

# International Handbook on Unfair Competition

von

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1. Auflage

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Although Brazil's Civil Code (*Código Civil* or "CC") of 1916 contained several 6  
 general clauses, in particular the tort provision in Article 159 CC, which were based  
 on French law, the country's scholars did not adopt the French concept of  
*concurrência déloyale*, but cast their unfair competition legislation rather in the  
 German mould by opting for an enumerative technique.<sup>22</sup> The influence of US-  
 American law has, as in many other parts of the world (and particularly in Latin  
 America), continually grown over the last couple of decades and has been strong in  
 antitrust law ever since the emergence of this discipline.<sup>23</sup> In addition to European  
 (especially French and German) and US law, Portuguese literature is considered by  
 Brazilian authors, in particular *J. de Oliveira Ascensão*, *Concorrência Desleal*,  
 probably the most in-depth analysis of unfair competition law in the Portuguese  
 language.<sup>24</sup> However, the reception probably results primarily from the common  
 language, and seems to have had less impact on the evolution of Brazilian law than  
 the aforementioned legal systems.<sup>25</sup>

## 2. Modern unfair competition law

Today, unfair competition law is recognized as a distinct field of law, often 7  
 located within the wider area of industrial property law.<sup>26</sup> It is mostly analysed in  
 legal literature in connection with either intellectual property law or consumer  
 protection law, because it is primarily regulated in legislation dealing with one of  
 these areas.

The consolidation of unfair competition law in the area of industrial property 8  
 occurred with the introduction of the Industrial Property Act of 1996 (*Lei da  
 Propriedade Industrial*, or "LPI").<sup>27</sup> From the intellectual property perspective, the  
 focus of unfair competition law is the protection of a company's market position —  
 established *inter alia* by its trademarks, reputation and know-how — against its  
 competitors.<sup>28</sup> The over-arching concept for such intangible assets is the market  
 value or "goodwill" (*aviamento*) of a company, which is seen as the object of  
 protection of unfair competition law.<sup>29</sup> While the doctrinal foundations of "*avia-  
 mento*" are still disputed, it is clear that the clientele of a company pertains to its  
 "*aviamento*" and partakes in the protection unfair competition law accords to  
 companies *vis-à-vis* their competitors.<sup>30</sup>

With the inclusion of unfair competition provisions in the Consumer Protection 9  
 Act, the analysis of commercial practices which potentially harm the consumer, e.g.

<sup>22</sup> F.C. Pontes de Miranda (fn. 4), p. 279 *et seq.*; D. Barbosa, *Tratado da Propriedade Intelectual*, Vol. I (2010), p. 492 *et seq.*; Cf. Section IV *infra*.

<sup>23</sup> B.M. Shieber, *Abusos do Poder Econômico; Direito e Experiência Antitruste no Brasil e nos E.U.A.*, 1966, *Revista dos Tribunais*, p. 1 *et seqq.*; D.F. de Almeida Glória, *A Livre Concorrência como Garantia do Consumidor*, 2003, p. 79 *et seq.*

<sup>24</sup> The book is also available in German, *J. Oliveira Ascensão*, *Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der EWG*, vol. VIII, Portugal, 2005 (German translation by Karin Grau-Kunz and Fabian Böttger).

<sup>25</sup> It should also be noted that Portuguese law itself is also strongly influenced by German, French and, obviously, EU law.

<sup>26</sup> D. Barbosa (fn. 21), p. 478; C.A. Bittar/C.A. Bittar Filho, (fn. 1), p.16.

<sup>27</sup> Act No. 9279/96 of May 14, 1996 (D.O.U. of May 15, 1996).

<sup>28</sup> C.A. Bittar/C.A. Bittar Filho, (fn. 1), pp. 19–20

<sup>29</sup> C.A. Bittar/C.A. Bittar Filho, (fn. 1), pp. 20–21.

