Civil Procedure Review
AB OMNIBUS PRO OMNIBUS

5

The Emrek *vs* Sabranovic case: an economic analysis of the consumer's jurisdiction rule for the European Union

José Borges Teixeira Júnior

Master of Laws candidate by the Federal University of Espírito Santo. Master of Laws candidate by the Steinbeis-Berlim School of International Business and Entrepreneurship. Member of the Brazilian Association of Law and Economics. State Judge.

Abstract: the paternalism of the procedural law can have unthinkable results. This paper address exactly to this topic, analyzing a ruling made by the European Court of Justice regarding the competence of a EU country to adjudicate a case between two parties, the consumer and the company, in which the said objective of the adjudication as it was made was to protect the consumers. This paper tries to show how it could go wrong, by deriving a model of the behavior of companies and consumers after the ruling was made.

Keywords: Civil Procedure; EU civil procedure; consumer's choice; economic analysis of law; economic analysis of procedure.

1. INTRODUCTION

On October 13th 2013, the European Court of Justice, by its Third Chamber, in the Case C-218/12, in the proceedings *Lokman Emrek vs. Vlado Sabranovic*, made

a precedent that directed all interpretations of the Regulation n.º 44/2001 and the regulation that followed it (n.º 1512/2012, known as the Brussels I Recast)[1].

The main purpose of the European Court of Justice on that case was to secure the protection of the consumer in their relationships with producers, mainly regarding product liability cases, ensuring the consumers that the litigation costs between European countries borders would not be a hindrance to the full access of the judicial system.

What this paper aims to do is to analyze the efficiency of the precedent bought by the Case C−218/12 regarding the protection of the consumer.

It will do this by the *positive* method of economic analysis of law[2].

It plans to do that in an analytical way, decomposing the phenomenon in small parts, fixing its premises and then drawing its conclusions.

The first part will be a brief background about the law applied to the Emrek vs. Sabranovic case and the real facts discussed. Following that introduction, some micro economic basis will be address to, regarding topics that this work reasoning finds necessary to proceed. Later, the economic analysis of procedural law and litigation will take place, with so much to say as indispensable to this paper conclusions.

Finally yet importantly, all this fundamental notions will be applied to the case.

2. THE EMREK *VS* SABRANOVIC CASE: BRIEF BACKGROUND

Preliminary to the economic analysis of the case itself, it is mandatory, for instance, to show a brief background about the legal basis that lies before it and, for sure, the facts that were discussed at the regional courts and, later, at the EU's Court of Justice.

First of all, the consideration 11 of the Council Regulation n.º 44/2001 prescribes:

> The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the

1. GILLIES, Lorna E. Recent developments in the approximation of EU private international laws: towards mutual trust, mutual recognition and enhancing social justice in civil and commercial matters. *In*: TWIGG-FLESNER, Christian. *Research Handbook on EU Consumer and Contract Law*. Northampton: Edward Elgar Publishing, 2016. p. 175.
2. "Positive economics is in principle independent of any particular ethical position or normative judgments. As Keynes says, it deals with 'what is', not with 'what ought to be'. The ultimate goal of a positive Science is the development of a 'theory' or 'hypothesis' that yields valid and meaningful (i.e., not truistic) predictions about phenomena not yet observed. Such a theory is, in general, a complex intermixture of two elements. In part, it is a 'language' designed to promote 'systematic and organized methods of reasoning'. In part, it is a body of substantive hypotheses designed to abstract essential features of complex reality" (FRIEDMAN, Milton. *Essays in Positive Economics*. Chicago: University of Chicago Press, 1953. p. 4-7).

Civil Procedure Review. v.10, n.1: jan.-abr., 2019.
ISSN 2191-1339 – www.civilprocedurereview.com

> subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

The consideration 13 of the same law, concerning insurance, consumers and labor contracts, also say that the *weaker* party should be protected by rules of jurisdiction more favorable to their interests than the general rules provide for.

When it comes to matters relating a contract, a person domiciled in a Member State may, in another Member State, be sued in the courts for the place of performance of the obligation in question.

However, article 15 of the same regulation also says that in matters relating to a contract concluded by a person, the consumer[3] may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

But the consumer only has this possibility if – among other hypothesis, that do not regard the object of this work – the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

So we have the following legal background: *i)* as a ground rule, the plaintiffs have to bring a proceeding at the defender's domicile; *ii)* if the plaintiffs are consumers, they have another option, on a specific given situation; *iii)* if the other part pursues commercial or professional activities in the consumer's domicile *or* if direct such activities to that Member State and the contract in discussion is about these activities, then the consumer may bring proceedings in his own domicile.

That is the legal background that this paper aims to discuss.

Now, it is time to see about the facts.

L. Emrek, domiciled at Saarbrücken (Germany) was looking for a used car to buy. V. Sabranovic had in Spicheren (France), a city close to the border between these countries, a company that focused on the selling of used cars.

In September 2010, Emrek came to know, from colleagues, that Sabranovic could have exactly the good that he was interested in, so he went to Spicheren and celebrated, on writing, a contract buying a used car.

It is important to say that Sabranovic had an internet website announcing his cars, including two phone numbers, one French, another Germany.

At September 13th 2010, Emrek sues Sabranovic at the Amstgericht Saarbrücken (Germany District Court) because of the vehicle warrant. In *synthesis*, he established

3. For a purpose here which can be regarded as being outside his trade or profession.

that Sabranovic's commercial activities aimed the Germany Member State and, once he was a consumer, he could sue him at his own domicile, not at Sabranovic's.

Germany District Court did not agree with this argument and said that Sabranovic had not directed his commercial activity to Germany within the meaning of that provision. Emrek appealed with the grounds that Regulation n.º 44/2001 does not require the establishment of a causal link between the commercial activities directed to the consumer's Member State and the conclusion of the contract; neither does that provision require the contract to be concluded at a distance[4].

The Landgericht Saarbrücken (Germany State Court) decided to stay the proceedings and to refer the EU's Court of Justice for a preliminary ruling about two questions: *1)* if in cases in which a trader's Internet site is directed to the Member State of the consumer, does Regulation require, as a further unwritten condition, that the consumer was induced to enter the contract by the website operated by the trader; and *2)* if, in general, there must be a causal link between the activity directed to the Member State of the consumer and the conclusion of the contract.

As it was said before, the main issue that will be addressed by this work – and was, actually, solved by the EU Court of Justice at that time – is if there is any need of a causal link between the means used to direct the commercial or professional activity to the Member State in which the consumer is domiciled and the conclusion of the contract with that consumer.

