



**ADHESION TO THE PROJECT ‘ IT IS NICE TO CONCILIATE’ – THE
NATIONAL COUNCIL OF JUSTICE/ CNJ¹
PIONEER PROJECT: “THE TREATMENT OF THE SITUATION OF THE
CONSUMER² OVERINDEBTEDNESS”**

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Abstract:

The inexistence of legal precept aiming the treatment of the situations of overindebtedness in Brazil and the increase of the number of individuals and families inflicted by this factor of social exclusion – having the example the results found in the research

¹ The National Council of Justice/Conselho Nacional da Justiça, called CNJ, “is part of the Judiciary and controls its administrative and financial situation, as well as the judges duties. It is an administrative organism part of the Magistracy. It has been created on December 31st 2004 and its inauguration dated June 14, 2005. Its president is now the Minister Ellen Gracie, who was appointed by the Supreme Federal Court/Supremo Tribunal Federal and it has 15 council members approved by the Senate and then nominated by the president.

The CNJ is located at the Anexo II of the Supreme Federal Court/Supremo Tribunal Federal, STF, and its competences are established at the 103-B article of the Brazilian Federal Constitution and its rules are in its internal statute. Its rules are as follows:

- To look after for the autonomy of the Judiciary and for following the Magistracy Statute, issuing normative actions and recommendations;
- To define the strategic planning, the goals to be achieve and the programs to evaluate the Judiciary as institution;
- To receive complaints against its members and against the Judiciary’ organisms including its support services such as notary servants and the registry services that act on its name or under its official seal;
- To judge the disciplinary actions assuring the due process of law and having the right to determine the judges removal or its retirement with proportional payment according to the time worked and the ability to apply other administrative’ sanctions;
- To elaborate and to publicize twice an year a statistical report about the jurisdictional activity and numbers of suits as well as other national data.”

² We would like to thank the Professor Dr. Cláudia Lima Marques for its constant guidance as well as for the creation and coordination of the research group about overindebtedness at the Universidade Federal do Rio Grande do Sul, determiner factor for this work realization.

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realized at Graduate Program of the Universidade Federal do Rio Grande do Sul/UFRGS, under Professor Dr. Cláudia Lima Marques' coordination has justified the establishment of a pioneer project in two cities of the state of Rio Grande do Sul (which are Charqueadas and Sapucaia do Sul). This pioneer project aims to insert back in the social scenario the consumer under overindebtedness' situation. This goal is obtained throughout conciliation hearings - within or outside of the course of a legal action. These hearings serve to renegotiate with all the creditors at once. A judge coordinates the work during the hearing proposing the renegotiation with each individual debtor according to the financial possibilities of the person afflicted with the overindebtedness making sure it will be set aside a minimum amount as a living stipend.

Keywords: overindebtedness - renegotiation – pioneer project - judicial experience – social treatment.

Summary: Introduction – I. Reasons of this Work – II. *Stricto Sensu* Proceedings – Conclusion – Bibliography references.

INTRODUCTION

The spreading of the consumer credit in Brazil happened after 1994 with the edition of the 'plano Real' and more intensely in the past 5 years due to the economical stability and to the access to a part of the population totally excluded from access to credit before.

The access to the credit to the less privileged classes had been debated amongst the Consumer Rights' organizations that had the conception of the Access to the credit as an exercise to a freedom and home autonomy defending that the poor families should be included in the financial market having access to specialized institutions of credit for consumers less privileged.



It cannot be denied that credit allows solving the problem of many families to access goods that increase life quality and are necessary to the minimum well being of families. There is no economist in the world that doubt about the importance of the credit to generate grow, because with the increase of consumption forces the companies to produce in a bigger level and as a consequence have more employees increasing the population buying and also its life standards.

The importance of the consumption according to the sociological viewpoint is identified by Bauman⁵ when affirming that happiness and dignity achieved their highest, following society standards of consumption with access to abundant consumption as a “mark of success and a road that leads directly to the public applause and to fame”. On another words, we lived in a “world where the products are feelings and where death do not exist. [...] Where everyday life is formed of small pictures of absolute impossible happiness and there are no room for pain, misery and agony. The world where exists living beings and paradoxically there is no human fragility.”⁶

This is the context that Lipovetsky⁷ draws about the substitution of the society’s rigor on enforcing the “society’s behavior”, founded on the hedonist and psychological culture that focus on the immediate satisfaction of desires and needs stimulating the urgency of pleasures and enlarge the personal growth putting on a pedestal the paradise of well being, of comfort and leisure”. This is a constant feeling of seduction that acts, according to our feeling, as a legitimate source already identified as “overindebtedness society”⁸, seeing under the condition of mass phenomenon capable of create instability to the political, economical and social order.

Under the conditions of the actual society, the credit reveals a scary similarity to the feud society because a “fraction of work is already anticipated to the master with the slave work”, the system induces the “buy beforehand and then to pay for it with work afterwards”.⁹

⁵ BAUMAN, Zygmunt. *O mal-estar da pós-modernidade*. Rio de Janeiro: Jorge Zahar, 1998, page 55.

⁶ ROCHA, Everardo P. Guimarães. *Magia e capitalismo*. 2. ed. São Paulo: Brasiliense, 1984, page 25.

⁷ LIPOVETSKY, Gilles. *Os tempos hipermodernos*. São Paulo: Barcarolla, 2004, page 61.

⁸ KHAYAT, Danielle. *Le surendettement des menages*. Paris: PUF, 1999, page 6.



The success of the credit as a factor of democratization on accessing the comfort and the well being for those that not have a comfortable economy as well as what regards to management of personal assets¹⁰, was until now restrict to those fortunate individuals, it has deserved the Peace Nobel Prize this year. The banker Muhammad Yunus was the winner of the prize because he was able to save in Bangladesh 12 millions people from poverty throughout a pioneer project of concession of microcredit to the less fortunate on the planet¹¹.

There is an enormous grow opportunity to the financial sector in Brazil identified in the study of BNDES (Banco Nacional de Desenvolvimento Econômico e Social/ National Bank of Social and Economical Development) that says:

The bank sector see more and more the markets of the low income people as an opportunity to grow. Many prestigious banks have openly established a commercial strategy in this market as its central target.

On attempting to attract 50 million new individuals to the bank sector banks are opening alternative channels to their service stations. As an example of these alternative channels are Post Office' agencies used by the Bradesco bank aiming 5.500 new stations for service, supermarkets are being used by Banco do Brasil targeting 5.700 new locations. Also convenience stores, that mainly sale lottery tickets are the places being used by the Caixa Econômica Federal aiming 5.561 new places¹².

The policy to stimulate the popular credit of Lula's government was responsible to open the consumption amongst the low income population that absorbed 17 billions of reais offered by the market. Between 2005 and 2006 2.15 million of families do not belong to the consumers from the group D/E and moved up to the C group¹³.

⁹ BAUDRILLARD, Jean. *O sistema dos objetos*. São Paulo: Perspectiva, 2004, page 169.

¹⁰ Sophie Gjidara emphasizes that in a first moment the management of an investment strategy was exclusively connected to the means of the families. It is understood as an investment strategy even as a management of reserved fortune to the individuals of substantial wealth. The easy access to credit created a democratization of the patrimonial management. Lately, the patrimonial management is global and on evolution, it is part of the the active and passive, the debts. From now on the patrimony goes beyond the concept of economy to adapt to the financial situation of its owner. (GJIDARA, Sophie. *L'endettement et le droit privé*. Paris: LGDJ, 1999, page 143).

