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**CONTRACTUAL INTERPRETATION IN BRAZIL UNDER  
THE LIGHT OF THE 2019 ECONOMIC FREEDOM ACT<sup>1</sup>****Sketching a scientific inquiry: brief introductory remarks**

Contractual interpretation is one of the most highfalution and recurrent topics in Private Law. Even more so in the context of an ever-more-complex economy, driven precisely by contracts<sup>2</sup>. Their interpretation, as argued by legal scholars, “aims at determining the meaning, the reach and the effects of each transaction”<sup>3</sup>. Hence

the scope of contractual interpretation is tied to identifying self-regulation of interests, rights and obligations assigned to each party and, therefore, contractual efficacy. In such terms, it is clear that interpreters aim more than a simple reconstruction of the past, searching for common intentions understood as a fact; it aims at predicting, while considering the functional scope of the contract in question, what shall happen in the future<sup>4</sup>.

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<sup>1</sup> This article was written in the scope of Agendas de Direito Civi-Constitucional research network, as well as of the research project *entitled Proteção do consumidor à deriva: uma tentativa de aferição do estado da arte, na tutela jusconsumerista, no âmbito do Superior Tribunal de Justiça*, financed by CNPq (407142/2018-5) and put in action in Universidade Lasalle and in Grupo Virada de Copérnico, from Universidade Federal do Paraná.

<sup>2</sup> O. Gomes, *A função social do contrato* [in:] *Novos temas de Direito Civil*, ed. O. Gomes. Rio de Janeiro 1983, p. 108.

<sup>3</sup> P. Lôbo, *Direito civil: parte geral*, São Paulo 2009, p. 252.

<sup>4</sup> E. Capobianco, *La determinazione del regolamento* [in:] *Trattato del contratto: regolamento*, ed. V. Roppo, Milano 2006, p. 302.

Different ways of drafting contracts and terms of use, inherent to contemporary economic transactions, as well as variations in ways of tackling contractual issues by the Courts, make contractual interpretation a priority concern of legal scholarship. Text and context, autonomy and heteronomy, liberty and coercion, certainty and uncertainty, beacon demands concerning traditional guidelines on interpretation. It is not rare, e.g., for scholars to refer to Pothier's rules on interpreting contracts; standards dear to the Brazilian Commercial Code of 1850<sup>5</sup>; and to strict conceptions of private autonomy stemming from negative liberty alone – which contrast with Martins-Costa<sup>6</sup> case for a *solidary autonomy*. These retours emerge to the level of legal drafting and decision-making in the early 21<sup>st</sup> Century.

The Brazilian Economic Freedom Act (Lei nº 13.874/2019), often celebrated as a landmark of the revival of freedom amidst an Economy deeply integrated by the State, is a symptom of such concerns. This statute intended to break a long interventive tradition supported by the mostly collective Brazilian Constitution – which, nevertheless, does not forbid a more libertarian approach by legislators. More specifically in terms of contractual interpretation, this recent piece of legislation brought new words to Art. 113 of the Brazilian Civil Code, on the grounds of “keeping the State from interfering in the Economy”<sup>7</sup>.

This article aims at scrutinizing the legal text of the recently added first paragraph to Art. 113 of the Brazilian Civil Code, in order to shed some light on normative inconsistencies and senile aspects lying beneath supposed novelities. This goal is pursued through a critic literature review, structured in three sections. The first section delves into the relation between Brazilian Civil Code and the Economic Freedom Act, while emphasizing the perpetuity often associated to codifications. The second section analyzes and criticizes every aspect of the new paragraph. The last section presents closing – yet inevitably precarious – remarks.

### **Brazilian Civil Code and the Economic Freedom Act: intersections and aporias**

Civil Codes, as sketched in the Continental Tradition during the 19<sup>th</sup> Century, are thought to be perpetual – or, at least, to aim perpetuity. This is made clear by Napoleon's famous remark on his life, during his exile in Sainte-Hélène: “that

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<sup>5</sup> R. Pothier, *Tratado das obrigações*, transl. A.S. Batista, D. Ferreira, Campinas 2002.

<sup>6</sup> J. Martins-Costa, *Reflexões sobre o princípio da função social dos contratos*, “Revista DireitoGV” 2005, no. 1(1), p. 43.