At the time of the judgment, the Court ruled that Regulation n.º 44/2001 must be interpreted as meaning that it does not require the existence of this causal link.

This decisions were based mainly on the ground that difficulties related to proof of the existence of a causal link between the means used to direct the activity and the conclusion of a contract would tend to dissuade consumers from bringing actions before the national courts under Regulation n.º 44/2001 and so would weaken the protection of consumers which those provisions seek to achieve[5].

So, to make a partial conclusion, what this paper aims is to analyze, with some microeconomic tools, the rule made by the EU Court of Justice at this particular case and show, at the end, being this a *positive* analysis, and not a *normative* one, as already said above, the efficiencies (or not) of the law to its objective (the consumer's protection).

4. In fact, the UE's Court of Justice at the Case C-190/11 (D. Mühlleitner *vs* A. and W. Yusufi) already disregarded this argument before and so it will not be pointed at this paper with more detail.

5. For sure the Court made it's point with other side arguments, as the fact that Sabranovic's establishment was grounded in one Member State close to the border of another Member State, in an urban area extending on both sides of the border, and that he uses a telephone number allocated by the other Member State, and by making it available to potential clients domiciled in that other State to save them the cost of an international call, may also constitute evidence that his activity is 'directed to' that other Member State. Although this also constitutes basis for the decision, the question that – for the purposes of this paper – assumes de position of the *ratio decidendi* (the ruling that really stands and becomes law), is the one above.

Civil Procedure Review. v.10, n.1: jan.-abr., 2019.
ISSN 2191-1339 – www.civilprocedurereview.com

3. THE ECONOMIC ANALYSIS OF LAW

3.1. General Principles

As said in 1932 by Lionel Robins, *economics is the science, which studies human behavior as a relationship between ends and scarce means, which have alternative uses*[6].

Being the study of human behavior or, so as to speak, of the human decision making process, it is almost mandatory to say that *incentives* for a certain kind of behaving (or not behaving) have a central importance in what is to be studied. Stephen E. Landsburg taught that "people respond to incentives, the rest is commentary"[7].

To the law and economics field of study, legal rules (made by the judiciary or by some body of legislative constituents, it does not matter) create incentives, including "non-price incentives" to engage in (or avoid engaging into) certain kinds of behavior.

The economics so provide a scientific theory to predict the effects of legal incentives (one may call it sanctions) on behavior. To economists, sanctions look like prices, and, as said before, people respond to these sanctions as much as they respond to prices.

As said by Cooter and Ulen, "economics generally provides a human behavior theory to predict how people respond to laws. This theory surpasses intuition just as science surpasses common sense. The response of people is always relevant to making, revising, repealing and interpreting laws"[8].

That being said, the majority of law and economics field scholars- and this paper will also follow this understanding – put their work on two major assumptions, summarized by Cole and Grossman:

> The central role of incentives in both law and economics has important implications for theories of behavior, including most notably (a) the assumption that economic actors are rational, for, if they were not, they would not respond as we expect to price or non-price incentives; and (b) the assumption that economic actors operate strategically to do the best they can for themselves, given the structure of incentives from both market and legal sources[9].

The main issue of the law and economics is, for this paper, as said by Richard Posner, it's the possibility to deliver an interpretation of the law that is consistent

6. *An essay on the nature and significance of economic science*. London: Macmillan or Co., limited, 1932. p. 15.
7. *The Armchair economist: economics & everyday life*. New York: Free Press, 2012. p. 3.
8. *Law & Economics*. 6th ed. Boston: Pearson Education, 2012. p. 3.
9. COLE, Daniel H.; GROSSMAN, Peter Z. *Principles of Law & Economics*. 2nd ed. New York: Wolters Kluwer Law & Business, 2011. p. 2.

with promoting the *efficient* allocation of resources[10] – any resource that humankind finds valuable, including abstract things, such as time, and subjective values, like peace and welfare[11].

Of course, efficiency is a vague word, one that has also an enormous emotional content in it.

That is why, to make any scientific discourse about it, this paper must follow the teachings of Rudolf Carnap and see that the lack of a clear conception of words is the greatest problem of any science language[12], and the explicit definition of what we see as efficiency is something that won't be neglected.

What will be called efficiency, from now on, will not as did the "first" Posner, as maximization of wealth by the law (judicial or otherwise) and not the maximization of utility (happiness), with the ethical argument that wealth maximization derives support from the principle of consent that can also be regarded as underlying the otherwise quite different approach of Pareto ethics[13].

Posner himself did not hold this view later on his works, moving to a pragmatic scope of the law and its method and possibilities[14].

For this paper purposes, efficiency will be regarded – following the footsteps of the Brazilian author Bruno Meyerhof Salama – as the fit between the legal tools and the normative means of the law, which is the same thing as saying: a law is efficient if and only if the instruments it gives to the people are apt to reach the objective that it assumes as its goal, at the least cost possible to all (citizens, parts affected and the State itself)[15][16].

10. "To me the most interesting aspect of law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses. Law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that have studied successfully" (POSNER, Richard. *In:* FAURE, Michael; VAN den BERGH, Roger (eds.). *Essays in Law and Economics: Corporations, Accident Prevention and Compensation for Losses*. Portland: Maklu Uitgevers N.V., 1993. p. 10).
11. *Economic Analysis of Law*. 9th ed. New York: Wolters Kluwer Law & Business, 2014. p. 31.
12. CARNAP, Rudolf. On the character of philosophic problems. *In:* RORTY, Richard M. *The linguistic turn: essays in philosophical method*. Chicago: Chicago Press, 1992. p. 60.
13. *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*. 8 Hofstra Law Review 487. (1980).
14. *Problems of Jurisprudence*. Cambridge: Harvard University Press, 1990. p. 353-392.
15. *A História do Declínio e Queda do Eficientismo na Obra de Richard Posner*. Avaliable at: < http://emporiododireito.com.br/wp-content/uploads/2015/03/A-Hist%C3%B3ria-do-Decl%C3% ADnio-e-Queda-do-Eficientismo-na-Obra-de-Richard-Posner-Por-Bruno-Meyerhof-Salama.pdf>. Saw in 12 February 2018.
16. "In the sphere of legal thinking, proposals are the alternative interpretations or rules. Each proposal will lead to different consequences. The legal system will choose the best for its ideals. [...] Economic

Civil Procedure Review. v.10, n.1: jan.-abr., 2019.
ISSN 2191-1339 – www.civilprocedurereview.com

The law and economic movement does delivers its interpretations of the law by applying microeconomics postulates to achieve its goal, as the shortage of goods and valuables (all valuables), and the necessity to establish a trade off in every choice that is made.