<sup>30</sup> R. Requião (fn. 19), pp. 346 *et seq.*

deception by abusive marketing practices, came into focus.<sup>31</sup> Though they were considered examples of unfair competition, some of the practices nowadays covered by the Consumer Protection Act (especially advertisements) or the Antitrust Act (for example price-fixing agreements) were regulated in a precursor to the present-day Antitrust Act.<sup>32</sup> However, competitor protection and consumer protection are not mutually exclusive. Unfair competitive activities can harm both other market participants and consumers.<sup>33</sup>

- 10 For enforcement, administrative, civil and criminal measures might be used. Under the Consumer Protection Act, administrative agencies<sup>34</sup>, public prosecutors<sup>35</sup>, the affected consumers themselves<sup>36</sup> and non-governmental consumer organizations (NGOs)<sup>37</sup> may initiate such proceedings. The administrative agencies, especially the *Programa de Orientação e Proteção ao Consumidor* (“Procon”) on the state level, play an important role also in civil proceedings.<sup>38</sup> In some areas, business sectors have established self-regulation to prevent and sanction unfair trade practices.<sup>39</sup>
- 11 “Unfair competition” (*concorrência desleal*) is the statutory and thus official term for this field of law in Brazil. However, in legal literature the term “illicit competition” (*concorrência ilícita*) is sometimes used, either as a synonym or to identify specific unfair competition activities in a contractual relationship.<sup>40</sup>

### 3. Unfair competition practice

- 12 Unfair competition law is of considerable practical importance within the Brazilian legal system. As already noted, the increasingly competitive environment has increased imitative and parasitic behaviour.<sup>41</sup> Although the Patent and Trademark Office is based in Rio de Janeiro, which makes this city the pre-eminent intellectual property location in the country, most court cases in the field of unfair competition nowadays are concentrated in the State of São Paulo, where the majority of Brazilian businesses are located.<sup>42</sup> This does not, however, mean that in far-off regions like the North unfair trade practices cannot be encountered. An important issue in this respect is the Free Economic Zone of Manaus (*Zona Franca de Manaus*), where major manufacturing sites of international and national companies are located due to tax exemptions.
- 13 Moreover, unfair competition law plays a particularly important role for foreign companies as regards the protection against disloyal behaviour of (former) employees. The violation of contractual and post-contractual obligations of employees not

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<sup>31</sup> Deceptive or abusive advertising practices are regulated in Article 37 CDC.

<sup>32</sup> *R. Requião* (fn. 19), p. 357.

<sup>33</sup> *C.A. Bittar/C.A. Bittar Filho*, (fn. 1), p. 44.

<sup>34</sup> Articles 55–60.

<sup>35</sup> Articles 61–80.

<sup>36</sup> Articles 81–104.

<sup>37</sup> Article 107.

<sup>38</sup> See *S. Rhodes*, Social movements and free-market capitalism in Latin America: telecommunications privatization and the rise of consumer protest, 2006, pp. 146–148; the proceedings conducted by these *Procons* are discussed *infra* Section VIII.2.

<sup>39</sup> In particular the advertising industry, *infra* Section II.3.

<sup>40</sup> *C.A. Bittar/C.A. Bittar Filho* (fn. 1), p. 46; *R. Requião* (fn. 19), pp. 351 *et seq.*

<sup>41</sup> *Supra* Section I.1).

<sup>42</sup> *G.E. Dannemann*, A Concorrência Desleal – Uma Pesquisa Sobre as Decisões Judiciais dos Tribunais Brasileiros, 2002, 61 *Revista da ABPI*.

to compete constitutes an act of unfair competition.<sup>43</sup> Furthermore, the abuse of confidential information, especially know-how, by the employee even constitutes an unfair competition *crime*.<sup>44</sup>

## II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law

### 1. International and constitutional legal basis

As there is no clause expressly relating to unfair competition in the Federal 14 Constitution of 1988 (*Constituição da República Federativa do Brasil* or “CF”), the highest normative level is perhaps Article 10*bis* PC. This reasoning is supported by the facts that (a) rights and guarantees enshrined in the Constitution do not exclude other rights or guarantees emanating from international treaties entered into by Brazil (Article 5, § 2 CF),<sup>45</sup> (b) the wording of Article 10*bis* PC, paragraphs (2) and (3), suggests their “self-executable” character,<sup>46</sup> and (c) the vagueness of the Constitutional regime relating to the incorporation of international law.<sup>47</sup> Unfortunately, this question was not solved *via* the incorporation or adaption<sup>48</sup> of Articles 1–12 and 19 PC in Article 2 (1) TRIPS-Agreement.<sup>49</sup> Although in the *Havana Club* Decision the Appellate Board reasoned that unfair competition must be understood as part and parcel of what constitutes “intellectual property” under the TRIPS Agreement,<sup>50</sup> even this complete incorporation of Article 10*bis* PC into the TRIPS Agreement would not necessarily entail direct applicability in Brazil. This caveat must be noted following the landmark decision *E I Du Pont De Nemours and Company v Instituto Nacional de Propriedade Industrial*<sup>51</sup> of the Superior Court of Justice (*Superior Tribunal de Justiça* or “STJ”), sometimes also called Federal Court of Appeals). This case, albeit dealing with patent term extensions in light of Article 65 (2) and (4) TRIPS-Agreement, rejected the direct applicability of the