¹¹ See the history of the revolution of the micro credit that has helped the poor people in many countries at YUNUS, Muhammad. *O banqueiro dos pobres*. São Paulo: Ática, 2006.

¹² NICTER, Simeon; GOLDMARK, Lara; FIORI, Anita. *Entendendo as microfinanças no contexto brasileiro: programa de desenvolvimento institucional*. Rio de Janeiro: BNDES, 2002, page 13.

¹³ According to a study realized by the LatinPanel, the biggest research company about domestic consumption in the Latin America, there has been a reduction of five points of the population that belongs to the D/E groups (families with incomes up to 4 monthly salaries – salário mínimo is a monthly minimum wage). This segment



The retired population is also being seduced by the widely shown publicity on the media and also targeted by banker's associates. The reason is that the retirees have become the new target of bank loans using the 'crédito consignado'/consignment credit taken directly from their pension plan monthly payment throughout the Instituto Nacional de Seguridade Social (INSS)/ Brazilian national pension plan¹⁴.

The arguments are convincing: easy and fast credit without checking credit protection agencies, easy to reach to those with credit restrictions giving amounts from R\$ 100 (one hundred reais/ around fifty American dollars) and up, giving also 36 months for the payment and lower interest. Since May 2004 when this credit started being offered more than 5 million of retirees went to the banks to take loans with monthly payments taken from their pension plans achieving a value superior than 13 billions on April 2006.¹⁵

However, the effects of this credit expansion took a peculiar dimension in the Brazilian case. Because of the absence of specific laws to deal with this regimen of overindebtedness the consumers started suits aiming their contract revision. These legal actions had their origin in three historical causes: I) the limitation of the level of the interest rates of 12% described on the Brazilian Federal Constitution of 1988, article 192, §3º; II) the attempt of the financial institutions on see pushed away the influence of the Brazilian Consumer Code from the bank-consumer relation; and III) the practicing of renegotiation of debts by the financial institutions, identified as 'a new contract'/novação, writes it in a unilateral format and includes abusive interest on it.

represented 44% of the total in 2005 and has passed to 39% this year. The C group has moved up to 37% of the population in the country. According to the analysis done by its CEO Ana Cláudia Fioratti this changes happened due to the buying of durable goods favored by the increase of the money and access to the credit. Research done 11/22/2006 at <http://br.news.finance.yahoo.com/22112006/25/financas-classes-d-ampliam-consumo-nao-duraveis.html> .

¹⁴ The National Social/Previdência Social plan is a plan for those who contribute to it. It is a public institution that has the goal to recognize the rights and give it to its members. The money transferred to the Previdência Social is used to replace the worker's income when he is unable to work due to illness, physical permanent incapacity, high age, death or involuntary unemployment and maternity leave.

¹⁵ News available at the site BRASIL. Ministério da Previdência Social. The loans giving in consignment achieved R\$ 470 millions in April of 2006. See: <http://www.previdencia.gov.br> . Researched on 5/26/2006.



In the Brazilian Law system there is the “lei de usura”- Usury law since April 7, 1933 – law # 22.626. Its incidence in the bank-consumer relations is not usually recognized by the Superior Courts. The provision of the 12% yearly interest rates according the Brazilian Federal Constitution of 1988, article 192, §3º, has generated an increase on law suits on the Judiciary aiming the application of this law on the loans contracts with banks. However in 1993, the Supremo Tribunal Federal(Higher Constitutional Court of Appeals) after deep discussion about the automatic application of the constitutional article decided upon the judgment of an ‘Ação Direta de Inconstitucionalidade nº4’. The judgment has declared that the interest limitations would depend on a creation of a law – specific for the matter, which has not happened until now. As a consequence the referred third paragraph, article 192, was revoked by a constitutional amendment number 40 of 2003.

The inexistence of limits of the interest rates banks could apply added to the resistance that bank institutions on applying the Brazilian Consumer Code/ Código de Defesa do Consumidor on the consumer-bank contracts under articles 51, “caput”; 51, IV, §1º e 6º, V, first part; e 6º, V, and second part that allows the contract revision based on the ‘theory of the not predictable’ (as in the case of abusive clauses, high damage and also the theory about the breaking the base of the contract¹⁶).

On this direction, aiming to stop the incidence of the Brazilian Consumer Code /Código de Defesa do Consumidor on the bank-consumer contracts based on the article 3º, §2º that considers ‘service’ any activity that is offered to the consumer’s market and charged – this activity can be of banking, financial, of credit or insurance nature. The only activities exempt are the ones qualified as labor related activities. The Confederação Nacional do Sistema Financeiro/ National Confederation of Financial System (CONSIF) brought up to the Supremo Tribunal Federal/Higher Supreme Court an ‘Ação Direta de Inconstitucionalidade’ (ADIn 2.591). The Confederation intended with this action to declare the formal unconstitutionality of the aforementioned article and see it been taken from the Consumer Defense Code the clear characteristic of relation of consumption regarding the banking,

¹⁶ SILVA, Luis Renato Ferreira da. *Revisão dos contratos: do Código Civil ao Código do Consumidor*. Rio de Janeiro: Forense, 1998, page 35.



financial and insurance services. This action was judged on June 7, 2006 and was declared the full constitutionality of the Consumer Defense Code and its applications to what concerns banking services, credit services, financial and insurance operations by 9 votes for it and 2 against.^{17 18}

Although there is the guarantees by the applicable rules of the Defense Consumer Code that aims the balance within the contract, in the practical world the financial and banking operations still being realized with higher interest and on many cases abusive if the Brazilian reality is taken in consideration. Furthermore the practice of the ‘new contract/novação’ is vulgarly identified as renegotiation of debt bringing absurd increases on the amount of the debt with inclusion of abusive fees that only ended up aggravating the situation of consumer overindebtedness.

In this scenario the consumers have passed to seek solution individually on the Judiciary aiming in special to reduce the interests to a reasonable amount. Thousands of actions to revise the interest were placed and the volume of it was the factor for the increase

¹⁷ Cláudia Lima Marques embraces the STF decision because it recognizes the values of the Constitution and it is based on the Consumer Defense Code teaching us: “The consumer’s right is more than before recognized and granted as a fundamental right in Brazil (art. 5º, XXXII) and connects the State (vertical efficacy in the relations of Public Law, in the consumer relations and the Judge-State, in the relations state as legislator and in the relations of the state as Executive power). The ADIn 2.591 decision also opens a new moment to the Drittwirkung, for the so called horizontal efficacy of the fundamental rights in the banking relations, amongst bank consumers, amongst financial corporations and credit companies and securities companies on Brazil.” See more about the effects of the decision of the STF in the article “The Victory of the ADIn 2.591 and the Reflexes on the Bank Consumer Law of the Decision of STF Granting Constitutionality to the Defense Consumer Code” (MARQUES, Cláudia. *Aplicação do Código de Defesa do Consumidor aos bancos*: ADIn 2.591. São Paulo: Revista dos Tribunais, 2006, pages 363-395).

¹⁸ Legal reference to find the judgement on the aforementioned sentencing “**AÇÃO DIRETA DE INCONSTITUCIONALIDADE 2.591-1**; PROCED.: DISTRITO FEDERAL; **RELATOR ORIGINÁRIO :MIN. CARLOS VELLOSO; RELATOR PARA O ACÓRDÃO :MIN. EROS GRAU**; REQTE. : CONFEDERAÇÃO NACIONAL DO SISTEMA FINANCEIRO – CONSIF. ADVDOS. : IVES GANDRA S. MARTINS E OUTROS. REQDO. : PRESIDENTE DA REPÚBLICA. REQDO. : CONGRESSO NACIONAL. Articles of the Defense Consumer Code “ART. 3º, §2º, CÓDIGO DE DEFESA DO CONSUMIDOR – ART.5º, XXXII, DA CB/88 – ART.170, V, DA CB/88 – AÇÃO DIRETA JULGADA IMPROCEDENTE.