With that in mind, one can deduce – and use it in the law interpretation – the theory of offer and demand, the behavior of the consumer and the company, the monopolistic behavior and so forth.

The question this paper will try to analyze with the microeconomic reasoning is if the ruling from Emrek *vs.* Sabranovic case is efficient to the objective of protecting EU's consumers or, if by that angle, it is not.

So, this paper shall look at some postulates for the economic analysis of law (the ones that are strictly necessary to its goal) and then use its tools to the approach that it tries to follow.

3.2. Costs, prices and tariffs

People respond to incentives, that is the economic main axiom[17].

In almost every country in the world, markets are rarely free from government intervention. There are taxes, subsides or quantity regulations of goods. In any case, the effect is the same; the market cannot freely move the point at which quantity supplied equals quantity demanded. It must find a new equilibrium point.

For the sake of simplicity, let's suppose a simple scenario.

A producer, named "Palpatine"[18] sells his products (lightsabers, for instance) at a free market in Coruscant. At the beginning of his activities, suppose Coruscant adopts one liability rule for his goods, called *caveat emptor* (or "let the buyer beware", in latin), which means that the seller or the producer are not responsible for defects in their product[19]. Later, the Republic Senate, trying to protect consumers from defective

---

analysis of law helps develop alternative legal proposals, helps ascertain their consequences, and assesses which consequences best advance the established ideals. From one perspective, economic analysis of law does not establish ideals. Ideals are selected by social mechanisms outside economic analysis of law [...]. Economic analysis of law applies and develops principles, approaches, methods, or tools that seek to make each task as objective and scientific as possible" (GEORGAKOPOULOS, Nicholas L., *Principles and Methods of Law and Economics: basic tools for normative reasoning*. New York: Cambridge University Press, 2005. p. 2-3).

17. J. Ferrater Mora teaches that axioms are "[...] irreducible propositions, general principles that reduce all other propositions and on which all others are based in. The axiom possess, so as to speak, an imperative that obliges to agreement when announced and understood [...] Nowadays, one does not hesitate in treating the axioms as hypothetical propositions. The axiomatic systems themselves are defined, sometimes, as hypothetical deductive systems" (MORA, J. Ferrater. *Dicionário de filosofia*. Tomo I. 2ª ed. São Paulo: Edições Loyola, 2004. p. 243-244. Free translation).
18. Any resemblance to a successful movie franchise is not pure coincidence.
19. This paper also assumes, it is important to make clear, a perfect competition market, which means that the products are homogeneous, the "in" an "out" of the market are free and consumers and producers are not "price givers" but "price takers".

products, change this rule to the *caveat venditor* one (or "let the seller beware"), which means that Palpatine is going to be liable.

As David Friedman warns, one's first instinct is to suppose that if the law changes from *caveat emptor* to *caveat venditor*, consumers gain (and producers lose), so it is an efficient rule to protect the former, because the later will have to compensate them for defective products[20].

But this conclusion depends on the assumption that the law does not take into account: that the rule change will not affect the prices at which the goods are sold, which, as a matter of fact, is most unlikely, because the new legal rule raises the cost to the producer and also the value of the good to the consumer.

Both the supply curve and the demand curve shift up, so the price must rise.

It is important to remember that, as Pindyck and Rubinfeld says, the offer curve informs the quantity of goods that the *producers* are willing to sell at a certain given price and the demand curve is the quantity that the *consumers* are willing to buy, as there are changes at the unitary price of a certain good[21].

Because of that change in the equilibrium, it is possible that a more inattentive one could say that it does not matter (consumers pay higher prices just as much as they receive for defective products), but it does.

This notion is important to this paper so it is relevant to illustrate it with furthering its example.

In the market of lightsabers, there are one seller (Palpatine) and one buyer ("Obi-Wan").

Being a fully competitive market – as this paper assumes (see above) – the price of a single unit of the lightsaber is exactly its marginal cost for the producer[22], let's say, $10.

Obi-Wan values the lightsaber by $20 so he is willing to buy it from any price from $10 to $20. He will not buy the lightsaber for less than $10, because Palpatine will not sell it to him and he is not going to have it for more then $20 (it is what it values to him).

Therefore, at any point between $10 to $20 the lightsaber will be sold. This is the bargain margin between Palpatine and Obi-Wan and what have the final word on what price the bargain will land is not relevant to this paper. Let's assume that the lightsaber is sold for $12.

The consumer's surplus in this particular case is $8 and the producer's surplus is $2[23].

---

20. FRIEDMAN, David D. *Price Theory: an intermediate text*. 2nd ed. Cincinnati: South-Western Publishing Co., 1990. p. 493.
21. PYNDICK, Robert; RUBINFELD, Daniel. *Microeconomia*. 8ª ed. São Paulo: Pearson Education do Brasil, 2013. p. 22-23.
22. VARIAN, Hal R. **Microeconomia: uma abordagem moderna**. 9ª ed. Rio de Janeiro: Elsevier, 2016. p. 292.
23. Consumers' surplus is the monetary gain obtained by consumers because they are able to purchase a product for a price that is less than the highest price that they would be willing to pay. Producer

Civil Procedure Review. v.10, n.1: jan.-abr., 2019.
ISSN 2191-1339 – www.civilprocedurereview.com

Until now, the liability rules did not come into account. It did not integrate the price of the lightsaber (as if the cost to make a perfect lightsaber is zero and the consumer have perfect information about its quality and price).

Now, it is time to flexibilize this assumption and insert the liability rule, beginning with the *caveat emptor* rule.

Remember that in this particular set of rules, the buyer is the sole responsible for the product defects. The market is the same, Palpatine and Obi-Wan.

To begin with, Obi-Wan is a careful Jedi, and takes very good care of his lightsaber. He estimates[24] that his losses will be of $4 for each lightsaber bought. Thereby he is capable of buying one for himself from any price between $10 to $16 (the lightsaber worth's less to him now, because he knows for sure that he will lose $4 from each unit).

Assuming the lightsaber is sold again by $12, the consumer's surplus is now $4 and the producer's surplus, again, is $2.

However, if Obi-Wan is a reckless Jedi (very much like an apprentice of him), he estimates that he will lose about $8 for each lightsaber bought. Thereby he is capable of buying one for himself from any price between its marginal cost of $10 to $12, which will make, at the trade above, a consumer's surplus of $0 and a producer's surplus, again, of $2.

Another Jedi, an even more reckless than Obi-Wan in this example (lets name him Anakin, for instance), that estimates a loss by $12 for each lightsaber for products defects, will not buy a lightsaber, because all he is willing to pay is $8 each and the price of one is $10.