<sup>43</sup> *Infra* Section VI.2.

<sup>44</sup> Article 195 (XI) LPI.

<sup>45</sup> Furthermore, Article 4 LPI provides for the indiscriminate application of “treaties in force in Brazil” to nationals and resident foreigners; cf. Article 2 PC and *D.G. Domingues*, *Comentários à Lei da Propriedade Industrial*, 2009, p. 21.

<sup>46</sup> Cf. *G.H.C. Bodenhausen*, *Guide to the Application of the Paris Convention for the Protection of Industrial Property* (1968), p. 143.

<sup>47</sup> See *M.S. Guise*, *Comércio Internacional, Patentes e Saúde Pública* (2008), pp. 102 *et seqq.* Some authors, therefore, assume that international treaties become incorporated in domestic law the moment national ratification by Congress has taken place, cf. *IDS-Instituto Dannemann Siemsen de Estudos de Propriedade Intelectual*, *Comentários à Lei da Propriedade Industrial* [2nd edition, 2005], p. 38).

<sup>48</sup> Cf. *O. Brand*, in: J. Busche and P.-T. Stoll (eds.), *TRIPS: Internationales und europäisches Recht des geistigen Eigentums*, 2007, Article 2, margin no. 9.

<sup>49</sup> The TRIPS-Agreement itself was ratified by the Legislative Decree No. 30 of December 15, 1994 and promulgated through Decree No. 1,355 of December 30, 1994.

<sup>50</sup> Appellate Body, United States–Section 211 Omnibus Appropriations Act of 1998. WTO-Doc. WT/DS176/AB/R, January 2, 2002. For a thorough analysis see *C. Wadlow*, *The Law of Passing-Off: Unfair Competition by Misrepresentation*, 2011, 2-066–2-072.

<sup>51</sup> *Superior Tribunal de Justiça*, REsp No. 960.728 – RJ (2007/0134388-8) of April 15, 2009, *relatora Ministra Nancy Andrighi*, and *Superior Tribunal de Justiça*, EDcl no REsp No. 960.728 – RJ (2007/0134388-8) of February 05, 2010, *relatora Ministra Nancy Andrighi*. An English translation of the first decision and a commentary can be found in *C. Heath*, “Federal Appeal Court: BRAZIL”, IIC 2010, pp. 601–612.

TRIPS Agreement. Brazil therefore currently seems to follow the dualistic approach to treaty application.<sup>52</sup> However, as the abovementioned decision concerned the TRIPS Agreement and not the PC itself, the old doctrinal controversy regarding the applicability of Article 10*bis* PC has not lost its relevance.<sup>53</sup> In day-to-day legal work, Article 10*bis* PC is cited whenever unfair competition practices are at issue.

- 15 Irrespective of the (non-)applicability of Article 10*bis* PC, the Federal Constitution of 1988 does not specifically refer to unfair competition but states that:

*“The economic order, grounded in the valuation of human work and free initiative, is aimed at securing a dignified existence for all, according to the precepts of social justice and in pursuance of the following principles:*

*[...]*

*IV – free competition;*

*V – consumer protection [...].”*<sup>54</sup>

## 2. Legislation and relations to neighbouring areas of law

- 16 Considering that the Brazilian approach to unfair competition has never been limited to enumerated categories, but conceived of in broader terms,<sup>55</sup> it becomes clear that – if unfair competition can indeed be understood as safeguarding “free competition”<sup>56</sup> – the Constitution underpins the fact that unfair competition is regulated by different laws, i.e., (a) the Industrial Property Act (“LPI”), (b) the Consumer Protection Act (“CDC”), and (c) the Antitrust Act (*Lei de Antitrust*).<sup>57</sup> Nevertheless, unfair competition law is recognized today as a distinct field of law.<sup>58</sup>