<sup>7</sup> These are the grounds stated on amendment number 32, presented by the Rep. Vinicius Poit (Novo/SP) during the legislative process of the Brazilian Economic Freedom Act.

which nothing can wipe out is my Civil Code. That will last forever”<sup>8</sup>. Things could not be different, since a Code, as the continent of norms governing private relations, “entails elementary legal categories which operate in every sector of the Law”<sup>9</sup>. The very idea of Code had to change to accommodate this meaning. As reported by medieval legal historians, the word *Code* meant simply a sum of pages sewed to each other and to a lump that served to reunite, albeit without systematization, related matters<sup>10</sup>. At the dawn of the Modern Age, this normative artifact was rebuilt on top of four pillars: 1) *rationalization* of legal discourse centered in a uniform and broad body of rules; 2) commitment to human, economic and social *progress*, on the basis of an ideal of legal certainty that underlies the first codificatory wave; 3) restatement of *legal education* as a consequence of the purpose of sistematizing legal issues through *a priori* definition of certain categories; and 4) upholding of a modern *utopia* as a social order ilimited in its rationality plastered by the ideal of civil codification<sup>11</sup>.

Any attempt on understanding the historical and cultural context in which most modern Codes were forged would furthermore indicate that in spite of cherishing clarity and systematization, such Codes also reverberate the triumphing ideals of revolutionary France<sup>12</sup>.

The transition from Modern to Contemporary Age fractured the discourse concerning Civil Codes. These fractures gradually diminished the once widely held belief that Civil Codes would last forever<sup>13</sup>. In other words: things changed – and changed severely – during the brief, yet intense, 21<sup>st</sup> Century, particularly after World War II. Conceptions of *Law* and *State* altered with remarkable speed<sup>14</sup>, which intensified with the dusk of globalization<sup>15</sup> and the increased dynamicity of human relations purported by the Internet and other real-time means of communication.

In this context, the existing Civil Codes are no longer as they used to be. Modern Codes were widely updated through legislative reforms, overthrown by specific regulations, or even replaced by *new* Codes<sup>16</sup>. The very *Code Civil des*

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<sup>8</sup> C. Montholon, *Récits de la captivité de l'Empereur Napoléon à Sainte-Hélène* *apud* R. Rivera, *Una breve revisión histórica del Code Napoléon: solemne avenencia entre revolución y tradición*, “Derecho Público Iberoamericano” 2016, no. 9, p. 149.

<sup>9</sup> O. Rodrigues Junior, *A Lei da Liberdade Econômica e as transformações no Código Civil Brasileiro* [in:] *Liberdade econômica: o Brasil livre para crescer*, ed. J. Goergen, Brasília 2019, p. 122.

<sup>10</sup> C. Alvarez, *El derecho civil en la época codificadora y vicisitudes posteriores* [in:] *Centenario del Código Civil (1889–1989)*, vol. II, Madrid 1990, p. 1106.

<sup>11</sup> L. Díez-Picazo, *Codificación, descodificación y recodificación*, “Thémis” 1993, no. 25, *passim*.

<sup>12</sup> C. Alvarez, *El derecho...*, p. 1107.

<sup>13</sup> L. Penteado, *Integração de contratos incompletos*, Ribeirão Preto 2013, p. 24.

<sup>14</sup> P. Costa, *A democracia após os ‘totalitarismos’ – a democracia constitucional na segunda metade do século XX* [in:] *Poucos, muitos, todos: lições de história da democracia*, ed. P. Costa, transl. L. Fritoli, Curitiba 2012.

<sup>15</sup> A. Giddens, *The consequences of modernity*, Stanford 1990, p. 64.

<sup>16</sup> O. Rodrigues Junior, *Direito civil contemporâneo: estatuto epistemológico. Constituição e direitos fundamentais*, Rio de Janeiro 2019, pp. 116–117.

*Français*, that would last forever, has been deeply restructured by *Ordonnance 131/2016*. So many transformations result in what legal scholars consider a *second wave of Civil Codes*<sup>17</sup>. A movement whose products have peculiar traces, since, according to Martins-Costa:

Civil Codes from the late 20<sup>th</sup> Century and beyond show novelties in technique and statutory language. (...) Statutory language is now packed with values, principles, social directives, programs and results to be considered desirable for the common good and social utility, as well as scientific, economic and sociologic terms compatibly to the Contemporary Age<sup>18</sup>.

The Brazilian 2002 Civil Code – which was already elderly when it first saw the light of day<sup>19</sup>, due to being molded in obsolete forges<sup>20</sup> – is halfway in between the two aforementioned paths. It is a peculiar case of a Civil Code that, as Fitzgerald’s *Benjamin Button*<sup>21</sup>, sometimes seems to rejuvenate with time, by the hands of legislators, judges and legal scholars<sup>22</sup>. The results of well-minded initiatives, however, are sometimes frustrating, or ill-advised.