As it is easy to see, this set of rules *excludes* from the market any consumer that, by the previous rule could buy the product but, after it, will not be able to do so, which will, as a matter of fact, reduce the overall revenue of the producer, because he, being able to sell the good for anyone willing to pay more than $10 for it, loses consumers that estimates products defects for more than $10.

Now let us see how the market behaves if the rule Coruscant adopts is the *caveat venditor* (the seller is the sole responsible for the product defects).

Palpatine still produces one unit of lightsaber by $10. Meanwhile, he is capable of guaranteeing the quality of its product if he changes the process of production and spend another $10 per lightsaber.

So the marginal cost (and the price) of a lightsaber will be $20 as Palpatine have all the incentives not to take on the responsibility of paying the full cost of a unit ($10) if any consumer claims against him later.

---

surplus or producers' surplus is the amount that producers benefit by selling at a market price that is higher than the least that they would be willing to sell for.

24. Perfectly. This paper will not work with asymmetry of information and imperfect information. All calculus are exact ones, just for its purpose.

What it is said is the same as arguing that the Coruscant govern, with the *caveat venditor*, put a tariff of $10 for the Palpatine lightsaber. It is a component of the price that it is not a part of the chain of production, and does not aggregate to the producer as profit. However, the consumer's will now have to deal with this new price.

The first Obi-Wan (the careful one, from Episode IV) faces now a price of $20. He still values the lightsaber by $20, but he also values the quality of this product by $4 (because his carefulness, he knows that there are few chances that a lightsaber will have any defects on his hands).

Therefore, in a situation of imperfect lightsabers, he values a lightsaber by $24[25]. Palpatine is willing to sell him one lightsaber for $20, no matter how careful this Obi-Wan is.

In this case, the lightsaber will not be sold for anymore $12 anymore, but somewhere between $20 and $24, with a trade surplus of $4 in any case, which will be divided with Palpatine and Obi-Wan.

The careless Obi-Wan however, as said before, also values a lightsaber by $20 and estimates the possibility of product defects on his hands by $8, to a total value of $28. With him the trade surplus is even greater, because the lightsaber will be sold anywhere between $20 (marginal cost and price) and $28, for a trade surplus of $8.

Notice that another Jedi, an even more careful than the first Obi-Wan on that example (we will name him Yoda, regardless any semblance, of course), that estimates a loss by $0 for each lightsaber for products defects (as a matter of fact, he is truly strong with the force), will only buy a lightsaber for $20, with a trade surplus of $0.

If more, a Jedi values the lightsaber by $19 in any case he will not buy the good, because, however the price for the producer is $10 he is not able to buy it for less than $20.

On the other hand, if a producer cannot make improvements on his factory to achieve the standard of quality that is necessary for at least $10 he will also be in serious hardship, because only the most careless consumer's will be willing to pay the price he will ask.

In both cases, though, it is important to see that the liability rule reduces the value of the good for the possible consumers *or* raises its price for the producer, diminishing the space of bargain and taking out consumers and producers alike, with different rates at different scenarios.

That is called as the *deadweight loss* of tariffs at the micro economy analysis.

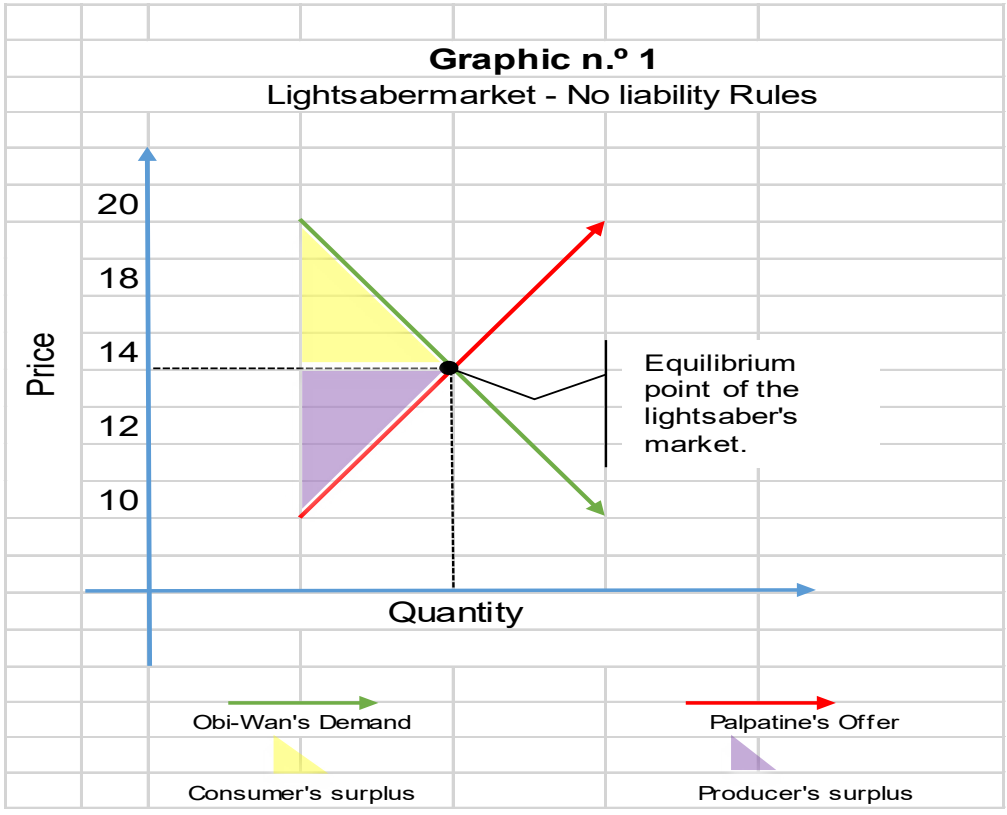
As noted by Mankiw about taxes, also has explicit implications on what this paper is bringing to light:

25. Remember that now any defects of the lightsaber will be a winning to the consumer and not a lost. So any expectations that he has about product defects will be what he estimates of winning in a situation that the risk come to bear.

Civil Procedure Review. v.10, n.1: jan.-abr., 2019.
ISSN 2191-1339 – www.civilprocedurereview.com

> Taxes on buyers and taxes on sellers are equivalent. In both cases, the tax places a wedge between the price that buyers pay and the price that sellers receive. The wedge between the buyers' price and the sellers' price is the same, regardless of whether the tax is levied on buyers or sellers. In either case, the wedge shifts the relative position of the supply and demand curves. In the new equilibrium, buyers and sellers share the burden of the tax. The only difference between taxes on buyers and taxes on sellers is who sends the money to the government[26].