### a) Ties to industrial property law

- 17 The area of unfair competition law has close ties with industrial property law. This is evidenced formally by its inclusion in the Industrial Property Law of 1996. Article 2 LPI expressly states that the protection of industrial property rights is effectuated by the “repression of unfair competition”. Article 195 LPI deals exclu-

<sup>52</sup> See K. Schmalenbach, in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, 2012, Article 27, margin no. 25 *et seq.*; additionally, see literature cited by relatora Ministra (Rapporteur), Nancy Andrichi, in her vote (REsp. No. 960,728 – RJ (2007/0134388-8). Argentina, e.g., follows a monistic approach, cf. *Corte Suprema de la Nación, Ekmekdjian v. Sofovich* [JA 1992-III-199]).

<sup>53</sup> In support of the applicability of Article 10*bis* PC, *F.C. Pontes de Miranda* (fn. 4), p. 281; critical *J.C.T. Soares* (fn. 8), p. 11.

<sup>54</sup> Article 170. Articles 170 *et seq.* are premised upon the existence of a free market economy, cf. *E.R. Grau*, *A Ordem Econômica na Constituição de 1988*, 4<sup>th</sup> edition, 1997, p. 230 *et seqq.*

<sup>55</sup> *F.C. Pontes de Miranda* (fn. 4), p. 280.

<sup>56</sup> *N.P. de Carvalho*, *The TRIPS Regime of Patent Rights*, 2010, p. 133, distinguishes between antitrust or competition law which “aims to preserve *free* competition” and unfair competition law “aims to ensure that competition remains *honest*” (italics by the authors). This view can be supported by the fact that Article 173 § 4 CF deals with practices generally regarded as antitrust or anticompetitive; Cf. also *E.R. Grau* (fn. 51), pp. 232–235.

<sup>57</sup> Act No. 12, 529 of November 30, 2011 (D.O.U. of December 1, 2011). Additionally, there are some provisions in the CC of 2002 which relate to unfair competition insofar as they concern a person’s name and privacy (Articles 16–21 CC of 2002 and see Section VI. 3).

<sup>58</sup> Cf. *C.A. Bittar*, *Teoria e Prática da Concorrência Desleal*, 1989, pp. 43 *et seq.*; *OECD, Competition Law and Policy in Latin America*, 2006, pp. 95 *et seq.*

sively and specifically with unfair trade practices and provides a basis for both criminal and civil prosecution. In the LPI, the unfair competition provision serves as (collateral) protection of industrial property right-holders.<sup>59</sup> Practices which prejudice rights of a competitor, without violating registered rights protected by special provisions of the LPI, can consist, e.g., of making parasitic use of trade dresses of a third party, which cannot be protected by a trademark, or in the illegal appropriation or disclosure of trade secrets.<sup>60</sup> Article 195 LPI specifically covers unregistered distinctive signs, whose violation does not constitute a (criminal) trademark infringement.<sup>61</sup> Despite the criminal aspect of Article 195 LPI, the practices prohibited under Article 195 LPI can also be the object of a civil law suit according to Article 207 LPI. Article 209 LPI reiterates that – with regard to civil liability – there is no *numerus clausus* of prohibited practices and provides the judge with the authority to issue interim injunctions in cases of noncompliance with the law.

#### b) Ties to consumer protection law

Practices between businesses and consumers (“B2C”), which are not covered by 18 the LPI, may constitute unfair competition under the Consumer Protection Act. This reflects the fact that unfair trade practices can harm not only the competition and individual competitors, but also consumers.<sup>62</sup> Thus, consumer law deviates from the concept underlying unfair competition law in the fields of antitrust and industrial property, according to which abusive practices must have a bearing on free competition (i.e., the functioning of the market) in order to be the subject of sanctions by those same laws.<sup>63</sup> The Act devotes an entire chapter to illegal marketing practices, chiefly to deceptive advertising and direct marketing (Articles 29–45 CDC).<sup>64</sup> Because of its focus on B2C activities, the scope of the Consumer Protection Act appears to be narrower than that of the Industrial Property Act, which contains provisions protecting competitors irrespective of whether the end consumer is affected, such as the protection of confidential information.<sup>65</sup>