What succeeds is that this noble labor will not be admissible if it departs from a capricious and anarchic interpretation, integration and development methodology deployed of historical rigor and committed legal reasoning from a dogmatic perspective. Or that (...) answer to passing fashionable tendencies usually subservient to unspeakable economic and political interests<sup>23</sup>.

This is the case of one of the most wide-ranging and impacting innovations to the Brazilian Civil Code<sup>24</sup>: the 2019 Economic Freedom Act (n. 13.874/2019). This piece of legislation as a peculiar example of legislative initiative with origin issues. It is also a good sample of unfortunate innovations that carry more problems than solutions.

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<sup>17</sup> A. Pedrón, *La segunda codificación* [in:] *Seguridad jurídica y codificación*, Madrid 1999, p. 76.

<sup>18</sup> J. Martins-Costa, *A boa-fé no direito privado: critérios para a sua aplicação*, São Paulo 2018, p. 133.

<sup>19</sup> L. Barroso, *A realização do direito civil: entre normas jurídicas e práticas sociais*, Curitiba 2011, p. 15. See also: G. Tepedino, *A constitucionalização do direito civil: perspectivas interpretativas diante do novo código* [in:] *Direito Civil: atualidades*, eds. C. Fiuza *et al.*, Belo Horizonte 2003, p. 128.

<sup>20</sup> A. Junqueira de Azevedo, *O direito pós-moderno e a codificação*, “Revista da Faculdade de Direito da USP” 1999, no. 94, p. 10.

<sup>21</sup> F. Fitzgerald, *The curious case of Benjamin Button and tales of the Jazz Age*, London 2013.

<sup>22</sup> See also: A. Pinto Monteiro, *Interpretação e o protagonismo da doutrina*, “Revista Fórum de Direito Civil” 2015, no. 4.

<sup>23</sup> A. Román García, *Codificación, descodificación y recodificación en el derecho civil* [in:] *Estudios jurídicos en homenaje al profesor Luis Díez-Picazo*, vol. I, ed. A. Sánchez, Madrid 2003, p. 921.

<sup>24</sup> O. Rodrigues Junior, *Direito civil...*, p. 123.

The first issue concerning the Economic Freedom Act is its origin in a Presidential Decree (“Medida Provisória” n. 881/2019) that does not conform to the specific constitutional requirements of promulgation: *urgency* and *relevant public interest*<sup>25</sup>. The second genetic issue is a consequence of the *precarious* efficacy of a Presidential Decree – the exact opposite of the *durability* commonly aimed by and attributed to Civil Codes – as well as its autocratic, nearly despotic, nature, that directly interferes with the functioning of Congress. Although these two issues are of the outmost importance<sup>26</sup>, this article will not farther elaborate on them, since it has a narrower scope, dedicated to the material insufficiencies of the Economic Freedom Act Art. 7, which introduced two paragraphs with various contractual interpretation criteria to Art. 113 of the Brazilian Civil Code. This last section now reads:

Art. 113. Legal transactions should be interpreted in accordance with good Faith and to the uses of where they take place.

§ 1º The interpretation of legal transactions must ascribe to it the meaning that:

- I – is contemplated by the way parties behave after contracting.
- II – corresponds to uses, customs and market practices related to the particular kind of transaction.
- III – corresponds to good faith.
- IV – is more benefic to the contractor who has not drafted the clause, if identifiable.
- V – corresponds to what would be the *reasonable negotiation of the contractors*, inferred from other provisions and to their economic rationale, as well as by the information available upon closure.

§ 2º Contractors may freely agree on rules of interpretation, gap filling and integration of legal transactions other than those prescribed by statutory law.

This *new* legal text introduced by the Economic Freedom act, besides superfluous<sup>27</sup> in some respects – i.e.: regarding sections I, II and IV – and negligent in others<sup>28</sup> – particularly, section V –, is full of concessions to subjectivist decision-making and apparent economic inconsistencies. This will be farther developed ahead. Consequently, it calls for a critical and constructive scrutiny of novel prescriptions on contractual interpretation, strictly uncommitted to the celebratory remarks that predominate in local legal literature<sup>29</sup>.

<sup>25</sup> R. Maia, *Prefácio* [in:] *Comentários à Lei da Liberdade Econômica*, eds. F. Marques Neto, O. Rodrigues Junior, R. Xavier Leonardo, São Paulo 2019, p. 6.