The graphic below can help illustrate the different steps of the example:

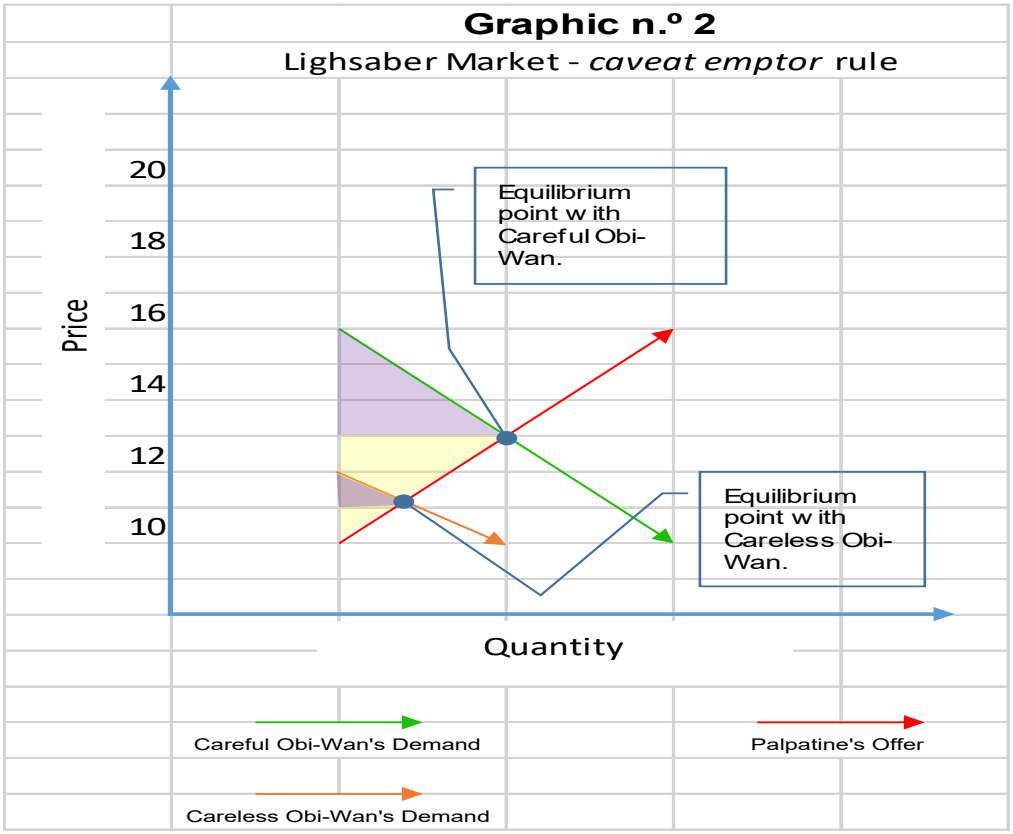


As it can be seen, without any concerns about product defects, the market surplus will be of $10, with the equilibrium point (by Pareto's standard[27], at least), at $4 for each buyer and seller.

26. MANKIW, N. Gregory. *Principles of Microeconomics*. 5th ed. Mason: Cengage Learning, 2008. p. 127.
27. Pareto efficient allocation is an allocation of the available goods in an exchange economy if it is not possible to devise an alternative allocation in which at least one person is better off and no one is

However, the liability rules, when introduced, generates an increasing of the price or a reduction of the product value for the consumer, because either him or the other will take the costs of any defects, and, being the rules pre-established by the government (it was already given when the commercial activity began), or it will influence one way or the other.

See, again, graphically:



On this new graphic, it is possible to see that the largest feasible surplus for the trade is of $6, different to the previous one, which had a surplus of $10 in any trade. This difference of $4 is the *deadweight loss* of the *caveat emptor* rule in this example.

This graphic also shows that if the lack of care of some consumers decreases his value for the lightsaber bellow $10 (for instance, let's just assume that he, neutrally, values a lightsaber by $12, and not by $20 just like Obi-Wan and estimates losses by $4, like our Jedi model) he will be put out of the market.

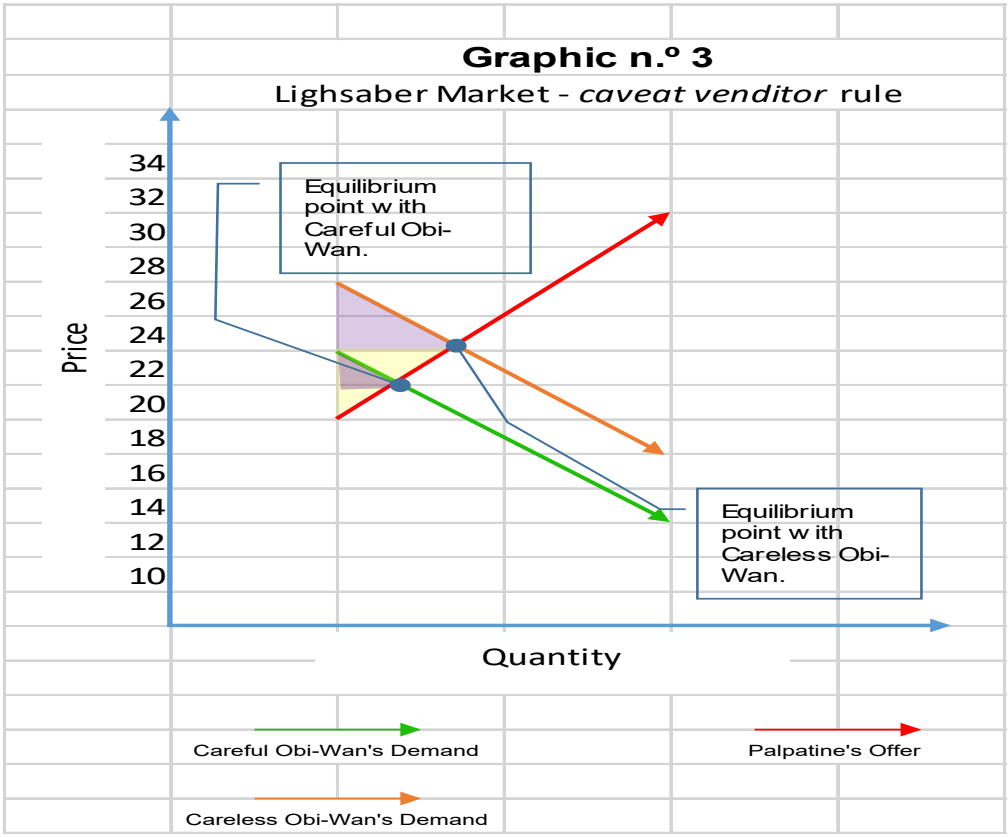
worse off (SNYDER, Christopher; NICHOLSON, Walter; STEWART, Robert. *Microeconomic Theory: basic principles and extensions*. Hampshire: Cengage Learning, 2015. p. 358.