#### c) Ties to antitrust law

Finally, unfair competition law has some basis in antitrust law. Some types of 19 unfair competition conduct are prohibited under the Antitrust Act.<sup>66</sup> The new

<sup>59</sup> *Supremo Tribunal Federal*, R.T.J. 56/453–5, held that “it will be found within the scope of unfair competition those acts of fraudulent or dishonest competition, which undermines what is held to be correct or normal in the business world, though not directly infringing patents or registered trademarks”; cf. *D. Barbosa* (fn. 21), p. 481; see also *J.H. Pierangeli*, *Crimes contra a propriedade industrial e crimes de concorrência desleal*, 2003, p. 266.

<sup>60</sup> *C.A. Bittar/C.A. Bittar Filho*, (fn. 1), p. 30.

<sup>61</sup> *Tribunal de Justiça de São Paulo*, case no 37.374, R.T. 363/207; cf. *D. Barbosa* (fn. 21), p. 482.

<sup>62</sup> *C.F. Bittar/C.F. Bittar Filho*, (fn. 1), p. 44.

<sup>63</sup> Cf. *J.I.G. Franceschini*, *Direito da Concorrência: Case Law*, 2000, pp. 267–270 with reference to CADE, case no. 08000.00145/96-55, 9 June 1999.

<sup>64</sup> Marketing practices through marketing are exhaustively dealt with by the CDC, *Cf.A.H. de Vasconcellos e Benjamin*, (fn. 13), p. 248.

<sup>65</sup> Cf. Article 195(11) and (12) LPI.

<sup>66</sup> *L.d.C. Luciano*, *The Effects of the Use of a Hybrid Approach to Competition Law in the Regulation of Market Power: the Case of Brazil*, p. 33.

Antitrust Act<sup>67</sup>, which entered into force on May 29, 2012, prohibits in particular tie-in sales<sup>68</sup> and the refusal to supply.<sup>69</sup>

- 20 In addition to these broader statutes, special legislation has been created to restrict unfair competition in certain specific fields, e.g., advertising.<sup>70</sup> If unfair competition practices are simultaneously prohibited under different statutes, the respective remedies and procedures apply cumulatively.<sup>71</sup> The principle also applies with regard to civil and criminal provisions of the same statute, namely the Industrial Property Act.<sup>72</sup>

### 3. Self-regulation

- 21 This unfair competition legislation is in some industries accompanied by self-regulation created by industry associations. For example, the Brazilian Code of Advertising Self-Regulation (*Código Brasileiro de Auto-regulamentação Publicitária*) of 5 June 1980,<sup>73</sup> which was implemented by the National Council of Advertising Self-Regulation (*Conselho Nacional de Auto-regulamentação Publicitária* or “CONAR”), encompasses certain other practices which might be considered unfair competition. Formal complaints by competitors and third parties are filed with CONAR which, being an NGO, cannot by itself impose sanctions. Nevertheless, the activities of CONAR play a significant practical role in enforcing standards of fairness in advertising.<sup>74</sup> Binding self-regulation for the legal profession was established by the Brazilian Bar Association (*Ordem dos Advogados do Brasil*). But non-binding codes of conduct are also relevant to unfair competition law, as they can serve as an indicator of fairness in a particular sector.<sup>75</sup>

## III. Basic Considerations

### 1. Purpose of protection

- 22 The fact that unfair competition is primarily regulated in the Industrial Property Law, and that most activities enumerated in Article 195 LPI relate to industrial property rights, suggests that the purpose of protection under this law is the protection of such rights held by the competitor. However, under Article 209 LPI “prejudice to another person’s reputation or business” also constitutes unfair competition. Therefore, the purpose of protection of the LPI is broader than the protection of such industrial property rights and extends also to the personal rights of the competitor (goodwill in a broader sense).<sup>76</sup> The purpose of the Consumer Protection

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<sup>67</sup> Law 12.529/2011 was approved in October 2011 by the Brazilian Congress, by President Dilma on November 30<sup>th</sup> and published in the Official Gazette on December 1<sup>st</sup> of the same year.

<sup>68</sup> Article 36 § 3 (XVIII).

<sup>69</sup> Article 36 § 3 (V).

