Contractual chains: is it possible to outsource activities without assuming responsibilities?

The premises and limits of business fragmentation in the face of the risks of organized irresponsibility

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An important topic within the scope of business contracts is the allocation of risks and responsibilities in contractual chains. One of the important discussions is to ascertain whether and to what extent the internal distribution of risks and responsibilities among the members of the chain may affect the attribution of liability towards third parties, all the more so when it comes to vulnerable third parties, such as consumers and workers, or to non-contractual creditors, such as the victims of environmental damage and other instances of non-contractual liability.

The question is relevant because, within the scope of business contracts, which are presumably on an equal footing, the allocation of risks duly agreed between the parties should prevail, even though intriguing questions may arise, such as those concerning the existence of a duty of care towards all the participants in the chain, even if they are not directly bound by a contractual relationship.

However, the focus of concern of this article relates to ascertaining the extent of the allocation of risks and responsibilities established by economic agents in relation to third parties, especially those deserving of special protection.

In this sense, the reflection now proposed is intended to give practical effectiveness to the principle of the balance between power and responsibility, preventing economic arrangements from creating an environment of organized irresponsibility towards third parties.

In the case of Consumer Law, as I have already addressed in a previous column[1], there is a general rule of joint and several liability among all the participants in the chain. The challenge is therefore to try to delimit the direct participants in the chain, so as not to unduly extend joint and several liability to those that have an indirect or ancillary participation in the supply of the product or service.

However, in other areas, such as Labor Law and Environmental Law, there is no statutory provision for joint and several liability among the members of the chain, so that greater effort is required to ascertain whether and to what extent the participants must answer for the damage suffered by third parties.

To advance in this discussion, it is necessary to consider the recent transformations that the duty of care of company managers has been undergoing. Indeed, this duty has been acquiring a procedural dimension, so as to encompass the care with which managers structure the business organization in order to deal with the respective risks[2].

In this way, the duty of care comes to extend equally to business partners, requiring care both in their selection and in the monitoring of their activities. From this perspective, it is not enough to know whether the partner provides a good service or delivers a good

[1] https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/quem-responde-pelos-danos-ao-consumidor

[2] https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/dever-de-diligencia

product; it is essential to know how it provides that service or manufactures its product, as well as what precautions it takes in order to comply with the legislation and with compliance targets. After all, a good product or service is of no use if it is offered at the cost of corruption, slave labor, environmental degradation or other unlawful practices.

In addition to the duty of care regarding business partners, some areas, such as Environmental Law, seek to broaden the accountability of economic agents by means of broad definitions of the centers of responsibility, of which Article 2 of the Brazilian Environmental Act is an example.

Now, if even in the criminal sphere criminal liability reaches all those who, through their acts or omissions, took part in the conduct, with all the more reason must this reasoning be applied in the sphere of civil liability.

At the international level, national legislative initiatives stand out, as does the recent European Union directive, which provides for a broad duty of diligence in relation to business partners on sustainability matters in the broad sense, human rights included[3]. Hence the provision of the *corporate due diligence duty* for large companies, on pain of fines and compensation.

In any event, it can be stated that, in Environmental Law, the definition of polluter, combined with the extension of the duty of care in relation to business partners, may assist in attributing liability for environmental damage to those who take part in the production chain and have, in some way, contributed, through their acts or omissions, to the production of the damage.

In Labor Law, in turn, an important benchmark is the judgment of the Federal Supreme Court in the case on the outsourcing of core activities. Although the Court recognized the possibility of

[3] https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/sustentabilidade-e-dever-de-diligencia

outsourcing, its reasoning converges with the economic premise that activities may be outsourced, but responsibilities may not[4].

In that case, the Federal Supreme Court made it clear that the liability of the service taker, although it changes, does not cease to exist. It remains present, albeit on a subsidiary basis, depending on the degree of fault in the selection or in the supervision of the partners, or even on the risk assumed by each member of the chain. The headnote already makes it clear that it is essential for the taker to verify the trustworthiness and the economic capacity of the outsourced company and to be subsidiarily liable for non-compliance with labor and social security rules, and Justice Barroso's vote on the subject is worth highlighting:

> "The subsidiary liability of the service taker, in outsourcing, constitutes a minimum corollary of the rights guaranteed by the Constitution to workers and of the prohibition on the exploitation of economic activity at the expense of the worker's dignity. (…) To enter into outsourcing contracts, at low cost, with outsourced companies, not to supervise them, to appropriate part of the economic advantages obtained through the violation of such rules and to seek to exempt oneself from any consequence arising from such a state of affairs is illegitimate. Those who outsource obtain the advantages and must therefore also assume the risks of outsourcing, which cannot be borne solely by the employees and by the Public Authorities, in their social security and social assistance capacity."

This is a fundamental lesson, in which the Federal Supreme Court states that, more than a duty of care, the service taker must answer, in some way, for the risk of outsourcing, since it obtains direct benefits from it. Accordingly, it would make no sense for it to be

[4] STF, ADPF 324, Reporting Justice Roberto Barroso, judgment of 30.08.2018.

exempt from all liability for the damage caused to workers by the direct employer.

Beyond that, specific legislative initiatives have contributed to ensuring the liability of the participants in the chain in labor matters. See, as an example, the subject matter of ADI 5465, on which occasion the Court declared constitutional a São Paulo statute that provided for heavy sanctions – cancellation of the ICMS registration and even a prohibition on operating in the sector for up to ten years, in accordance with the conforming interpretation given by the Federal Supreme Court – for purchases of products related to work analogous to slavery[5].

Another interesting case is the one in which the CVM held that there may be a breach of the duty of care of the managers of a company by reason of the violation of labor rules – conditions analogous to slavery – committed by the contracted company[6]. Even though the officers were acquitted, the CVM did not consider the discussion on the breach of the duty of care in such cases to be irrelevant, basing the acquittal on the existence of reasonable internal controls.

The vote of Director Marina Copola even mentions that "the risk relating to compliance by service providers with the legislation applicable to them was inherent to the Company's activity. That risk should therefore feature as a priority in the monitoring exercised by the board of directors, ostensibly forming part of T4F's risk management system."

In this way, what is observed in Brazil is an effort to find grounds for holding the participants in production chains liable towards vulnerable third parties. The difference is that, whereas in the consumer field, in the face of a broad statutory definition of the production chain, efforts are being made to better delimit that chain,

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[5] https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/sancoes-por-aquisicoes-de-produtos-relacionados-ao-trabalho-escravo

[6] PAS CVM 19957.003158/2024-46, Reporting Director João Accioly, judgment of 11.11.2025.

in the other areas, in which there is no statutory rule, the effort is precisely to find grounds for holding its direct participants liable.

To that end, the procedural view of the duty of care and its association with the compliance requirements of contractual partners is very important, which calls for an increasingly close dialogue between Corporate Law and Contract Law.

It is also essential to consider the particularities of each area – such as the notion of polluter adopted by Environmental Law, the applicable constitutional principles and the economic rationality of holding the participants in the production chain liable, which is to avoid the creation of economic efficiencies through the undue transfer of social costs.

It is thus concluded that the efforts to be made on this subject require solutions that strike an adequate balance between decision-making capacity, appropriation of economic benefits and effective assumption of the corresponding risks, in order to avoid exaggerated opportunism, excessive risk-taking, the generation of negative externalities, the transfer of costs to third parties and violations of rights.

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