Civil Procedure Review. v.10, n.1: jan.-abr., 2019.
ISSN 2191-1339 – www.civilprocedurereview.com

The same will happen with consumers that are so careless (Anakin, as said before) that the losses are estimate above $10. Meanwhile if he values the lightsaber at the same amount as our consumer model (Obi-Wan), by $20, he will be put out of the market as were, because the lightsaber will worth, at last, to him, bellow the price for the producer, of $10.

In any case, those consumers – in this particular case (*caveat emptor* rule), the careless consumers will be more harmed than the careful ones – that were put out of the market are all part of the *deadweight loss* that any tariff will have[28].

To end this part of the work, it is time to see, graphically, how the rule *caveat venditor* changes the first equilibrium:



28. It is important to emphasize that this paper does not, in any moment, believes that a commerce without rules (product defect or otherwise) is the only "efficient" model. It is not on its objectives to make *normative* analysis of how the law should be or not. As said before, economics are about *tradeoffs*. Some – consumers and producers – possibly will be hurt with any measure adopted by governments. It is not this paper's job to say who should or not be harmed by the rules, but only exhibit, at the light of the rational choice axiom, if the assumed purpose of the rule will be achieved by its commands.

As one can see the best surplus now ($8) goes to the careless consumers, but it is still below the initial trade surplus ($10). To the careful consumers the total surplus will be of only $4 and for the most careful consumers there will be no room for bargain (surplus of $0). The consumers that are careful and value the lightsaber bellow the consumer's model (Obi-Wan) will be out of the market.

Therefore, the *deadweight loss* here will contemplate all the consumers that go out of the market plus the loss of trade surplus because of it.

That is what should be said about gains, prices and tariffs in the relationship between consumers and producers. The discourse will now change to brief comments about the rational choice for the litigation decision and there will be time to bring it all together and do our analysis of the Case C−218/12 ruling.

3.3. The rational choice of litigation

Bringing a suit involves costs; the plaintiff will expend time, energy and possibly money in the form of bill for legal services and filing fees.

As said by K. E. Spier, the plaintiff will sue when the lawsuit's cost is less than the expected benefits from it or, in another words, a suit is more likely to be filed the lower its costs, the greater the odds of winning at trial and the greater the plaintiff's award conditional to winning[29].

So the plaintiff's litigation cost (c_p, onwards), for making the suing process rational, should be lower than the gross return of the suit, *x*, thereafter.

In another words, the gross return of the suit will be the benefit that it will deliver (*b*) to the plaintiff times the percentage estimated that he would, in fact, receive this boon (u_p). In formal language:

$$x = u_p \times b \qquad E^1$$

However, as this paper aims at the continental rule (or English rule) of legal fees, it is important to assume that the plaintiff, if victorious, will pay nothing of his legal expenses, but, it defeated, he will pay his *and* the defendant's legal fees (c_d for now on).

Therefore, the E^1 is not going to reflect exactly the actual estimated winning of the plaintiff, and so merely saying that $u_p \times b \geq c_p$ will lead to a rational suit brought to Justice is also wrong.

The plaintiff will only have private incentives to bring suit when the possibility of *defeat* times the legal costs plus the legal costs of the defendant is smaller than the probability of *victory* times the winnings in this case.

29. SPIER, Kathryn E. Litigation. *In: Handbook of Law and Economics*. Vol. 1. Amsterdan: Elsevier, 2007. p. 264.

Civil Procedure Review. v.10, n.1: jan.-abr., 2019.
ISSN 2191-1339 – www.civilprocedurereview.com

So, in formal language, the litigation for the individual plaintiff will be motivated when:

$$(1 - u_p) \times (c_p + c_d) < u_p \times b \qquad E^2$$

This allow to say that the lower the litigation costs, there should be more cases where the plaintiff would bring suit while the higher costs, less suits will be brought to courts.

But this also allows saying, as did Steven Shavell, that there will be more suits when the plaintiff expects a percentage superior to 50% of winning ($u_p > .5$)[30].

This is the individual decision to use the legal system by the plaintiff. However, will his decision be compatible with the social efficient use of the Judiciary?

Thomas Miceli teaches that there is no necessary relationship between the private and social values of lawsuits. The private value of a suit, as said above, is solely determined by comparing an individual plaintiff's loss to their cost of suing.

Thus, when plaintiffs vary in their individual losses, some will find a suit privately valuable and others will not, regardless of the social value of suits.

In contrast, the social value of lawsuits is based on aggregated costs among all plaintiffs since that is what determines the expected costs faced by injurers at the time they make their care choices. Thus, there will be too many suits when they are not socially valuable and there may be too many or too few when they are socially valuable[31].

An example will clarify things, and this paper will rely on one already given by Steven Shavell[32].

Suppose that a victim has suffered harm of $1,000. Since he will collect this amount if he sues, he will proceed if his legal costs turns to be less than his award of $1,000; for example, he would sue if his costs of suit were $300.

The victim's decision about suing is based on a comparison of their own costs of bring the suit, with their victim's benefit from it—in the form of the judgment equal to the harm they have sustained.

From the social standpoint, however, the costs of a suit may be higher than the private costs because the injurer will defend himself and the state will bear costs as well.

Thus, if the victim's costs are $300, the injurer's costs are $200, and, for instance, the state's costs are $100, then the total social litigation costs associated with a suit are not $300, but $300 + $200 + $100, or $600.

30. Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs. *Journal of Legal Studies*. 11:55-81. p. 61-62.
31. The social versus private incentive to sue. SANCHIRICO, Chris William (Eds.). *Procedural Law and Economics*. Cheltenham: Edward Elgar Publishing, 2012. p. 474-475.
32. The fundamental divergence between the private and the social motive to use the legal system. Journal of Legal Studies, vol. XXVI, June 1997. p. 581-582.

Assuming, for simplicity, that the level of activity of injurers is fixed, the social benefits of suit inhere in the deterrent effect, that suit has on the exercise of precautions by injurers and thereby on the frequency of harm.

However, this benefit will only take place if precautions are cheap and effective in its aim to *avoid future litigations cost*, or in another words, if the precautions injurers choose to exercise may result in a significant decline in the incidence of harm (and in litigation, for sure).

If, meanwhile, there is little that injurers can do to avoid being sued by taking precautions.