1. The financial institutions are all of them under the incidence of the rules of the Consumer Defense Code.
2. The Consumer Defense Code reaches under its incidence all the financial institutions. “Consumer”, to the effects of the Consumer Defense Code is any person or company that uses as its final destination the banking, financial and insurance activities
3. The conditions imposed by the article 3º, §2º of the Consumer Defense Code should be interpreted according to the Brazilian Federal Constitution.”



of the number of judicial cases that achieved the total of 9.955 in the country, on 2004 according to the statistic of the Brazilian Bank Federation/ Federação Brasileira dos Bancos (Febraban). The state of Rio Grande do Sul is the leader of the national ranking with 33% of the judicial cases to revise the interests.¹⁹

However, taking judicial action has revealed to be only a momentary solution for many reasons. One of the reasons is that the jurisprudence on these cases has been modified throughout the years on the aspect of the interest limitations banks apply due to the changes on the consumer' market and on the economy. The Higher Courts have confirmed that the bank interests are not limited to 12% year rate. As a result of this at the end of the judicial case the consumer was confronted with a debt amount even bigger and able to take him to insolvency,²⁰ mainly because during the process the consumer did not pay the amount due.

Furthermore, the contractual revision is a procedural instrument restricted to the individuality of the contracts in front of its creditors in the way it has been used judicially. The pioneer project aims the whole renegotiation of the debts as an alternative to treat the situations of overindebtedness of the consumer – that has no possibility or difficulties to pay their debts aiming the socio-economical reinsertion of the familiar centre in the absence of the special legislation that regulates the matter.

To analyze this matter we are using the existing legislations on Comparative Law, as an example the French regulations that have inserted on its Consumer Defense Code an specific title on article L.333-1. The insertion on Switzerland happened on May 1994, on Germany since January 1st, 1999 and it is identified as InsO 5/10/94 EgInsO, on Austria is identified as konkursordnungs – novelle – 1993, on Denmark is identified as Gaeldssanering since 1984, on Finland began on February 8 , 1993) and on the United States of America within the Bankruptcy Code of 1978. The existence of all these laws in different countries

¹⁹ Jornal “Zero Hora”, 20/7/2004, p.16. Zero Hora newspaper edition of July 20, 2004.

²⁰ MARQUES, Cláudia Lima. Sugestões to a Law that treats about overindebtedness of people in bank consumer credit contracts: propositions based on na empiric research made on 100 cases in Rio Grande do Sul/ Sugestões para uma lei sobre o tratamento do superendividamento de pessoas físicas em contratos de crédito ao consumo: proposições com base em pesquisa empírica de 100 casos no Rio Grande do Sul’. *Direitos do consumidor endividado*. São Paulo: Revista dos Tribunais, 2006, page 255.



only demonstrates the worldwide repercussion of this phenomenon.²¹ Following this lead are Portugal, The Netherlands, the United Kingdom, the Norway, Swiss and Luxembourg, have specific legislation on the matter or are working on it.²²

This phenomenon of overindebtedness, already treated in the national doctrine by professor Cláudia Lima Marques²³, was theme of an empiric an inedited research made under her coordination at the Law Graduate Program at the Universidade Federal do Rio Grande do Sul/ Programa de Pós-Graduação em Direito da Universidade Federal do Rio Grande do Sul on 100 cases of consumers' overindebtedness developed with the Civil Division of the Public Defender's branch of the same state.

The research has found some interesting facts such as the predominance of the overindebted passive consumer on the regional scenario because of some identified causes such as 'life incidents' (unemployment 36,2%, illnesses and accidents 19,5%, divorce 7,9%, death 5,1% and others, such as birth of a child 9,4%"); 46% of the people interviewed are in between of the ages 40 and 60 years and the others, 11% above 60 years of age.

The goals of the research propositions were to offer elements to the Ministry of Justice to elaborate a 'bill's project' that treats about the issues of overindebtedness. The results found revealed a dramatic social scenario that indicates the need for an immediate solution even before there is a law treating the matter.

From this point on the pioneer project started in two jurisdictions of the state of the Rio Grande do Sul, by the Judiciary on two cities (Charqueadas e Sapucaia do Sul) located on the metropolitan area of the city of Porto Alegre (capital of the state), which the main characteristics are^{24 25}:

²¹ ANDORNO, Luis O. *L'endettement: rapport* Argentin Paris: L.G.D.J., 1997, page 57.

²² BARRERO, Vicente Toledano. La protección al consumidor sobreendeudado. In: *Crédito al consumo y transparencia bancaria*. Madrid: Editorial Civitas, 1998, page 491.

²³ MARQUES, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*. São Paulo: Revista dos Tribunais, 2004.

²⁴ Source: IBGE, Division of Research, Coordination of National Accounts – situation of the digital net of Brazil in 2001. Rio de Janeiro: IBGE, 2006.



	CHARQUEADAS	SAPUCAIA DO SUL
Population	33.808	135.956
GDP – gross domestic product	751.754 thousand reais	1.760.631 thousand reais
GDP per capita	23.038 reais	13.346 reais
Agrobusiness value	17.687 thousand reais	798 thousand reais
Industry value	540.734 thousand reais	1.057.050 thousand reais
Services value	142.178 thousand reais	481.106 thousand reais
Financial Institutions	2 agencies	7 agencies
Credit operations	17.413.755,87	63.787.254,59

This work is divided in two parts: the first dedicated to the explaining of the reasons adopted with the empiric and doctrine justifications and the second part destined to illustrate the proceeding itself. At the end we are going to draw the conclusions found about the acceptance of the project and the rate of the conciliation achieved, among others.

I. EXPOSITION OF REASONS:

The creditor has in the Brazilian juridical scenario the provision of the Civil Procedural Code on articles 748 and 786 to the hypothesis of civil insolvency of the debtor (person and not a company) when the debts exceed the amount of all the debtor's assets. However, this is not a system to treat the overindebtedness because it configures a modality of 'execução por quantia certa contra o devedor'/suying the debtor for a specific amount. The insolvency declaration can be by the initiative of creditor or even of the debtor and has as an effect the anticipation on the payments deadline, the gathering of all his/her patrimony susceptible of pledge (the actual and those acquired during the course of the law suit) and the 'execução por concurso universal dos seus credores/ all the creditors can sue the debtor having some of them preference on the amount of the credits obtained.

²⁵Source: Central Bank of Brazil, Administrative Registry 2005; situation of the digital net of Brazil 2005. Rio de Janeiro: IBGE, 2006.



In this type of action called ‘execução’ the causes that generate the overindebtedness are not investigated, its goal is to define the state or patrimony of the debtor and to declare who are the creditors that are going to be taken part in this collective action of ‘execução’. On other words, there is no similarity in between the relief systems found in the Comparative Law²⁶ and they do not aim to prevent the social problems related to the overindebtedness.

In the matter of legal proceedings the Law # 9.307, of September 23, 1996, regulates the arbitrage in Brazil, to solve the ‘disputes related to patrimonial rights’.²⁷ However, the juridical reality has shown that it is still a recent practice because the consumers rather take legal action to the Judiciary to be decided.

