Banking in the information society:  
a Brazilian vision

Claudia Lima Marques

1. INTRODUCTION

In the last ten years, the financial services market in Brazil has changed dramatically. There has been a substantial growth in credit card, electronic banking card, telephone and Internet home banking schemes. Also, the Brazilian government has deregulated the financial market, leading to an increase in the competition of financial institutions, and, consumer protection has finally been regulated by contracts (including financial products and services). In the 1990s the globalization, the openness of MERCOSUR countries and the advances in electronic communication produced large changes in the Brazilian financial and consumer credit market. All this created an interesting diversity and openness to large (and foreign) banking corporations, but also a very hard situation for low income

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consumers and to the less educated people, who are easily excluded from this new ‘electronic banking age’.  

In the 1990s many national public banks in Brazil became privatized and almost all national and international banks turned from traditional commercial banks to multifunctional institutions (so-called bancos múltiplos) and today offer an increasing and very wide range of services to consumers. The range of services offered by banks in Brazil includes: (1). Deposit and savings (current/check accounts, automated teller machines (ATMs), deposit/savings accounts, including investment and high interest deposit accounts, special types of savings accounts, e.g. mortgage deposit, holiday savings budget, credit account); (2). Money transmission (check, credit transfer, standing orders, direct debits, bank drafts); (3). Lending (overdrafts advances on current account, personal loans, house purchase schemes, bridging loans, credit cards); (4). Travel and foreign (foreign currency, traveler's checks, international check cashing arrangements, international money transfer); (5). Investment and taxation (safe deposit, insurance, life assurance, pension plans, tax planning, investment); and (6). Specialized advice, information and services (in general, and often tailored to suit the needs of specific market segments, such as pensioners, students, diplomats etc.). The Central Bank Resolution number 1524, issued on 22 September 1998, allowed the multifunctional bank to operate. The traditional commercial and investment banks turned into multifunctional banks with more and more relationships with consumers and other vulnerable actors.

Such developments in the Brazilian market occurred to a greater or lesser extent in all economies in the 1990s and they have exposed the fragility of the legislative consumer protection framework. The Brazilian Consumer Protection Act (Lei n. 8.078/90), the so-called Consumer Code (CDC), is a new statute. Some key effects of the Consumer Code are as follow. In the first place, it ensures against the inclusion of unfair clauses (cláusulas abusivas) in consumer contracts. Secondly, it has an influence on the general theory of contract, especially service contracts. Thirdly, it provides formal recognition of the need to provide consumers with special protection, with special rules of interpretation.
and controlling standard contracts. But in financial services the Brazilian Consumer Code is based on the way consumer-bank relationships or financial products were shaped in the late 1980s, without taking account of the advances in electronic communication and technological innovations. Nevertheless, in the Brazilian market consumers face various problems in the area of financial services, such as access to the financial service, and the complexity of both purchase contracts and financial services (e.g. the recent problems with the automobile leasing), the lack of transparency and information, variability of costs in long-term contracts, unfair contract terms, unintelligible conditions, privacy protection, over-indebtedness, security in electronic payments and transfers, authentication of consent in electronic payments. Legal responses to these problems of the consumer are not easy to formulate.

This essay will consider only some impacts of technological innovations in financial services in Brazil (Section 2) and some aspects of transparency and fairness in the contractual relationship between banks and consumers in an emergent country like Brazil (Section 3).

2. TECHNOLOGICAL INNOVATIONS IN BANKING SERVICES AND CONSUMER PROTECTION IN BRAZIL

2.1 The Consumer of the Banking Services

Before engaging into the analysis of the impacts of technological innovations in banking services, it would however be helpful to start with some remarks on more pragmatic elements of the Brazilian financial market. For historical reasons, the financial sector, and especially the banking one, has been very protected and less controlled by the Brazilian government. This sector has been immune to all antitrust regulations, so the concentration in this sector was and is great in Brazil; the Brazilian Banks Federation (FEBRABAN) has also developed a very special lobbying force and has successfully gained special treatment for banking and financial services on many occasions. They also tried to exclude the financial services to fall upon the Brazilian Consumer Code provisions.