At least at a reasonable cost, they will take fewer precautions, and the frequency of harm (suits) will not change much as a consequence of the prospect of suit.

Thus, SHAVELL concludes, "they (*the social benefits*) will always include deterrence benefits and may also include compensation of victims [...] and the setting of precedent [...] In other words, suit is socially worthwhile if the expected litigation costs are less than the net benefits of suit"[33].

So, in formal language, the litigation will be socially desirable when:

$$\pi' \times (c_p + c_d + c_s) < (\pi' - \pi) \times \Sigma - \partial \qquad E^{3}[34]$$

What equation number three represents is that the litigation costs should secure the situation in which a suit will only be brought if and only if it's deterrence effect is at some point that the legal fees taken by the parts (litigation and plaintiff) and the state itself creates incentives for suing only when the *efficient* precautions are not taken.

Therefore, if this equation is balanced[35], there will be no "too much" suits that brings precautions costs otherwise efficient to be "a money waste" (because the defendant can expect being suited even when not liable, being the costs of suing too low) or "too few" suits that also makes profitable for injurers not to take the precautions that could diminishes the harm.

3.4. Case Applications

As it is seen above, the economic analysis of law, especially the relation among the market behavior, the tariffs imposed by the government and the incentives to bring sue are very rich of knowledge and potential explanation of the world.

Thus, this paper shall use the notions outlined to address the Emrek *vs.* Sabranovic case.

33. *Foundations of Economic Analysis of Law*. Cambridge: Harvard University Press, 2004. p. 393-394.
34. Let it be π the probability of harm (Σ) if suit is not bought, and let be π the probability of the harm if suit is bought. Let ∂ be the precaution expenditures that injurers will be induced to make if there is suit. The "c's" ($c_p + c_d + c_s$) are the costs beared by plaintiff, defendant and state, respectively.
35. Social incentives are reflected in private incentives.

Civil Procedure Review. v.10, n.1: jan.-abr., 2019.
ISSN 2191-1339 – www.civilprocedurereview.com

Remember that the main argument the court made for ruling as it ruled was the protection of the consumers.

For sure, as living in a *tradeoff* society, with scarce resources, the protection of the consumer will harm everyone else. So this work aims to, theoretically, indicate what are the expected behaviors following the judicial law passed by the European Court of Justice.

First, the location where a suit is going to be filed is an integral part of the litigation costs to the plaintiff or to the defender.

In a consumer's relationship with the producer – especially when product liability is at stake – it is fair to assume that the first will be the plaintiff and the former, the defendant.

So, the European Court of Justice, saying the defender shall (file the suit in the consumer's domicile) go to the place of the consumer in a significant amount of cases (the jurisdiction rule is to "protect" the consumer, after all) will bring a tariff over all the products sold by the producer.

For sure that will not always be the case, but once rule exists to protect the consumer, it will be rational for the producer to estimate the *probability* of the tariff being charged to him at very high standards.

Therefore, the calculus of the chance of having to litigate abroad times the expenses to provide his defense will be the tariff.

The effect is already shown above. Some producers, who cannot bear the costs (its profit is already at the margins of its costs), will be expelled out of the market. Certain consumers who do not value the products at this new price will also leave the market.

In any case, the trade surplus will be lower than before, because the tariff does not take into account the individual preferences, and, in fact, it is not feasible that a government, whatever well intentioned it may be, would have a degree of knowledge that high.

On the other side, there are reflections of these rules at litigation.

As said before, lowering the costs to the plaintiff will increase the number of suits. However, this will be socially desirable if the costs beared by the parts (plaintiffs, defendants and the states involved) are less than the costs to prevent the harm to be done by the injurer.

Being this a theoretical paper, it does not intend to show data about it.

What it can, however, is bring an ideal type, just like Mises said[36], and expose what is expected to happen.

36. "Ideal types are the specific notions employed in historical research and in the representation of its results. They are concepts of understanding. As such they are entirely different from

Lowering the costs of suits and being the plaintiff, mostly, more optimistic about his probabilities of winning, or *risk preference*, in another words[37], raises the number of suits brought to the European state Courts.

That being the case, it will, as already noted, raise the cost of doing business, which will have a reflection at the price *to all consumers*, plaintiffs or not.

However, once the judiciary is not a perfect institution and the plaintiffs acknowledge that, some consumers will address more suits than they would otherwise, because of the lower costs: the careless ones.

On a set of rules that raises the costs of bringing suits, the careless ones, even if optimistic about their winnings, can be deterred from suing the producers, because of the costs they will bear if the Judicial system does not agree with them.

However, when the costs are lower – and being possible to suit someone at your own hometown certainly is cheaper than traveling abroad – the incentives for suing the producers are higher and it may become rational for more careless consumers to sue in the set of jurisdiction rules passed by the EU Court of Justice at the Emrek *vs.* Sabranovic case.

Meanwhile, increasing the total number of suits (especially in other countries) will raise the costs of doing business *and* the price of the goods *to every single consumer*, careful or careless, but the majority of the gains will possibly be appropriated only by the former.

Therefore, the theoretical model here presented indicates that the "protection of the consumer" is only partially secured by the Case C–218/12 precedent.

In fact, some producers got out of the market, but also did some consumers. The set of jurisdiction rules will benefit *some* consumers, but not the careful ones[38].

praxeological categories and concepts and from the concepts of the natural sciences. An ideal type is not a class concept, because its description does not indicate the marks whose presence definitely and unambiguously determines class membership. An ideal type cannot be defined; it must be characterized by an enumeration of those features whose presence by and large decides whether in a concrete instance we are or are not faced with a specimen belonging to the ideal type in question" (*Human Action: a treatise on economics*. Auburn: The Ludwing von Mises Institute, 1998. p. 59-60).

37. RACHLINSKI, Jeffrey J. Gains, Losses, and the Psychology of Litigation. *Cornell Law Faculty Publications*. Paper 795, 1996. Available at: <http://scholarship.law.cornell.edu/facpub/795>. Last seen in February 12, 2018.

38. For the purpose of this paper did not matter the elasticity of the demand and offer curves, because the analysis was about the whole market and not the product "a" or "b". For the market of used cars (the object of the Emrek *vs.* Sabranovic case), however there are no evidences brought by this work, it is relative safe to presume that the demand is more elastic than the offer (at least in the short run) and thus, for this specific market, it is possible the producers will bear the costs of the "Emrek/Sabranovic tariff".

Civil Procedure Review. v.10, n.1: jan.-abr., 2019.
ISSN 2191-1339 – www.civilprocedurereview.com

4. CONCLUSIONS

A few final considerations are in order.