Since Brazil do not have a special legislation about the treatment of the situations of overindebtedness, the pioneer project and its creation and elaboration by the exclusive initiative of the state judges proposes a proceeding based on the voluntarism of the parts involved. It has its basis in the ‘Conciliation Project’ of the National Council of Justice/Conselho Nacional de Justiça. This project presents identical fundaments with those mentioned by the ‘Conselho Nacional de Justiça’ on its motif exposition:

The proposal treats about the mechanisms destined to make agreements in cases already taken to the Judiciary or on disputes not yet transformed in law suits.

The strategy aims to diminish substantially the duration of the process and to create solutions for it throughout simplified proceedings. The goal is to reduce the number of cases that only grow at the Judiciary waiting to be decided. This would be an easy access mechanism to every citizen confronting the serious problem of disputes and would create a more engaged justice taking its instruments to the communities.

This initiative not depends on the edition of new laws or a constitutional reform; like the notion presented at the article 5º, II on the Brazilian Federal Constitution and presents zero cost to the Federation using the material structure already existent and/or easy to rearrange such as conciliators and lay judges aiming to install conciliation centers in the actual jurisdictions and mainly bringing the justice to the country side where there are no offices of

²⁶ See also: KILBORN, Jason J. Comportamentos econômicos, superendividamento; estudo comparativo da insolvência do consumidor: buscando as causas e avaliando soluções. *Direitos do consumidor endividado*. São Paulo: Revista dos Tribunais, 2006.

²⁷ Article 1 of the Law # 9.307 of 1996/Artigo 1º da Lei nº9.307/96 .



the Judiciary establishing this way truly alternatives to the population and means capable of solving the cases that it has to face.²⁸

The pioneer project in the jurisdictional environment will be developed in the jurisdictions of Charqueadas and of Sapucaia do Sul under the responsibility of the judges that are author of this paper and those who created the project and are not restricted to the consumers that live in those two cities.

The proposal to take the justice closer to communities not served has also the character of engaging the universities interested on partnerships within the metropolitan area of Porto Alegre and with the Higher Court of Appeals of the state of Rio Grande do Sul, located in Porto Alegre. To achieve it the Legal Services of free access to the Judiciary of the aforementioned universities would be responsible for taking in people, filling the forms that are standard and part of this project. The negotiation hearings will take place inside of the universities that are partners coordinated by the authors of the project and/or other judges interested on participating without cost to the Judiciary . The internalization of the Project to the universities will happen without damage for the original jurisdictions where the judges are designated to work. The judges involved on the project would depend of appreciation and approval of the Magistracy Council to take it forward.

The extension to the universities of the pionner project aims the development of the culture of pacification of the disputes, as suggested by the National Council of Justice/Conselho Nacional de Justiça encouraging the students to find alternative solutions to the conflicts also developing integration amongst students of Law, Psychology, Social Assistance and Economics because a multidisciplinary action is needed to confront the overindebtedness which is a factor of social exclusion, domestic violence, family disintegration and increase of cases taken to the Judiciary. In the same way, the direct action in the pioneer project of the internships done by the students belonging to the universities with partnerships will allow the development of citizenship and the constitutional precepts of the article 1 of the Brazilian Federal Constitution as fundaments of a democratic State.

²⁸ See on website: <http://www.conciliar.cnj.gov.br/conciliar/arquivos/ProjetoConciliar.doc>



At the beginning this justice attempt to be taken to all the areas ('internalization') invoked on the motif exposition of the National Council of Justice was taken to action by the judges authors of this paper to divulge the project and to achieve the goal of easy access to justice and social pacification following the activities described:

OCTOBER/2006:

- Presentation of the adhesion to the 'Project Is Nice to Conciliate' by the judges 'corregedores', and presentation of the Pioneer Project "Treatment of the Situation of the Consumer Overindebtedness" at the Conference "Consignment Credit and Overindebtedness" promoted by the Magistracy School of Rio Grande do Sul.

NOVEMBER/2006:

- Meeting with the lawyers from the Jurisdiction of Charqueadas to explain the project,;
- Beginning of the pioneer Project on the jurisdiction of Charqueadas;
- Participation on the television show "Sala de Audiência", channel 20, promoted by the judges state association of Rio Grande do Sul;
- Publication informing about the project on the local newspaper "O Portal", jurisdiction of Charqueadas.

DECEMBER/2006:

- Meeting on the jurisdiction of Charqueadas, with the local shop owners and local financial institutions about the project;
- Interview at the São Jerônimo local radio station about the project;
- Launching of the folder about overindebtedness at the Court House/Foro Central of Porto Alegre, by the state Higher Court of Appeals/Tribunal de Justiça of Rio Grande do Sul;
- Talk at the Magistracy School of Rio de Janeiro to inform about the Overindebtedness Folder;
- Starting the project's application at the jurisdiction of Sapucaia do Sul;
- Interview at the Goiânia – state of Goiás - at a radio station about the Project with posterior electronic mail of the overindebtedness folder;



- First case hearings at the jurisdiction of Charqueadas.

MARCH/2007:

- First case hearings at the jurisdiction of Sapucaia do Sul;
- Meeting to speak about the project with the coordinator of the Law School of the Universidade Luterana do Brasil (ULBRA), Campus São Jerônimo;
- Meeting to speak about the project at the Universidade do Vale do Rio dos Sinos (UNISINOS), with the coordinators of the legal services from the university;
- Article publication at the newspaper “O Sul”, Porto Alegre (RS);
- Talk about the project at Universidade Ritter dos Reis, Canoas (RS);
- Article publication at the local newspaper “A Notícia”, jurisdiction of Sapucaia do Sul;
- Article publication at the local newspaper “Destaque”, jurisdiction of Esteio (RS).

APRIL/2007:

- Article publication at the magazine “Carta Capital”, São Paulo, about the project and the overindebtedness folder;
- Meeting with the president of metal industry workers union of the of São Leopoldo to speak about the project;
- Publication of the overindebtedness folder with informations about the project on the newspaper “Diário Gaúcho”, Porto Alegre (RS);
- Talk about the project at the jurisdiction of Charqueadas with representatives of metal industry workers’ union , with industry workers, neighboring community associations, mother’s association, Senergisul, Public Defense’s office representatives and municipal council members;
- Talk about the project at the III Seminário Internacional Defensoria Pública e Proteção do Consumidor, Fortaleza (CE)/ International Seminar of the Public Defense and Consumer Protection;
- Talk about the project at the Universidade Ritter dos Reis, Campus of Porto Alegre (RS).



The justification to the execution of the pioneer project is based on the consumer and their creditor's independent wish to participate on hearings and renegotiations. We registered also the presence of the duty to renegotiate as one of the authorizing fundamentals of the mediation and it has to be conducted by a judge.

In this sense the study of the “general duty of renegotiation of the long term contracts” according to the actual European doctrine that has been drawing the duties of cooperation, *bona fide*, and on the old exception of ruin as teaches Cláudia Lima Marques²⁹. This is one of the functions of the *bona fide*, according to the German doctrine would be “to correct and to adapt in case of change of circumstances”³⁰ and as a result the fundament of the duty of renegotiate facing the negotiation's broken base.

Despite the diversity of the fundamentals to the existence of the duty to renegotiate we can identify similar illustrations in the French doctrine about its recognition in special on overindebtedness as an example of the possibility of the contract as ‘a new right’ voluntarily or through the Judiciary - as a “tendency in the activity of the legislator and of the judge on avoiding the breach or the non execution of the contract in the name of the social utility – acting as a privilege instrument of the contemporary treatment for the overindebtedness”³¹.