<sup>26</sup> See: G. Bercovici, *Parecer sobre a inconstitucionalidade da Medida Provisória da Liberdade Econômica (Medida Provisória nº 881, de 30 de abril de 2019)*, “Revista Fórum de Direito Financeiro e Econômico” 2019, no. 8(15).

<sup>27</sup> M. Bunazar, *A Declaração de Direitos da Liberdade Econômica e seus impactos no regime jurídico do contrato de Direito Comum* [in:] *Liberdade econômica: o Brasil livre para crescer*, ed. J. Goergen, 2019, p. 148. See also: A. Arnt Ramos, *Compra e venda de ascendente para descendente: reflexões acerca do art. 496 do Código Civil Brasileiro* [in:] *Derecho privado y solidaridad en Sudamérica: VIII Agendas de Derecho Civil Constitucional*, eds. M. Catalan, S. Barocelli, Buenos Aires 2020.

<sup>28</sup> F. Amaral, *Direito civil: introdução*, São Paulo 2017, p. 521.

<sup>29</sup> P. Forgioni, *A interpretação dos negócios jurídicos II* [in:] *Comentários à Lei da Liberdade Econômica*, eds. F. Marques Neto, O. Rodrigues Junior, R. Xavier Leonardo, São Paulo 2019, *passim*.

## The (not so) new first paragraph to Art. 113 of the Brazilian Civil Code

Article 113, *caput*, of the Brazilian Civil Code is still the same. It determines that good faith and local practices are the beacons of contractual interpretation. And *to interpret*, according to a widely held scholarly opinion, is “to assign a meaning to one or more than one linguistic signs, integrating a legal text. The product of the act of interpretation, therefore, is the meaning assigned to the disposition or text”<sup>30</sup>; a text ever inseparable of its context, since “legal norms are only effective if and when fed by the aporetic energy that moves each interpreters labor”<sup>31</sup>. Consequently, the rule of behavior framed and expressed by the principle of good faith and by practices circumventing each contract guide the ascription of meaning to a category here considered in its dynamic design<sup>32</sup>.

In spite of this traditional understanding, the Economic Freedom Act *innovated* the wording of Art. 113 with two new paragraphs, as noted above. The renewed text repeats fragments of its original version. Besides, it reverberates ancient interpretive beacons once regulated by Art. 131 of 1850 Brazilian Commercial Code<sup>33</sup>. In doing so, the so-called legislative innovation challenges the interpretive postulate that “one must not interpret a statutory provision in such a way that some parts of the provision prove to be unnecessary”<sup>34</sup>. If this postulate is to be considered contrafactual, other issues arise.

Interpreting and applying sections I and III of the article in scrutiny, which simply refer to *good faith* as already stated in the *caput*, requires three cautions.

First, legal agencies and practitioners must be careful not to restrict the scope of good faith to how parties behave *after* contracting, in spite of what is literally stated by section I. This cautionary recommendation follows the visceral bond that ties *good faith* to estoppel doctrine – and categories like *supressio*, *surrectio*, *venire contra factum proprium*, *tu quoque*, *exception doli*, *inciviliter agere* etc. This connection sets forth rights and duties that are often indifferent to clear contractual dispositions. Such rights and duties therefore stem from circumstances that precede, coincide or supersede the contract itself<sup>35</sup>. That is: even though

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<sup>30</sup> E. Grau, *Por que tenho medo dos Juízes (a interpretação/aplicação do direito e os princípios)*, São Paulo 2017, p. 39.

<sup>31</sup> R. Aronne, M. Catalan, *Quando se imagina que antílopes possam devorar leões: oito ligeiras notas acerca de uma tese passageira*, “Civilistica.com” 2018, no. 7, p. 3.

<sup>32</sup> A. Caumont, *Por uma teoria ética do contrato*, “Revista Eletrônica Direito e Sociedade” 2020, no. 8(1), p. 93.

<sup>33</sup> M. Bunazar, *A Declaração...*, p. 146.

<sup>34</sup> A. Peczenik, G. Bergholz, *Statutory interpretation in Sweden* [in:] *Interpreting statutes*, eds. N. MacCormick, R. Summers, London 2016, p. 339.

<sup>35</sup> R. Pamplona Filho, *Delimitação conceitual do princípio da boa-fé* [in:] *Boa-fé e sua aplicação no direito brasileiro*, eds. F. Lôbo, M. Ehrhardt Junior, R. Pamplona Filho, Belo Horizonte 2019, p. 50.

the legislator only mentioned *superseding behavior*, the smorgasbord of scholarly and case-law contributions on the subject is still relevant<sup>36</sup>.