This paper did not aim a *normative* consideration about the Emrek *vs.* Sabranovic case. It is not in position to say if the EU Court of Justice did the "best" judgment, the "worst" or anywhere between.

On the other hand, being a *positive* analysis of the effects the ruling may have on the behavior of the market, it also does not intend to be, as RICHARD RORTY said, *a mirror of the reality*. Science is not about that.

All this work aimed to do is, by simplifying the "chaos of the real" (KANT), to predict the future behavior of consumers, producers and the litigations process that will be suited after the Case C–218/12 precedent.

There are, in fact, many variables which this paper did not considerate, but it is in the nature of the economic science to "assume" things to make its analysis feasible.

Even the more traditional ways of the law do the same without many of its scholars even realize it.

In any case, this paper stands for its conclusions because lies strong with its micro economic thoughts and axioms, that were tested and retested throughout the previous three centuries, being it, today, the most advanced social science in human knowledge.

In that case, summarizing its conclusions, it can be said that:

1) The Case C-218/12 precedent brought a tariff over products. A tariff that in some cases will be charged and others will not. The principle that the jurisdiction shall be interpreted to the consumer's benefit will have estimates of charging being higher, which will raise prices to compensate it, possibly in an amount that goes beyond its real charge;

2) The Case C–218/12 precedent should raise the number of suits brought by consumers. This paper cannot say if it will be socially desirable or not because it has no data to back a conclusion of this kind;

3) In any case, there will be producers who will be taken out of the market, as well as consumers. Assuming that the demand curve and the offer curve is equally elastic (to congregate all products of the market); the careless consumers will benefit by these rules. The careful consumers will be impaired by them. The producers, at last, that stayed in the market, will be neutral to the rules, because, at the long run, all of them could send its estimate costs to the price;

4) Therefore, the consumers that are more careful with their products will bear the mostly of the disutility for this ruling.

5. REFERENCE LIST

CARNAP, Rudolf. On the character of philosophic problems. *In:* RORTY, Richard M. *The linguistic turn: essays in philosophical method*. Chicago: Chicago Press, 1992.

COLE, Daniel H.; GROSSMAN, Peter Z. *Principles of Law & Economics*. 2nd ed. New York: Wolters Kluwer Law & Business, 2011.

COOTER, Robert; ULEN, Thomas. *Law & Economics*. 6th ed. Boston: Pearson Education, 2012.

COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of the Court (Third Chamber), 17 October 2013. Case C–218/12: Lokman Emrek v. Vlado Sabranovic*. Available at: <http://curia.europa.eu/juris/document/document. jsf?text=&docid=143184&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first &part=1&cid=80628>. Saw in 12 February 2018.

_____. *Opinion of Advocate General Cruz Villalón delivered on 18 July 2013. Case C–218/12: Lokman Emrek v. Vlado Sabranovic*. Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=139682&page Index=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=80628>. Saw in 12 February 2018.

FRIEDMAN, David D. *Price Theory: an intermediate text*. 2nd ed. Cincinnati: South-Western Publishing Co., 1990.

FRIEDMAN, Milton. *Essays in Positive Economics*. Chicago: University of Chicago Press, 1953.

GEORGAKOPOULOS, Nicholas L., *Principles and Methods of Law and Economics: basic tools for normative reasoning*. New York: Cambridge University Press, 2005.

GILLIES, Lorna E. Recent developments in the approximation of EU private international laws: towards mutual trust, mutual recognition and enhancing social justice in civil and commercial matters. *In*: TWIGG-FLESNER, Christian. *Research Handbook on EU Consumer and Contract Law*. Northampton: Edward Elgar Publishing, 2016.

LANDSBURG, Steven E. *The Armchair economist: economics & everyday life*. New York: Free Press, 2012.

MANKIW, N. Gregory. *Principles of Microeconomics*. 5th ed. Mason: Cengage Learning, 2008.

MICELI, Thomas J. The social versus private incentive to sue. SANCHIRICO, Chris William (Eds). *Procedural Law and Economics*. Cheltenham: Edward Elgar Publishing, 2012.

MISES, Ludwig V. *Human Action: a treatise on economics*. Auburn: The Ludwing von Mises Institute, 1998.

MORA, J. Ferrater. *Dicionário de filosofia*. Tomo I. 2ª ed. São Paulo: Edições Loyola, 2004.

POSNER, Richard. *Economic Analysis of Law*. 9th ed. New York: Wolters Kluwer Law & Business, 2014.

_____. *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*. 8 Hofstra Law Review 487. (1980).

_____. *In:* FAURE, Michael; VAN den BERGH, Roger (eds.). *Essays in Law and Economics: Corporations, Accident Prevention and Compensation for Losses*. Portland: Maklu Uitgevers N.V., 1993.

_____. *Problems of Jurisprudence*. Cambridge: Harvard University Press, 1990.

PYNDICK, Robert; RUBINFELD, Daniel. *Microeconomia*. 8ª ed. São Paulo: Pearson Education do Brasil, 2013.

RACHLINSKI, Jeffrey J. Gains, Losses, and the Psychology of Litigation. *Cornell Law Faculty Publications*. Paper 795, 1996. Available at: <http://scholarship.law.cornell.edu/facpub/795>. Last seen in February 12, 2018.

ROBINS, Lionel. *An essay on the nature and significance of economic science*. London: Macmillan or Co., limited, 1932.

SALAMA, Bruno M. *A História do Declínio e Queda do Eficientismo na Obra de Richard Posner*. Avaliable at: < http://emporiododireito.com.br/wp-content/uploads/2015/03/A-Hist%C3%B3ria-do-Decl%C3%ADnio-e-Queda-do-Eficientismo-na-Obra-de-Richard-Posner-Por-Bruno-Meyerhof-Salama.pdf>. Saw in 12 February 2018.

SHAVELL, Steven. *Foundations of Economic Analysis of Law*. Cambridge: Harvard University Press, 2004.

_____. Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs. *Journal of Legal Studies*. 11:55-81.

_____. The fundamental divergence between the private and the social motive to use the legal system. *Journal of Legal Studies*, vol. XXVI, June 1997.

SNYDER, Christopher; NICHOLSON, Walter; STEWART, Robert. *Microeconomic Theory: basic principles and extensions*. Hampshire: Cengage Learning, 2015.

SPIER, Kathryn E. Litigation. *In: Handbook of Law and Economics*. Vol. 1. Amsterdan: Elsevier, 2007.

VARIAN, Hal R. Microeconomia: uma abordagem moderna. 9ª ed. Rio de Janeiro: Elsevier, 2016.