As for the treatment of the overindebtedness in the countries where there are already existing laws about the topic. The distinct philosophies that give base to it can be divided in two conceptual categories of systems: the ‘fresh start policy’ and the ‘system of reeducation’. The first faces the “overindebtedness as a risk associated to the expansion of the financial market and, for that believes in the socialization of the risk of credit development conceiving a limited responsibility to the consumer”. In this system the debtor's patrimony are sold to pay the debt that it covers and the rest is forgiven. The second is founded “in the idea of the consumer has failed and need to be educated again. This is a conservative social model where the individuals are seen as responsible beings and citizens and less as economical agents.” On

²⁹ MARQUES, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*. 4. ed. São Paulo: Revista dos Tribunais, 2002, page 245.

³⁰ MARQUES, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*. 4. ed. São Paulo: Revista dos Tribunais, 2002, page 186.



this way the overindebted person is forced to pay the debts with their patrimony at the moment and throughout a payment plan that will take money out from the income to be received, this will have to be agreed upon with the creditors.³²

The proceeding elaborated for the pioneer project took in consideration the European model of reeducation and its emphasis on a pedagogical approach as the form to prevent and to treat the overindebtedness. We understand that for the Brazilian case this is the model to attend the principles for the national Policy for the Consumer Relations described on article 4^o of the Consumer Defense Code, specially the principle on part IV of the article that refers to the respect to education and information that the suppliers and consumers should know, about their rights and duties to improve the consumer's market.

José Rivero H³³ has said that the consumer education acts as a “development fact and explains the economical and social region's behavior. As a result of this is the need to capacitate the consumer to learn their rights and duties assured by the laws as a way to become real the principle of the human dignity.

Furthermore this system requires from the debtors an active learning about the consequences, the costs and the responsibility on taking too many loans. This will also stimulate the creditors on settle amicably the disputes if the effort of the debtors are valued to fulfill their obligations.³⁴ This active learning finds its peak at the negotiation hearing to which all the creditors and the consumer are invited and it is explained about the social phenomenon of the overindebtedness and its repercussions. All the presents are instigated to find an alternative for the debtor to honor the obligations within their possibilities.

³¹ GJIDARA, Sophie. *L'endettement et le droit privé*. Paris: LGDJ, 1999, page 396.

³² LEITÃO MARQUES, Maria Manuel *et alii*. *O endividamento dos consumidores*. Coimbra: Almedina, 2000, pages 214-217.

³³ RIVERO H., Jose. Necessidades básicas de aprendizagem e educação do consumidor. *Revista de Direito do Consumidor*, São Paulo, n. 8, pages 34-39, out./dez. 1993, page 37.

³⁴ KILBORN, Jason J. Comportamentos econômicos, superendividamento; estudo comparativo da insolvência do consumidor: buscando as causas e avaliando soluções. *Direitos do consumidor endividado*. São Paulo: Revista dos Tribunais, 2006, page 66.



As for the procedural characteristics it can be conciliation before a lawsuit exists or within an existing lawsuit.

The type of conciliation done before a lawsuit has been filled starts by the standard form containing all the information about the consumer who should voluntarily fill in the data at the Judiciary. In this case the procedure takes place when the consumer does not have pending lawsuits with creditors, the renegotiation of the debts will occur before a lawsuit that eventually the creditors might start to see their credit' money.

On the other hand the type of conciliation within an existing lawsuit can only occur in the cases where there is a pending suit between the consumer and the creditors (action to revise, action to collect, action to have the credit paid and an action called 'monitória' among others).

The total of debt can be a result of consignment credit, of consumer credit in general, of contract on services (essential services or not) these could be already due and there is no limitation to its amount. The excluded debts are: alimony debts, fiscal debts, mortgage debts and those that are originated from the civil or criminal compensation – because are not originated from a consumer relation. On the case of mortgage credits is due to its contractual complexity and legislation.

As for the conditions to be accepted, the consumer cannot be a company, has to come with bona fide status, he/she can have any level of family income and another important requirement is that the credit taken cannot have been to support his/hers profession for these are part of the requirements for the bankruptcy law.

Are also admitted the consumers identified as 'unconscious active overindebted' and the passive type being excluded only the conscious type of consumer.

The doctrine clarifies that the conscious active overindebted type is the person that has acted having no intention to pay trying to fraud the creditors; the unconscious active type is



the debtor that has acted under an impulse or did not formulate the correct calculus on the moment the debts were made. This person is also identified as a debtor without malice and capacity to foresee. The last type the passive overindebted consumer is the one that for external reasons and unforeseen situations have suffered a brutal loss of resources due to unemployment, divorce, illness all called 'life accidents',³⁵.

We would like to acknowledge that the experiences of debt renegotiation in Brazil directed to the treatment of overindebtedness have occurred not judicially as the same line of work been done at the Public Defender's office of the state of Rio de Janeiro/Defensoria Pública do Rio de Janeiro³⁶ and of the Protection Service of Consumers/PROCON³⁷ of São Paulo.

These experiences present a common origin since they were inspired in a field research coordinated by Professor Dr. Cláudia Lima Marques of the Universidade Federal do Rio Grande do Sul in partnership with com the state Public Defender's office/Defensoria Pública.

II. *STRICTO SENSU* PROCEEDING:

The start of a proceeding depends on the voluntary wish of the consumer, whom cannot be a minor and has to be capable according to the requirements of the article 5^o³⁸ of the Brazilian Civil Code having or not a lawyer's assistance. The proceeding must observe the following requirements:

³⁵ MARQUES, Maria Manuel Leitão *et alii*. *O endividamento dos consumidores*. Coimbra: Almedina, 2000, page 237.

³⁶ Article 1º - The Public Defendor's Office is an essential institution of the State. Its function is to give whole and free legal assistance inside and outside of the courts to the needy as considered according the law. Complementary law # 80, of January 12 ,1994.

³⁷ Created by the Law #9.192 of November 23, 1995 and the Law Decree # 41.170, of September 23 1996 the PROCON foundation is an institution connected to the Citizen Defense and Justice Department of the state of São Paulo, it has juridical personality of public law with technical, administrative and financial autonomy. The PROCON/SP is a pioneer institution to protect consumers in Brazil and is a synonym of protection to consumers' rights. The fruits of this work have been ripen aiming a balance in the consumer relations and a search to always improve it throughout the services rendered by the institution and to improve the life quality of the population as well as for a more conscious citizen.



- 1) Filling out the standard forms with his/hers information and to whom will be explained about the bona fide status about the veracity of the facts. The form will be available at the court house and will be filling with guidance from a trained worker:

Pioneer Project “ Treatment of the situation of the overindebtedness of the consumer”

1 Identification

Name: _____
CPF/oficial number of registry: _____
Residential Address: _____ Telephone: _____

2 Economic information

a) Gender: <input type="checkbox"/> M <input type="checkbox"/> F
b) Age: _____
c) Profession: _____ <input type="checkbox"/> active <input type="checkbox"/> retired <input type="checkbox"/> unemployed
d) Civil Status: <input type="checkbox"/> married <input type="checkbox"/> single <input type="checkbox"/> divorced <input type="checkbox"/> widow <input type="checkbox"/> partnership <input type="checkbox"/> others
e) Number of Dependants: _____
f) Individual monthly income: R\$ _____ Family Monthly Income: R\$ _____
g) Monthly fixed expenses: electricity: R\$ _____; rent: R\$ _____; water: R\$ _____; telephone: R\$ _____; groceries expenses : R\$ _____; alimony : R\$ _____; education: R\$ _____; health insurance plan: R\$ _____; medicines: R\$ _____; taxes: R\$ _____; others (specify): R\$ _____
h) Do you own your home? <input type="checkbox"/> yes <input type="checkbox"/> no
i) Total amount of debt: R\$ _____
j) Which is your monthly commitment amount to pay the debt ? R\$ _____.
k) Number of creditors: _____
l) Causes of the debt: <input type="checkbox"/> to expend more than earning; <input type="checkbox"/> unemployment; <input type="checkbox"/> divorce/separation/dissolution of a partnership; <input type="checkbox"/> personal or family illness; <input type="checkbox"/> reduction of income; <input type="checkbox"/> death.