6 arques, Les contrats, pp. 322 - 324.

The Brazilian Banks Federation (FEBRABAN) has developed a special lobbying force to exclude financial services from falling upon the Brazilian Consumer Code provisions.\(^8\) The consumer movement has answered\(^9\) and the courts have decided that the banking service shall fall upon the consumer code provisions without special treatment.\(^10\)

In the past, banking relationships were limited to merchants. Today, with the multifunctional banks, a variety of operations can be contracted typically with consumers.\(^11\) The judicial reasoning\(^12\) is that banks, ex vi Article 119 of the Brazilian Commercial Code, are commercial enterprises (Article 3\(^{o}\) CDC),\(^13\) and that lending money can be considered a consumer good or product (Article 3 \(\S\) 1\(^{o}\) CDC),\(^14\) but the typical banking activities are services (Article 3\(^{o}\) \(\S\) 2\(^{o}\) CDC).\(^15\) These typical banking

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\(^{10}\) Leading case: ‘Código de defesa do consumidor. Bancos. Cláusula penal 10 %. 1. Os bancos, como prestadores de serviços especialmente contemplados no Article 3\(^{o}\) \(\S\) 2\(^{o}\), estão submetidos às disposições do Código de Defesa do Consumidor. A circunstância de o usuário dispor do bem recebido através da operação bancária, transferindo a terceiros, em pagamento de outros bens ou serviços, não o desqualificando como consumidor final dos serviços prestados pelo banco’ (Resp. 57.974-RS, Min. Ruy Rosado de Aguiar, j. 29 May 1995, Superior Tribunal de Justiça, Brazil).


\(^{12}\) The judicial analysis will focus on the state of Rio Grande do Sul, where the author comes from, where the Tribunal de Justiça (hereafter TJ/RS) is one of the most progressive in Brazil. Cf. APC 195.037.338 (1996) Revista Direito do Consumidor 20 p. 182.

\(^{13}\) Leading cases of the TJ/RS, in Marques, Contratos, n. 9 above, p. 199, and ‘1º Tribunal de Alcada São Paulo’ (1996) Revista Direito do Consumidor 19, p. 264. This is also true in Canada, see Nicole L’Heroux, Droit de la Consommation (4a ed., Blais, Cowansville, Québec, 1993), pp. 30 – 31.


\(^{15}\) Article 3, \(\S\) 2\(^{o}\) CDC declares ‘service is any activity provided in the consumption market, in exchange for remuneration, including banking, finance, credit, assurance, excluding the labor contracts.’
services are accomplished in standard format for consumers and to powerless professionals and enterprises. The application of the Brazilian Consumer Code depends on the finding of a consumer. Article 2 of CDC provides a definition of a consumer sensu stricto: a consumer is any person or legal entity that purchases or uses a good or a service as a final addressee. But Article 29 of CDC expands these applications to all persons (professionals or not) exposed to a commercial unfair practice or clause. Here the jurisprudence seeks the concrete proof of the weakness of this consumer (consumidor equiparado). Today all these relationships between banks and vulnerable customers should fall upon consumer protection provisions (Articles 2 and 29 CDC).

The popular savings, credit to non-professionals, and small and vulnerable

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17 New leading case: 'Negócio jurídico bancário. Contrato de abertura de crédito e financiamento de capital de giro 2) Revisão de contratos renegociados, que continha cláusulas abusivas e, consequentemente, nulas de pleno direito. 3) Controle de cláusulas contratuais abusivas estipuladoras de encargos financeiros com base no Código de Defesa do Consumidor, inclusive em relação a pessoa jurídica (Article 29 do CDC)....(TJ/RS-APC 599050010, 1ª Câmara de Férias Cível, j. 11 May 1999, Des. Paulo de Tarso Vieira Sansverino). The first leading case was commented on in Marques, Contratos, n. 9 above, p. 158.


professionals, consumer credit and current accounts should be regulated by the Consumer Code.