<sup>70</sup> See specifically Article 17 Act No. 4.680 of 18 June 1965, which was implemented by Decree No. 57.690 of 01. February 1966, see *C.F. Bittar/C.F. Bittar Filho*, (fn. 1), p. 64.

<sup>71</sup> *L.d.C. Luciano* (fn. 66), p. 33.

<sup>72</sup> *C.F. Bittar/C.F. Bittar Filho*, (fn. 1), p. 34.

<sup>73</sup> [http://www.conar.org.br/html/codigos/codigos%20e%20anexos\\_ingles.htm](http://www.conar.org.br/html/codigos/codigos%20e%20anexos_ingles.htm) (English version, last accessed on February 29, 2012).

<sup>74</sup> *Infra* Section VIII.5.

<sup>75</sup> However, since “fairness” is a factual question, it is possible also to prove that such codes of conduct do not represent the actual customs of commerce, see *D. Barbosa* (fn. 21), p. 493.

<sup>76</sup> *C.F. Bittar/C.F. Bittar Filho*, (fn. 1), p. 52.

Act is the protection of public order and social interest.<sup>77</sup> Unfair competition law's protection not only of competitors but also of consumers follows from the consumer protection principle of the Constitution.<sup>78</sup> More specifically, the Consumer Protection Act aims at suppressing abuses in the consumer market, including unfair competition.<sup>79</sup>

The purposes of the Antitrust Act are the “prevention and repression of in- 23 fringements to the economic order, being guided by the constitutional principles of freedom of enterprise, open competition, social function of property, protection of consumers and the repression to the abuse of the economic power”.<sup>80</sup> Therefore, the purpose of unfair competition law is not just to protect the individual rights of the competitors by regulating specific types of unfair activities, but also to protect competition itself, and as such, safeguard the functioning of the free market.<sup>81</sup>

## 2. Systematic features

While the Brazilian legislation contains no general clause on unfair competition, it 24 provides some defining principles of unfair trade practices.<sup>82</sup> Objectively, the activity must (potentially) turn customers away from a competitor.<sup>83</sup> Therefore, unfair competition requires the existence of a competitive relationship between the actor and a third party as well as the presence of customers.<sup>84</sup> Competition must be verified to be in effective existence, which requires the analysis of the respective market; while, e.g., registered trademarks are protected nationwide, unregistered distinctive signs are not protected in regions or cities where the owner or user is not actively competing.<sup>85</sup> Competition also requires commercial activities; therefore private activities (e.g., the use of a personal name in a non-commercial context) cannot constitute unfair competition.<sup>86</sup> A competitive relationship can also exist between an establishment and its own employee, who is – illegally – competing with it.<sup>87</sup>

The respective act must be “unfair”, a term not legally defined in Brazilian legisla- 25 tion.<sup>88</sup> The (un)fairness of an act is considered a factual question.<sup>89</sup> It depends on the evaluation of customary relations between competitors in the respective market.<sup>90</sup>

Acts of unfair competition do not have to cause actual damage; it is sufficient that 26 a risk of damage to the competitor, e.g., the likelihood that consumers will be confused, can be demonstrated.<sup>91</sup>

<sup>77</sup> Article 4 of the Consumer Code; the objectives of the Consumer Code are discussed in more detail by *L.d.C. Luciano* (fn. 66), p. 33.

<sup>78</sup> See Article 5(XXXII) and Article 170(V) of the Federal Constitution of 1988.

<sup>79</sup> Article 4 CDC.

<sup>80</sup> Article 1 Antitrust Act.

<sup>81</sup> *J.H. Pierangelli*, (fn. 59), p. 275; *C.F. Bittar/C.F. Bittar Filho*, (fn. 1), p. 44.

<sup>82</sup> *C.F. Bittar/C.F. Bittar Filho*, (fn. 1), p. 46.

<sup>83</sup> *C.F. Bittar/C.F. Bittar Filho*, (fn. 1), p. 33, 45

<sup>84</sup> *J.H. Pierangelli*, (fn. 59), p. 332; *D. Barbosa* (fn. 21), p. 482, 499; *C.F. Bittar/C.F. Bittar Filho*, (fn. 1), p. 47

<sup>85</sup> *D. Barbosa* (fn. 21), p. 482.