³⁸ Article 5º: “The minority ends at the age of 18 years completed when the person is capable of all the acts of a civil life.”



- m) Is your name listed on the non payers companies? yes no
n) Did you find the offer of credit through: television; electronic mail;
 newspaper/magazine/folders; street folders; telephone/telemarketing.

3 Map of Creditors:

3.1 Creditor:_____.

Amount of Debt: R\$ _____.

- a) With guarantee given: yes no. Which?_____.
- b) Do you have a pending lawsuit? yes no.
- c) Deduction from payroll/retirement plan? Yes, number of installments:_____ no.
- d) Is your debt due? yes no.
- e) Have you already try to renegotiate yes no. How: directly with the creditor
With Public Defender's agent with a lawyer
at the Small Claims Court/Juizado Especial Civil.
- f) Did you receive the copy of your contract? yes no. If yes, before or after signing it.
- g) Were you informed about: monthly interest annual interest total amount of debt
 consequences of no payment.
- h) When did you contract with the company was your name on the "non-payers' list"? yes no

3.2 Creditor:_____ . Amount of Debt: R\$ _____.

- a) Guarantee given: yes no. Which?_____.
- b) Do you have a pending lawsuit? yes no.
- c) Deduction from payroll/retirement plan? Yes, number of installments:_____ no.
- d) Is your debt due? yes no.
- e) e) Have you already try to renegotiate yes no. How: directly with the creditor
With Public Defender's agent with a lawyer
at the Small Claims Court/Juizado Especial Civil.
- f) Did you receive a copy of the contract? yes no. If yes, before or after signing.
- g) Were you informed about: monthly interest annual interest total amount of debt
 consequences of no payment.
- h) When did you contract with the company was your name on the "non-payers' list"? yes no

WARNING: The analysis of the bona fide status of the consumer will be consider from the given information on this form.



Date: _____ Signature: _____

- 2) After filling out the standard form the consumer will receive the folder containing the “ 10 commandments to prevent the overindebtedness”

The making of the folder entitled “Manual of the Overindebtedness Consumer” aimed to reinforce the pedagogical and preventive aspect of the project especially because similar initiatives oriented towards prevention (education and guidance) of consumer overindebtedness are new in Brazil where education for consumers is not even part of the school curricula. Although the education and information to consumers about their rights and duties is one of the principles of the National Policy of Consumer Relations (article 44º, IV do CDC)³⁹. In a final analysis the consumer education becomes real the fundament of the democratic state of Law, which has prevision on article 1º, II, of the Brazilian Federal Constitution by taking the citizenship to another level also having the legal support of article 5º, XXXII, and 170, V, of the aforementioned constitution.

10 COMMANDMENTS TO PREVENT OVERINDEBTEDNESS:

- 1) DO NOT SPEND more than you earn;
- 2) BE CAREFULL with easy access credit;
- 3) Do not make debt before REFLECTING upon it and SPEAKING to your family;
- 4) READ the contract and the prospectus;
- 5) DEMAND information about monthly and annual interest rates;
- 6) DEMAND the previous total amount of the debt and EVALUATE if it is compatible with your income;
- 7) COMPARE the competition interest rates;
- 8) DO NOT transfer over to you third party’s debts ;
- 9) DO NOT MAKE debts and GIVE OUT your information through the telephone nor through the internet;
- 10) SET ASIDE part of your income for your personal expenses.



TEST:

AM I UNDER OVERINDEBTEDNESS?

- Do my debts correspond to 50% or more of my income ?
- Do I need extra work to pay my debts at the end of each month?
- Do the money from my salary finishes before the end of the month ?
- Are my debts causing family problems ?
- Can I pay on time the electric bill, the water bill, food, rent and/or home expenses related bills ?
- Am I suffering from depression due to worries about my debts ?
- Is my name under cadastres such as SPC, CERASA, CCF ?
- Have I been always paying my debts after the due date ?
- Have I already borrowed money from a family member or from a friend to pay my obligations ?
- Is my family not aware of my difficulties ?

WHAT CAN I DO?

If you are a person (this situation does not apply for a business nor for a company) and the situations shown in this test do apply to yourself look for the 'Pilot Project' of the Judiciary Power. This Project has its focus on treating the 'consumer overindebtedness' situation in the jurisdictions of Charqueadas e Sapucaia do Sul (South of Brazil). This project aims to mediate the renegotiations of the debts with all the creditors, in an amicable way, according with the family budget preserving the minimum amount to the family basic needs. If there is no 'pionner project' in your town's courthouse look for the Public Defenders, for an attorney or for the PROCON (Service to Protect the Consumer).

³⁹ The Public Defender's Office of the state of Rio de Janeiro and the PROCON of São Paulo were the first ones to create a Center to Help Consumers with Debt aiming the prevention of overindebtedness and its treatment throughout renegotiation with the creditors.



- 3) The proceedings are exempt of jurisdictional fees because the condition of ‘overindebted’ is equivalent to the legal provision of the articles 1^{o40} e 2^{o41} of the Law # 1.060/50 describing exemption of the fees based on the benefit of Free Legal Assistance.
- 4) The overindebted at the moment of filling the standard form is already subpoena to come to the renegotiation hearing with a set date.
- 5) The invitation standard letter will be send – preferably by electronic mail - setting the date to the renegotiation hearing with all the creditors indicated on the standard form.

“IT IS NICE TO CONCILIATE”

**PIONEER PROJECT: “THE TREATMENT OF THE SITUATION OF THE
CONSUMER OVERINDEBTEDNESS”**

Jurisdiction of
Address...
City and Zip code
Telephones:

Invitation letter # xxxx/07

(City), xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

To
The legal responsible

Address
City - RS

Dear Sir/Madam,

⁴⁰ Article 1º: “ The federal and state public power will guarantee the Free Legal Assistance will be given to the citizens independently of cooperation with the municipalities and the regional chapter of the Bar associations of Brazil (OAB).”

⁴¹ Article 2º: “The benefit expressed by this Law – the right to file a lawsuit in its criminal, civil, military or on the labor areas - will be given to the nationals and foreigners that have residence in the country. The law considers ‘needy’ under its determinations those with an economical situation that cannot afford to pay for the legal fees and for a lawyer’ service – without causing damage to its own maintenance and of his/her family.



The judge in charge of the project “Treatment of the Situations of Consumer Overindebtedness” is

INVITING

You to the meeting aiming the DEBT RENEGOTIATION to take place on date **xx/xx/2007**, time **xxh xxmin**, at the local project’s room at the local Court House on the address above given in relation to the contracts bellow described:

- . **Consumer’s name:**
- . **CPF:**
- . **contract #:**
- . **Amount:**

We clarify that the consumer/overindebted invited to take part in this project is a person and not a business, with bona fide, that cannot pay his/her debts already due or to be expired but is willing to pay for it all the creditors.