2.1.2 Prejudice Against Low Income Consumers and Technological Advances

The very complex Brazilian experience with advances in electronic communication in banking can be interesting to compare with the Malaysian experience, not only because Sothi Rachagan does, but also because these two emergent economies have similar indicators in adult illiteracy, health and economic services in the 1990s and both countries have recently devalued their currencies and have very unique financial markets. Like Erik Jayme proposed, postmodern comparative law would be a comparison of the differences and not only a search for similarities. In these different legal responses to the problems of the consumers, there could be a sign to the cultural identity and to a specific market failure in this country.


27 Selon le professeur allemand de l’Université de Heidelberg, M. Erik Jayme, le droit comparé postmoderne se caractérise par l’identification du différent dans les systèmes juridiques (das Trennende, die Unterschiede), par l’identification du passager et momentané (dem Flüchtigen, Zeitgenössische) comme significatif d’un système juridique. L’idée principale de Jayme est que à la phase moderne, dans la quelle le droit comparé servait comme auto-contrôle et re-affirmation que toutes les juristes avaient – plus au moins – les mêmes pensées, et si les instruments étaient différents, les différences ne serait significatives (praesumptio similitudinis), si les résultats juste obtenues, alors, que ce phase là – de quasi simplification de la comparaison légal pour hipervaliser le semblable et renforcer la loi nationale qui utilisait ces standards et modèles juridiques universelles – serait finie ou par finir. Les tendances contraires et les antinomies postmodernes stimulent la recherche pour une identité culturelle et nationale propre. La globalisation de l’économie rende la comparaison des similitudes une évidence, un résultat bien entendu de pouvoir économique et de la circulation des modèles juridiques. La finalité spéciale du droit comparé actuel devait être identifier les différences et les modes caractéristiques d’arriver au résultat juste, à une adaptation raisonnable à la réalité du pays, aussi bien les modes de respecter les droits individuels et droits humaines de chaque système juridique.’ (Claudia Marques, Relations bancaires dans la société d'information: une vision brésilienne, forthcoming).
In Malaysia and other rapidly developing economies of South East Asia, as Rachagan has argued, consumer protection has not achieved its goals in the 1990s, but the banking services are accessible to almost all of the populations. In Brazil, the inverse situation has been achieved: consumer protection is in almost all economic sectors a reality, but the banking sector is not accessible to any consumer and it has been one of the most difficult areas for effectiveness in consumer protection.

Three phenomena in the Brazilian banking market will now be discussed: an existence of a discrete prejudice against poor consumers through banking prices, an inefficient legal response in consumer over-indebtedness and a state seizure as a governance problem. In this essay I can only analyze the first one. Indeed, the Brazilian consumer protection law should have a distributive impact and achieve better conditions in consumer access to credit and banking services in general. On this point, however, the protective measures have failed. The banking market tends to
reproduce basic social injustices, so those consumers on low incomes are excluded from the bank sector, increasing their social integration problems.\(^{36}\)

In an emergent economy with great credit and saving difficulties like the Brazilian one, these developments increase the differences between the groups in society and create structural problems by distinguishing between: 1) the *homo economicus*, an individual from the class A or B with credit, savings and a current account in any national or international bank, who pays the bills automatically or through Homebanking; 2) the *homo semi-economicus*, an individual from the lower middle class with a current account to pay bills, but without credit or savings; and 3) the *excluded* *homo*, an individual with low income who has no bank account; in the Brazilian financial market they must discount checks and withdraw pensions and unemployment benefits in a public bank. In addition, they must pay their bills and taxes in a public national bank and can purchase credit only with private facilitators (*so called* *agiotas*).\(^{37}\)

In other words, their limited income also means that they have fewer opportunities to purchase financial services in the new banking market. The national public banks are almost all re-privatized in Brazil and seek a new profit policy, a senseless situation considering the credit problems of almost two-thirds of the population. On the other hand, since the inflation and average annual rate is not so high, there is less money in the market and the bank transfer is the only mechanism to do such financial transfers. Almost all payments can be (or must be) done in banks and the poor consumers must pay higher taxes and stand in longer lines than other consumers with current bank accounts and savings. The new element in the picture is the technological advantages of the electronic era. The Brazilian banks have rapidly invested in adapting to this era, but the electronic technology produces new discriminations against the poor and the less educated.\(^{38}\) The effects of racial and gender prejudice in