<sup>86</sup> *Tribunal de Justiça do Estado de Rio de Janeiro*, case no. 586003774, 23 October 1986.

<sup>87</sup> *C.F. Bittar/C.F. Bittar Filho*, (fn. 1), p. 85 with references to case-law.

<sup>88</sup> The term is often described by equating it to other, more colourful terms, such as “dirty tricks” or the “deviation from the right way”; see *J.H. Pierangelli*, (fn. 59), p. 269.

<sup>89</sup> *D. Barbosa* (fn. 21), p. 487.

<sup>90</sup> *F.U. Coelho*, *Manual de direito comercial*, pp. 31–32.

<sup>91</sup> *C.F. Bittar/C.F. Bittar Filho* (fn. 1), pp. 47–48.



- 27 Subjectively, civil liability for unfair competition requires only (simple) negligence, while a minority opinion in Brazilian literature suggests that no subjective element is required for acts of unfair competition, or that at least culpability (negligence) is presumed.<sup>92</sup> For crimes of unfair competition intent (*dolo*) must be proved.<sup>93</sup>

#### IV. General Clause Against Unfair Competition

- 28 Unlike Germany (s. 3 UWG),<sup>94</sup> Brazil has no all-encompassing general clause on unfair competition.<sup>95</sup> As Brazilian unfair competition legislation is still primarily based on a criminal approach in Article 195 LPI, a legal technique similar to the German *Regelbeispiele* (definitional enumerative elements) would most certainly contravene the principles of *nullum crimen sine lege* and *lex certa*.<sup>96</sup> The fact that the *caput* or *chapeau* (i. e., the first paragraph) of Article 195 LPI is devoid of any specific legal content beyond the basic statement that the following items constitute of unfair competition further rules out considering this provision by way of induction as some sort of (private law) general clause.
- 29 Article 209, *caput*, LPI could indeed serve as some sort of general clause due to its wording (“acts of unfair competition not encompassed by this Act”) and the enumerative technique employed in establishing broad categories of unfair competition:

*“acts of infringement of industrial property rights and acts of unfair competition which tend to prejudice some other person’s reputation or business, to create confusion between commercial, industrial or service establishments, or between products and services put onto the marketplace”.*

- 30 Such “generic” unfair competition complements the “specific” unfair competition activities mentioned in Article 195 LPI, which constitute crimes *and* torts.<sup>97</sup> But it is difficult to sustain the view that this law establishes a general clause for a matter which is regulated in different statutes with arguably divergent objectives (in addition to the LPI especially the CDC for activities relating to consumers), and, additionally, Article 195 LPI only applies to activities among competitors. While therefore Article 209 LPI contains generic types of unfair competition, which are broader than those enumerated in Article 195 LPI, it cannot be regarded as a general clause.
- 31 Therefore, an overarching general unfair competition clause could be found in the Civil Code, covering torts in general. However, although the Civil Code of 2002 contains several broadly worded general clauses, such as, *inter alia*, Articles 186 (tort liability), 187 (abuse of right), 421 (“social function of contracts”), 422 (*bona fides*), and 927, sole paragraph (strict liability), there has been no concerted doctrinal attempt to link them with unfair competition law. All that notwithstanding, Arti-

<sup>92</sup> *D. Barbosa* (fn. 21), pp. 476, 491.

<sup>93</sup> *Tribunal da Alçada Criminal do Estado de São Paulo*, RJTACRIM, Vol. 3, July/September 1989, p. 107; *Tribunal de Justiça do Estado de Rio de Janeiro*, case no. 598070324, 04.02.1999; both cases are discussed by *D. Barbosa* (fn. 21), p. 499; *C.F. Bittar/C.F. Bittar Filho* (fn. 1), p. 47.

<sup>94</sup> For the influence of German law and jurisprudence in general see, e.g., *L.M. Couto Gonçalves*, *Manual de Direito Industrial*, 2008, pp. 405 *et seqq.* and *F.C. Pontes de Miranda* (fn. 4), p. 280.

<sup>95</sup> *C.F. Bittar/C.F. Bittar Filho* (fn. 1), p. 46.

<sup>96</sup> *C.F. Bittar/C.F. Bittar Filho* (fn. 1), p. 46.

<sup>97</sup> *C.F. Bittar/C.F. Bittar Filho* (fn. 1), p. 54.