We request the presence of the company’s representative, on the date above with a letter confirming the person’s legal power to represent the company and authorization to sign agreements as well as the copy of the contract to be discussed, and an accurate spreadsheet of the debt so a renegotiation proposition can take place.

The no show will be understood as a lack of interest to renegotiate the contract.

If you cannot come in the date above suggested please contact us by the following electronic address e-mailxxx@xxx.com.br, and inform the number of your invitation letter and we will determine a new date to be informed by e-mail.

We trust that this is the best alternative to solve this dispute for both creditor and debtor and look forward to meeting you.

Sincerely,

Hon. Judge

- 6) **RENEGOCIATION HEARING:** it is a conjoint hearing with all the creditors and the consumer in the same opportunity to preserve the fast pace of the project and to guarantee a minimum amount to the living expenses of the overindebted consumer.



This minimum amount for the living expenses is called by the French “rest a vivre” was a target of concern for the legislator that in 1998 with the article 331-2⁴² of the *Code de la Consommation*, created some changes on the system of treatment of the overindebtedness because of the believe on solving the debts could not take all the means to maintain the debtor’s existence. Moreover after some experience dealing with the treatment of overindebtedness we have come to realize that if a person or family cannot have the minimum to cover their living expenses the possibility to honor their debts is unlikely.

The demand for the minimum amount to cover the living expenses as a way to guarantee the debtor resources to his/her maintenance cannot be inferior to the minimum amount to be respected by law in the terms of article L.145- 2 of the Labor Code, nor to the minimum amount of insertion (RMI).⁴³

The project did not adopt a specific formula to calculate the minimum amount because it is a complex task and cannot be reduced to any easy mathematical formula – like some used on juridical decisions that considers that the overindebtedness cannot go beyond one third of the consumer’s income.⁴⁴ We consider that the consumer would only be reasonably in

⁴² Article. L. 331-2: (Law # 95-125 of February 8 1995, article. 29, article 30 Diário Oficial of February 9, 1995, valid as 1 August 1st 1995) (Law # 98-657 of July 29, 1998, article 87 Diário Oficial of July 31,1998). The council has as its mission to treat the following conditions that are inserted in this chapter for the situation of the overindebtedness of consumers when they cannot fulfill their obligations with their creditors before the due date.

The amount or reimbursements that result from the application of the articles L.331-6 or L.331-7 is fixed according to the article L.145-2 of the Labor Code which determines to keep the portion of the income that cannot be taken away from the debtor. This is done to assure that the family will be safe with the minimum necessary resources to their existence. This is an amount of resources cannot be inferior to the ‘minimum amount of insertion’ (*revenu minimum d’insertion*) for the family, which is indicated on the plan structure according to the article L. 331-6 or on teh recommendations of the articles L. 331-7 e L. 331-7-1.

⁴³ The French juridical Law system has treated about the minimum amount in their Labor Code on article L145-2: (Law # 73-4 January 2, 1973 Diário Oficial of January 3 1973), (Law # 91-650 of July 9 1991 article 48, article 49 Diário Oficial of July 14,1991 started on August 1º, 1992), (Law # 98-657 of July 29 1998 article 88 Diário Oficial of July 31, 1998), (law # 2002-73 of January 17, 2002 article 71 Diário Oficial of January 18, 2002). The amounts that can be taken from the person’s income have to respect the limits of the living expenses according to the decree of the state Council. This decree will establish the conditions on which the parameters and the extenuate circumstances will be revised taking in consideration the evolution of the economical circumstances. To determine the amount that cannot be taken will be considered the accessories and even profits in *in natura*, after taxes. It will also be considered as an amount that cannot be taken if the consumer’s income only have the amount of minimum insertion. Are exempted the amounts presented by the worker and the gifts received towards the family.

⁴⁴ Alain Gouriou finds surprising that the Appeals’ Court qualifies the use of the ‘good sense rule’ based on that the ‘good sense’ leads to think that the important is not so much the percentage of the debt but the amount of



conditions to honor the agreement when a sufficient amount is preserved to pay for home expenses such as water and electricity bills, food, education, health, rent expenses, house related expenses amongst other necessary to the well being of the family cell⁴⁵.

As for the content the renegotiation can consist on installments of the debt, on concession of extension with alteration on due dates for payment, on reduction of fees or even partial or total forgiveness of the debt.

The success on the conciliation during the hearing can have the characteristic of a mediation or take terms inside of and existing lawsuit.

- 7) **SUCCESSFUL AGREEMENT AND CONCILIATING PROCEDURES:** the judge coordinator of the project will sign the agreement conciliation terms giving it legal enforcement.

The minutes of the renegotiation hearing are written in on document only identifying each creditor, the amount of debt, the method of payment, and penalty fees in the case of non fulfillment of the obligation. If there is a pending lawsuit in the minutes are going to express the suspension or extinction of the lawsuit.

Related issues about the competence to take the agreement document with legal enforcement to the court in the case the parts do not obey the agreement. It is also determined on the document the place to start the lawsuit as of the local residence of the

income after the deduction of the installment to be paid. A debt fee of 50% will not have the same importance for a home that earns 12 000 F monthly and for another one earning 50 000 F. According to the author the statistical methods of analysis and selection of risks demonstrates this criterion having a lower detection risk power. As a result the lower risk of incident of payment do not correspond necessarily to the lowest rate of debt, in the same way the higher debt rates are not synonym of strong probability of insolvency when the other criteria are met. (GOURIOU, La responsabilité..., page 56).

⁴⁵ In the Swiss Law has an interesting point. It presents an indication of a basic regimen to verify the capacity of reimbursement that is articulated around three principles: a) the amount received must allowed the consumer to get reimbursement for the credit ; b) this reimbursement value has to leave a minimum vital amount to the consumer expenses; c) aiming to reduce the risk of overindebtedness on a long run the capacity verification of the reimbursement should have been made under a fictitious base of installments of 36 months. The criteria were described by STAUDER, Le prêt responsable..., page 1029-1047.



consumer – according to the rules of the public order and social interest in the consumer relations according to article 1^{o46} and 101, part I,⁴⁷ both of the Consumer Defense Code.

Moreover are also register on the minutes some specific effects that were inspired on the French legislation reinforcing the responsibility of the overindebted on following the terms of the agreement – receiving a warning about the solemn characteristics of it.

The effects are:

The debts will be due before the deadline if:

- a. Intentionally you give false information or produce forged documents with the goal of making use of the benefits of the proceedings for overindebtedness;
- b. By hiding or feign the totality or even part of your assets aiming to fraud creditors or the collection process;
- c. You take other loans without the creditors' agreement and your debt situation is aggravated or if you practice acts of disposition with your patrimony while treating the overindebtedness situation.

8) UNSUCCESSFULL AGREEMENT WITHOUT A PENDING LAWSUIT : the overindebted is oriented to seek for his/her rights on the Judiciary at the Court House or even at the Civil Special Jurisdiction (Small Claims Court)⁴⁸.

9) UNSUCCESSFULL AGREEMENT WITHIN THE PENDING LAWSUIT: the pending lawsuit will be taken to its original jurisdiction to follow its regular proceedings.

⁴⁶ Article 1º: “The present article establishes rules of public and social interest on the terms of the article 5º, XXXII, article 170, V, of the Brazilian Federal Constitution and article 48 and its transitory dispositions” .