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\(^{37}\) This is a such a common practice in Brazil that there is a special regulation about the 'fair' tax or interest in this lending form. It is interesting to note that these rules fixing the 'fair' interest tax applies only to 'agiotas' and not to banks or any other official financial institution. See 'Class Action of Ministério Público from São Paulo and Leading Case' (1999) *Revista Direito do Consumidor* 29, pp. 192 and 178.

banking are not common in Brazil; only class discrimination is significant. The poor consumer may pay high banking taxes and have more difficulties to pay their bills. Payments for non-customers are allowed only in the ‘Payments Central’, far from downtown and with long lines and waiting time.

2.2 Electronic Advantages in Banking Services

In the 1990s, the mechanism of consumers'/customers' access to banking services began to change: (1) Automated teller machines were introduced in almost all Brazilian banks and a bankingnet called ‘Banco 24 horas’ was founded; (2) Banking cards and credit cards became accessible to more customers in Brazil; and (3) Home banking by telephone and Internet also became available.

2.2.1 Automated Teller Machines, Prices and Brazilian Consumers

In the past all cashiers were persons and a popular commercial bank offered a great number of cashier's offices to their customers. With the automatization and the evolution of the electronic cashier system, the Brazilian banks today offer a great number of automated teller machines (ATM) and a reduced number of normal cashiers.

This ‘evolution’ has brought consequences: (1) Reorganization of agencies with more space for machines and little space and employees for cashiers; (2) Special cashiers were opened for disabled and elderly customers (those below 60 years of age), however, the banks have not considered the high rate of adult illiteracy in Brazil; (3) The creation of new jobs was necessary to help the normal Brazilian consumer to deal with these machines (not always in functioning order): the ATM assistant, i.e. a low-paid new employee working all day at from four to six ATMs in order to help in such automated operations; (4) An ATM bankingnet was founded and, in this 24-hour bank (Banco 24 horas), all services can be provided no matter what institution the consumer is a customer of; and (5) The waiting time in the lines doubled, as many cities tried to regulate the maximum waiting time (from 30 minutes up to 45 minutes in line!). The Brazilian Bank Federation has successfully contested this kind of local legislation, but the legal response was an interesting sign of how this technological change in banking has affected the life of the consumer.

39 Some authors have considered the publicity about the racial and class discrimination of electronic technology unfair, but not the publicity of bank services; cf. Melina Penteado Tzentin, ‘A publicidade abusiva e o racismo’ (1994) Revista Direito do Consumidor 11, p.67.
These technological advantages in banking have changed the accounting and payment system in Brazil. Until recently the banks in Brazil have not tried to discourage the consumer from using the normal cashier by charging different roles. In Europe this is a normal procedure, but in an emergent country like Brazil this would create a great social injustice. The poor and less educated consumer, as well as elderly and disabled customers, ought to have the possibility of conducting banking services with a person teller and paying the same price as those who opted for using an automated teller. A price difference between the use of ATM and person tellers will have strong discrimination effects in Brazil and probably will be eventually forbidden (ex vi termini Article 5 Brazilian Constitution/1988). In Europe, the superior courts have developed a so-called free access to account doctrine, where the banks are forbidden to charge consumers a monthly fee of 5 or 8 through personal cashiers, so the elderly, disabled and poor consumer can avoid the higher prices of the banking services and access their deposited money. To enable consumers make payments and have access to their accounts, a similar ‘right to access the deposit’ through human cashiers free of charge is protected in Brazil.

2.2.2 Homes Banking, Internet Banking, Credit Cards and Other Banking Cards

To enable consumers to make payments, banks transfer money through four main forms: customer access to cash and cash distribution; checks and credit transfers, direct debits; and credit cards.

Home banking is a reality in Brazil, but only a few major banks give the consumers the chance to make withdrawals, payments, transactions, investments and to have account information on-line. No Brazilian banks give the consumer the chance to apply for credit on-line or via the Internet. In the most popular Brazilian banks, the home-banking service is available only by telephone. It is interesting to note that this service is normally conducted with the help of a bank employee. There is not yet, however, an electronic service with answering machines as in Europe, where the information is stored or recorded by means of a computer.

