Antitrust and Litigation

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Cade and the principle of non-surprise

There is no legal possibility for a surprise decision: everything has to be properly discussed beforehand with the parties

The new Brazilian Code of Civil Procedure (CPC), contained in art. 10, brought a new concept to civil procedure in Brazil. It states the following, "The judge cannot rule, in any degree of jurisdiction, in regards to an issue in which both parties have not been given an opportunity to respond, even if it is about a subject that is required to be ruled *ex officio*.

It is called the Principle of Non-Surprise, which is an offshoot of the principle of contradictory (Federal Constitution, art. 5, LV). This provision is not set forth in Law 12,529/2011 (Antitrust Law – LDC), thereby being applicable to antitrust proceedings, resulting from article 115 of this Law.

In reference to this principle, Welder Queiroz dos SANTOS says, "It is imperative that the parties know which matters of fact and questions of law are considered relevant by the judge and have the opportunity to contribute in the decision-making process.

In this manner, the parties can clarify all relevant facts, indicating their respective evidence and making inquiries (...). Thus, if a judge has the impression that a normative text, considered as applicable to the case by the parties is unconstitutional, he should summon the parties to give their opinions, in regards to its (un)constitutionality, if they wish, as long as this issue has not been previously discussed at any time during the proceedings. The same is applicable to procedural public policy issues, as well as the cause of the action and legal premises." ("Comments about the Civil Procedure Code," org. Cassio Scarpinella Bueno, Vol. 1, Saraiva, São Paulo, 2017, pages 155/156).

It is important to point out that the judge cannot decide that a right has become void, without having a broad debate and opening the possibility of furnishing evidence. Without this, the contradictory is violated.

The same is applicable to any sanctioning administrative proceeding. The Administration should not be surprised by a decision for a reason that was not previously mentioned, nor should individuals be convicted for a reason of which there has not being an ample debate or the possibility of furnishing evidence at the appropriate moment.

In September 2017, something noteworthy occurred, The Second Chamber of the Superior Court of Justice (STJ) decided, in Special Appeal 1,676,027-PR, in which Minister Herman Benjamin was reporting - addressing exactly the principle of non-surprise, that "negative effectivity to art. 10, together with art. 933 of CPC/2015, implies *error in proceeding* and nullifying the judgment, which imposes the necessity of summons processed in the court of origin, in order to allow the participation of the rightsholders of those being discussed to form the judge's conviction."

Going deeper, "the contradictory is manifested by the combination of knowledge/influence binomial." In other words, it is not merely enough to have information about the facts and arguments of the process, but rather, it is fundamental that the parties can exert their influence, which often occurs through furnishing evidence at the appropriate moment.

We shall now examine the moment, in which the object of the litigation is established (hereby seen in the singular to simplify, though in certain cases, it could be plural), regarding which parties have the right to give their opinions and to furnish the appropriate evidence.

In the civil procedure, this is the moment of the conclusive opening order, provided in article 357of CPC, in which item II specifies that the judge should "define the points of fact, which evidentiary activities shall be subject to, specifying the admissible means of furnishing the evidence."

This provision corresponds to art. 72 in the LDC, which states, "Within 30 (thirty) business days (...) the General Superintendence, through means of an order, will determine what production of evidence it considers relevant, provided that it shall be entitled to exercise the fact finding powers set forth in this Law (...)".

Although the word "conclusive opening" is not in the law, this order has been treated as a conclusive opening order. At this point, the SG must establish the controversial points of the claim and grant or deny the requirement of evidence, perhaps even determining an ex officio to furnish the other evidence.

This is done by the SG, based on the Procedure-Opening Technical Note (considered essential by art. 69 of the LDC) and for the defense of the accused party. Moreover, if the determination of the production of evidence is decided upon, it is obviously necessary to establish on what should/can be produced as such, thus - the object of the plead. The parties must mandatorily know, at this procedural point, what the controversial matters are.

Nevertheless, in the subsequent debate supported by the contradictory, some facts may appear, brought forth by third parties or by the authority itself. As for these new facts, it is not enough to allow the parties to check them. It is necessary to allow the parties to furnish evidence, even if the public order has already been issued, so that the facts can be taken into account in the decision. It is imperative that the plea for the production of new evidence be accepted. Otherwise, there would be an infringement to the principle of non-surprise, and, consequently to the principle of the contradictory.

The principle of non-surprise, although implicit in the previous legislation, is now expressed in civil procedural law, and it cannot be ignored, neither in civil procedure or in the administrative sanctioning process.

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