⁴⁷ Article 101, I: “In the action of civil responsibility of the supplier of products and services without damaging the exposed on Chapters I e II of this title will be observed the following rules: I – the lawsuit can be proposed on the local court house of the consumer’s residence”.

⁴⁸ Law # 9.099/95, article 3: “ The Small Claims Court/Juizado Especial Cível has jurisdiction for the conciliation, its processing and judgment over the civil cases of less complexity such as: I. suits where the amount of the case do not exceed 40 (fourty) times the minimum wage; II. Those cases described in the article 275, II, of the Brazilian Civil Procedure Code/Código de Processo Civil; III. Eviction’s action for owners’ personal use; IV. Ownership actions over property which value do not exceed the amount limited on item I of this article.”



CONCLUSION

Six months have passed since the beginning of the project we have concluded that the first difficulty on the performance is the stigma suffered by the overindebted consumer that frequently demonstrated great embarrassment to assume their total number of creditors, their difficulties on paying the debt and the full amount of debt they have contracted. There were cases, for example, when the consumer has declared only one creditor in the moment of filling the standard form and a week later came back to include the creditors he/she had omitted. As a result of situation like this we identified the need for this service to be rendered individually in a separate area to preserve the information given on each case.

The feelings of guilty and shame have not surprised us in this first phase of the project because we have found it described on the Comparative Law material researched. Although is important to make note of the research realized by the Observatório do Endividamento dos Consumidores, of the Centro de Estudos Sociais da Universidade de Coimbra, about the values, attitudes and behavior of the overindebted consumers which has concluded that the overall of the overindebted consumers presented emotional fragility, a failure and shame feeling towards family and society.⁴⁹

On the other hand we verified that the creditors are highly appreciative of the efforts the debtors are making on fulfilling their commitments becoming more flexible when making the agreements. The practice has shown also the situations of solidarity among the local creditors aiming to easy the group compose of the debt avoiding the insolvency of the consumer given more time to pay or a moratorium.

As for the creditor's adhesion to the project the showing for the hearings achieved a rate of 99% of attendance until now, although the entire proceeding depends on the independent wish of the parts involved to participate and do not create any burden to the creditor. The divulgation of the project has been helped by many creditors that have sent their

⁴⁹ FRADE; MAGALHÃES, Sobreendividamento..., pages 27-29.



debtors to the Court Houses to find out information. Another way of the divulgation has been done also via posters of the project on many commercial shops.

These conclusions are authorized also by the high rates of conciliation obtained that until now (June 11, 2007) achieved 81, 5% in comparison with the national rate of 30%⁵⁰, according to the National Justice Council/Conselho Nacional de Justiça.⁵¹ In the year of 2006 the Project called 'Movement for the Conciliation' has launched the National Conciliation Day – December 8, 2006 – as a stimulus to adopt controversy solution systems targeting conciliation and not the traditional dispute way such as arbitration, mediation and conciliation. On that day took place 83.987 hearings all over the country achieving and amount of 46.493 agreements, a rate equivalent to 55, 36%.

The first results analyzed revealed the adequacy of the chosen model with emphasis on reeducating especially because the direct contact between the consumer and their creditors targets a conjoint solution. This proactive posture can be the beginning of a change on the paradigm of the consumer being the only responsible for their excessive overindebtedness.

Historically the negative conception of overindebtedness is connected to the own negative conception of the credit as the source of overindebtedness⁵². The credit emerged connected with the notions of guilty and mistake and usury also condemned by philosophers and religious doctrines.⁵³ Furthermore it is important that this credit render trivial responsible for the society overindebtedness create also an acceptance policy⁵⁴ of the phenomenon as a social matter deserving of a humanitarian approach.

⁵⁰ See: www.conciliar.cnj.gov.br/conciliar/arquivos/AnJornalConciliacao.pdf

⁵¹ According to the oficial statistical data from the Conselho Nacional de Justiça's site: www.conciliar.cnj.gov.br/conciliar/arquivos/relatoriofinal.pdf

⁵² See details about the history of credit from antiquity to modern times in GELPI, Rosa Maria; JULIEN-LABRUYÈRE, François. *Histoire du crédit à la consommation*. Paris: La Découverte, 1994.

⁵³ Michel Lafitte assures that although the French philosophy rests under a laic "approche" the religious influence of Catholicism still impregnating the spirit and the relations among citizens and money. Such proverbs still being used showing this historical way of thinking: "L'argent ne fait pas le bonheur", "Peine d'argent n'est pas mortelle" ou "L'argent est bon serviteur et mauvais maître". (LAFITTE, Michel. *La valeur client et ses implications bancaires*. Paris: Revue Banque, 2005).

⁵⁴ In regards to the acceptance of the overindebtedness, Sophie Gjidara says that "the economical realism have imposed a normalization to the treatment of the overindebtedness as a permanent condition of financing and has made easier its treatment for the consumer in this crises situation can be assisted towards the integration



Paraphrasing Sophie Gjidara⁵⁵, “in an economy of overindebtedness the overindebted consumer is an essential gear for the preservation and survival of the economical system as well as for the maintenance of social peace”. As a result we believe that the creation of consciousness on the creditors for the need to bring back the consumer to within the economical circuit allowing creditors to be engaged in the fight against the overindebtedness.⁵⁶

Of the 84,5% of the overindebted consumers that have participated on the project had suffered some type of life accident, the so called ‘passive overindebted consumer’ those who did not contributed voluntarily to their condition of insolvency. Amongst the majority of them presented the unemployment as the cause of the overindebtedness, followed by income reduction, divorce/separation or illness⁵⁷.

The advancement of the judicial experience on the treatment of the overindebtedness consumers confirms the Judiciary as a transformation agent adopting alternative mechanisms which aim the social peace.

back on the economical circuit. This generically acceptance of the overindebtedness has not passed without juridical implications. The new economical logic has brought fundamental new juridical notions of obligations and patrimony. After a first subjective reading focused on the personality of the obligated counterparts was followed by an objective reading taking the focus out of the obligation and towards its object primary target of the economical exchanges. The economical imperatives have conducted to a more patrimonial obligation approach – considered as economic value on its respective patrimony. The credit represents a positive value in one side and on the other is presented as a negative value.” (GJIDARA, *L’endettement...*, p. 34).

⁵⁵ The author explains that the capitalism and liberalism have permitted the emerging of a so called consumer society on which the credit and the overindebtedness have developed and nourish themselves mutually. The empire of the economy over the law has created a juridical imperative taking in consideration the phenomenon of the overindebtedness to a point of running over the classical juridical categories. The overindebted consumer was promoted to an specific juridical condition that has migrated from the Civil Code to give a privileged statute. (GJIDARA, *L’endettement...*, p.37-159).

⁵⁶ About this François Boucard said that “demand reimbursement of credit from a debtor that is on a needy state or condition can be abusive. It is what we called as “survival ethic” identified on the political discourse by the expression ‘fight against all exclusions’”.

⁵⁷ The item ‘others’ corresponded to the situations where the overindebted consumer has taken debt from family members.



This form of jurisdictional action means in the words of Fernando da Costa Tourinho Neto⁵⁸,

An advancement of constitutional origin that comes to support an old need of all citizens – especially those less fortunate – of a justice system capable of offering a simple, fast, cheap and safe solution bringing to analysis a mechanism that broadens the access to a fair juridical order.

⁵⁸ TOURINHO NETO, Fernando da Costa; FIGUEIRA JÚNIOR, Joel Dias. *Juizados Especiais Estaduais Cíveis*



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