Home banking and Internet banking are just beginning in Brazil. Electronic communication offers real possibilities for improvement in the banking sector, but special safeguards must be adopted for the consumer credit context. It is interesting to note that for all contractual negotiations undertaken via the Internet

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40 At the moment both kinds of access to service have the same price, or using a non-automated cashier is free of charge.
(or telephone) Article 49 of the Brazilian Consumer Code provides a cooling-off period of seven days to cancel the contract without a motivation ‘causa’. In credit and banking relationships in Brazil there is no possibility for this cooling-off period or for cancelling these contracts.

Credit-card schemes became very popular in Brazil in the late 1990s. Initially, the credit card providers used to send—without previous manifestation of the consumer—credit-cards to the homes of the consumers. Later a bill with the annual rate was sent to the consumer, and in many cases the annual rate judicial request was sent as a claim against the consumer. That practice was considered unfair or abusive and the credit-card providers (as well as the associated banks) were forced to pay the consumer’s moral and material damages. The Department of Consumer Policy at the Ministry of Justice adjusted a collective conduct agreement with all credit-card providers in Brazil to ban this practice. All goods and services sent without previous manifestation of the consumer must be considered as a gratuitous promise (Article 39, III, § único of CDC).

Because payment with credit-cards is not considered a ‘cash’ payment and the special promotional offers can normally be paid only by checks or cash, the credit-card schemes in Brazil do not break the nexus between the retailers and the credit provider. Normally the retailers do business directly with the credit provider and banks in order to sell in rates their products in Brazil. Many retailers offer credit products in their own store. In this scheme the credit is provided by a third party. Article 52 of the Consumer Code provides a link between this accessory credit and the main consumer contract, because it is uncertain if the consumer understands that they are contracting with a third party credit provider and if they are making an informed credit purchase decision when buying the goods.

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42 For a suggested introduction of such cooling-off periods in consumer credit contracts, see Cláudia Marques, ‘Os contratos de crédito e a legislação brasileira de proteção do consumidor’ (1996) Revista Direito do Consumidor 18, p. 53.
3. CONTRACTUAL RELATIONSHIPS BETWEEN BANKS AND CONSUMERS TODAY: CONSUMER PROTECTION IN FINANCIAL SERVICES IN BRAZIL

The problems raised by standard bank contracts do not relate only to consumer protection, nor are abusive clauses and unfair banking practices the exclusive province of consumer contracts, but here I will focus only on the contractual relationship between banks and consumers. Everybody agrees that the consumer needs special protection for these contracts. The Brazilian Consumer Code provides special contractual duties during the contract negotiation and, after payment (Section 3.1), also provides a detailed reading of these contracts and develops rigorous unfair term's control (Section 3.2).

3.1 Special Contractual Banks' Duties: Consumers' Rights During the Negotiation and After Payment

3.1.1 Information Duties: a Protected Choice of Financial Service

The consumer has the right to a free choice and free purchase of financial services. To enable this right the Consumer Code assures an information right (Article 6, III CDC). The Brazilian law imposed an information duty on the Banks (Articles 30, 35, 46, 52 and 54 CDC): i.e., a duty to inform the consumer about the goods or services, about the price and also about the contract terms. The Consumer Code provides two specific remedies connected with these information duties. On the collective dimension the government administration can control the delivery of this information and can impose different kinds of punishment like fines and prohibitions (Articles. 55, 56, 57, 58 and 59 CDC). The Public Attorney (Ministério Público) and the consumer organizations are allowed to control the information practices of the banks through class actions (Articles 81, 84 and 91 CDC). For the individual consumer, the failure of providing information can be safeguarded mainly through contractual remedies in connection with breach of contract (vício de informação, Articles 20, 35 and 46 CDC).

The home banking, by telephone and Internet, raises a number of issues in connection with information that the consumer needs for the conclusion of a fair contract or a fair accessory transaction. The present Brazilian legislation is not considering these special needs, so there are not rules imposed or storage of the consumers' complaints. Articles 30, 31, 46, 49, 52 and 53 of the Consumer Code aim to provide quality information about particular services, the prices

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and the contract terms, but these information duties are easy violated, having no rigorous control or sanctions against the banks. The disclosure of Banking prices used to be a problem in Brazil.

