word about the groundings of the commercial Law concepts, this surely collaborates to a corrosion of the values associated to LPI.

A principlelogical Commercial Code fosters the conditions to reaffirm these concepts and strengthen the correspondent values. Consider, for instance, Art. 6º, III, of the BCCB (Senate Project): *“the principle of freedom initiative implies the recognition of the legal protection of private investment as important for the society as a whole, when it is made in order to supply goods and services, to create, consolidate or improve consumers’ market, to proportionate innovation and to contribute to the national economic development”*. This norm defines one of the free initiative implications. As a legal disposition, it becomes not only a rule to be applied by the courts, but also a “mandatory” subject of studies and research. The reflections on this disposition will contribute to raise the value associated to LPI position in the hierarchy of values, in the Brazilian society.

13 The piercing of corporate veil doctrine is adopted by Brazilian Law (Civil Code, art. 50; Consumer Protection Code, art. 28).

6. Measuring LPI.

Several times I have mentioned “lower-LPI” and “higher-LPI”. A notion of quantitative relationship can be found by everyone behind these expressions. We are able to understand in an intuitive way the LPI range itself and its relations with prices and competitiveness. The arguments above presented would be substantially enriched if we had an accurate quantification. I conclude this article presenting some elements that could become the embryonic model of an empirical legal study destined to quantify the LPI.

Measuring legal certainty itself involves almost insurmountable difficulties. Labeling a given judicial decision as unpredictable presupposes extremely complex discussions about interpretation. At least the judge who had rendered the decision and the lawyer who had won the case would consider it totally predictable. Another unresolved question is how to quantify the categories of absolute unpredictable, partially unpredictable and predictable decisions.

Different from legal certainty, LPI could be measured easier. The objective is rating jurisdictions according to a scale from 1 (lower-LPI) to 5 (higher-LPI), based on surveys among lawyers who work for entrepreneurs in all areas (corporate, contracts, litigation, labor, tax, environmental protection law etc). These professionals would be asked about the efficacy of the Risk Allocation Legal Measures (RALM) in the jurisdiction in which they practice. The surveys would capture the perception of these professionals on such efficacy, according to the scale below:

Grade	Meaning
1	Total inefficacy of the RALM
2	Transition from total inefficacy to partial inefficacy
3	Partial inefficacy of the RALM
4	Transition from partial inefficacy to total efficacy
5	Total efficacy of the RALM

The average rate of each jurisdiction must take into consideration the relevance of the RALM according to the respective legal areas. The interviewed lawyers in the surveys would be asked about the weight of each area. In my point of view, RALM has total inefficacy in labor law cases, it has partial inefficacy in tax law cases and almost total efficacy in civil and commercial cases in Brazil. My evaluation would give grade 1 to labor, 3 to tax and 4 to civil and commercial cases. As my perception of legal uncertainty is stronger in labor law than in other areas, my contribution to the adequate Brazil LPI-rate would take for granted some type of balanced weighing system.

RALM is a customized concept in the sense that it was created specifically for the surveys on LPI. For this reason, its meaning will have to be explained to interviewed lawyers. RALM encompasses every legal institution whose function is to allocate economic risks, such as companies, trusts, insurance contracts, etc. Indeed, even a limitation of responsibility clause inserted in a sale of goods contract is a RALM.

The customized feature is appropriate and of great advantage. This concept has enough abstractionism to permit global surveys. Albeit no specific jurisdiction strictly adopts it as a legal institution, its meaning could be easily comprehended worldwide. On the other hand, the RALM concept corresponds to one of the most important concerns of the entrepreneurs when they made legal calculations prior to investing in a given jurisdiction.

Consistent LPI rates will permit us to make comparisons between different jurisdictions and to test the above proposed statements. In Brazil, this index will permit further empirical verification of the economic effects of the future Commercial Code.