The Consumer Code and the doctrine of good faith impose a new transparency in home (and Internet) banking, specially in questions about the price, time of delivery or completion of the service, contract clauses and mandatory legal rules, such as the Central Bank rules and the Consumer Code. As already mentioned, Article 49 of the Brazilian Consumer Code provides a cooling-off period of seven days to cancel all contracts negotiated by telephone. But because in home banking the consumer has already a current account contract with the bank, this cooling-off period may not apply. This cooling-off rule can not be used in normal credit and bank contracts, because they are not distance contracts; it will also be a very limited power in Internet and home banking. Here studies carried out by consumer organizations (and governmental institutions) demonstrate the lack of transparency in banking services in general. In Internet banking this lack of transparency and the easy access can also raise new problems of consumer over-indebtedness in an emergent country like Brazil.

### 3.1.2 Cooperation and Care Duties: a Protection of Dignity

The Brazilian Consumer Code and the doctrine of good faith require cooperative and responsible actions from the banks. The bank must cooperate with the customer/consumer to protect consumers’ expectations based on the contract itself or on publicity about the product. The contract partners shall cooperate and shall not stand in the way of the realization of each contractual expectation (expectativas legítimas). Also, they must care about each other’s dignity, honor and reputation. The violation of these duties by the banks may

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51 Also Santolim, n. 41 above, p. 39.
54 About ‘good-faith’ duties in Internet Contracts, see Santolim, n. 41 above, pp.36 – 37.
cause extensive damages to the consumer and thus raises the possibility of contractual and non-contractual liability.\textsuperscript{55}

A very common violation in Brazil is the inclusion of the consumer’s name in the so-called Central Bank Services Databank (SERASA). The Brazilian Central Bank has also a databank named CADIN.\textsuperscript{56} The purchase of credit products and banking services in Brazil created a new danger to the consumer, i.e. that their names may be wrongly included in a database either out of error or during a judicial dispute against the credit provider.\textsuperscript{57} In both databanks, the inclusion of the consumer’s name when they have disputes in court against the banks are considered by the courts as moral damage,\textsuperscript{58} violating the consumer code (Article 42 CDC).\textsuperscript{59} The consumer can receive damages in accordance with the Consumer Code (Article 6, VI CDC).

The bank liability in case of information losses or loss of orders and Internet protocols are considered an ordinary contractual (main) liability (Articles 18 and 20 CDC).

3.2 Banks, Contractual Liability: Consumer Rights During the Contract

3.2.1 Interpretation of Consumer Contracts and Adequate Performance

Article 37 of the Consumer Code provides a positive interpretation of consumers interests in all clauses in consumer contracts. Not only ambiguous

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\textsuperscript{55} Marques, \textit{Contratos}, n. 9 above, p. 326.
\textsuperscript{57} Leading cases of the Superior Tribunal de Justiça: SPC, Serasa, Cadin. Exclusão do registro. Liminar. Pendência de ação ordinária. Não cabe a inclusão do nome do devedor em bancos particulares de dados (SPC, Cadin, Serasa) enquanto é discutido em ação ordinária o valor do débito, pois pode ficar descaracterizada a inadimplência, causa daquele registro (Resp. 188390-SC, j. 22 March 1999). ‘Deve ser cancelada a inscrição do nome do devedor em banco de inadimplentes se o contrato está sendo objeto de ação revisional, em que se discute a validade de cláusulas, valor do saldo e a própria existência da mora’ (Resp. 205039-RS, j. 6 May 1999 forthcoming).
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clauses merit a positive interpretation, but all contract terms (written or unwritten, but from the publicity or simple promises of the seller and employees of a company, Articles 30, 34, 48 CDC) should be interpreted according to consumer interests.  

Article 20 of the Consumer Code provides an outline of adequate service performance, but certain equipment failures (hardware), malfunctions (software) and involuntary human errors (error by processing data) may happen. In fact, both hardware- and software-driven ATM (Automatic Teller Machines) and home banking networks are products that have been tested at a great number of installations, where millions of transactions take place. Here there is a professional bank risk if this software and hardware cannot perform adequately. In Brazil there are more common errors related to user identification (unauthorized users), use of fraudulently obtained identification codes, failures in the security of home banking systems and in the '24 hour bank system'. Delays in message transmission are considered normal (24h - 48h are the normal bank delays in Brazil). The Brazilian banks must have an uninterrupted power supply, but the supply of energy is not always continuous, so the disappearance of information is not impossible; thus the banks must have copies and other permanent materials (i.e. writing orders, protocols, etc.) to deal with these problems. In home banking by Internet and by phone there is a lack of reliability (but not substantially greater than in the normal banking services). The Brazilian bank system shows a good efficiency even though in a third world country, but with high costs and lack of fairness (unauthorized double charging, new tax on interest, unfair commercial practices, etc.) in its contacts with consumers.

In Brazil payment or funds transfer with cyber coins are not yet used. In my opinion, the adequate performance of home banking services must include the right to have a copy of the bank contract or transaction in a 'permanent' way.

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60 Marques, Contratos, n. 9 above, pp. 105 – 115.
61 Santolim, n. 41 above, p. 23.
62 Ibid.
3.2.2 Protection Against Unfair Contract Term and Practices in Financial Services

The doctrines of good faith (Princípio da Boa-fé objetiva) and on laesio enormis (lesão enorme), both accepted by the Brazilian Consumer Code (Article 4, III c/c and Article 6, VI, V CDC), give the Brazilian courts the power to control, excuse or modify terms in contracts between consumers and banks. Such judicial modification of contracts (specially the modification on the tax on interest) or judicial interference in the basic principle of freedom of contract (i.e., nullification on unfairness clauses) has been subjected to strong criticism on economic grounds, but is justified on the ground that it protects the weak or ignorant from exploitation. Banks and consumers have unequal bargaining and lobbying powers, so the Consumer Code tries to bring some contractual justice and equality of chances.

The most used Consumer Code doctrine is that of good faith (Articles 4, III, 6, VI and 51 CDC). This doctrine is understood as serving two different goals: to create obligations of proper conduct (função criadora ou positiva, in German pflichtenbegrundende Funktion) and to impose limits on conduct and prevent unfairness (função limitadora, in German Schranken-bzw. Kontrollfunktion). Usually courts invoke the doctrine to protect consumers’ expectations based on the contract itself or on publicity (Articles 30, 34, 46 and 48 CDC), but courts use the doctrine to prevent the strong party (i.e., the bank, credit-card corporation or leasing corporation) from selfishly injuring the weak party (i.e., the individual consumer and small enterprises) in financial contracts (Articles 51, 52, 53 and 54 CDC). The Brazilian Consumer Code considers unfair contract terms null (Article 51 CDC) and provides controls for individual negotiated and standard contracts (Articles 51 and 54. CDC).

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64 Marques, Contratos, n. 9 above, pp. 105 - 115.
These doctrines have enabled the Public Attorney to control all consumers' standard bank contracts (Article 51, § 4º CDC). Even examples of the judicial bank contracts control can be given: the bank interest and taxes were controlled and the use of some 'bis in idem' indexes was forbidden. The mandate clause in favour of the bank or any enterprise of the same group is considered null. The election's clause of the forum in the interest of the bank is also considered null. An old credit provider's benefit was overruled in car leasing; thus there are no longer debtor's prisons in Brazil.

Today almost 60 per cent of the civil claims deal with banking services and the control of unfair terms and practices, which shows how big the importance of this matter is in Brazilian society. In the last ten years, the financial services market in Brazil has changed and introduced a substantial growth in credit card, and electronic banking card, telephone and Internet home banking schemes. The Brazilian Consumer Code is the only protective legislation for consumers in this very complex banking field. The increasing deregulation of financial services, the privatization and re-grouping (fusion) tendencies demand the adoption of more rigorous legal and control measures, including more specific rules about consumer protection in electronic financial services.