It is, then, clear that “pretense contractors act loyally in their pre-contractual dialogue, providing each other with sufficient information, avoiding deception [or] preventing the revelation of trusted data”<sup>37</sup> – conducts, each and every one of them, explicitly molded after a duty of good-faith. Besides, the need to amplify the timeframe related to behavior consideration<sup>38</sup> is stressed by the bearing-in-mind of conducts that may generate specific duties and even contracts, although sometimes unknown to each contractor<sup>39</sup>.

Moreover, as Ernesto Capobianco argues in his commentary on the Italian Civil Code, the “interpretive criterion in question is connected to the realistic statement that the contents of a contract are not simply derivable from the words craved into each disposition, but depend at least partially on the circumstances surrounding each contract and on the behavior of contractors”<sup>40</sup>.

Second, interpreters should care not to take good faith as an opportunity to subjectivism or as a norm predominantly directed to patrimonial concerns. That is: the challenge, in short, is to keep the Law of Contracts from pursuing the flight of Icarus<sup>41</sup>.

Finally, the textual reiteration of “good faith” on the *new* section 3 of Art. 113 of the Brazilian Civil Code is pointless. Both legal scholarship and case law had already elaborated on the original wording of the article in question. This doctrinal and judicial development elevated good faith to a very sophisticated hermeneutical tool<sup>42</sup> – as comparatists usually stress in most legal experiences that pertain to the Continental tradition.

Section II of the paragraph under scrutiny, on its turn, challenges interpreters to differ the ordinary legal categories of *uses* and *customs* from *market practices*. Would them not be *uses*? If they were, why on Earth would the law treat them separately? Would it be correct to assume that contemporary law is past the maxim *ubi lex voluit dixit, ubi noluit tacuit*?

The poor legislative choice of words craved into this section *introduced* by the Economic Freedom Act also does not play well with the dispositions entailed

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<sup>36</sup> M. Ehrhardt Junior, *Relação obrigacional como processo na construção do paradigma dos deveres gerais de conduta e suas consequências*, “Revista da Faculdade de Direito da Universidade Federal do Paraná” 2012, no. 56, *passim*. See also: J. Martins-Costa, *A boa-fé...*

<sup>37</sup> A. Junqueira de Azevedo, *Estudos e pareceres de direito privado*, São Paulo 2004, pp. 176–177.

<sup>38</sup> E. Capobianco, *La determinazione...*, p. 328.

<sup>39</sup> J. da Silva, *Contratos sem negócio jurídico: críticas das relações contratuais de fato*, São Paulo 2011, p. 37.

<sup>40</sup> E. Capobianco, *La determinazione...*, p. 327.

<sup>41</sup> M. Catalan, *Devaneios de Ícaro: uma reflexão ligeira acerca de incongruências vivificadas pela Lei da Liberdade Econômica*, “Revista Jurídica Luso-Brasileira” 2020, no. 6(3), p. 1455.

<sup>42</sup> J. Martins-Costa, *A boa-fé...*

by Statute 95/1998's. The latter governs the drafting, writing, altering and consolidating of written Law in Brazil. Legislative requirements on clarity and precision in force are incompatible with the unfortunate new section under analysis, as noted by scholars: the Economic Freedom Act "demands interpreters to define the specific meaning of the three concepts contemplated by the same section"<sup>43</sup>.

It happens, though, that distinctions endorsed by legal literature and anchored to secular traditions – (a) uses as uses of traffic, which are explained as usual practices and behaviors of certain professional or economic groups, (b) custom as recognition of certain behaviors or practices as legally binding and, (c) practices as habitual conducts in an individual perspective, contrasted to the transindividual character of uses – do not seem sufficient to guide the application of the legal precept. The reason for this is simple: in addition to overlaps between the various notions, centered on the habitual conduct of a certain individual or group of individuals, the new legal text alludes to market practices – which, of course, transcend the individual meaning commonly attributed to the notion of practices.

If a massive dose of pragmatism informs an operative answer to this issue, in the sense of taking *market practices* as an addition (or illustration) to the legal reference to *uses*, there seems to be little doubt as to the fact that the envisaged alternative may foster contempt of semantics. Also, this might implicate some condescension towards the regulative ideal of coherence, which should integrate any process of constructing legal norms.

The problems brought about to contractual interpretation by the Economic Freedom Act are a tad more challenging if one is to regard the last two sections of the new first paragraph to Art. 113 of the Civil Code. Section IV for reasons that are predominately juridical; section V for reasons related to Economics.

Section IV entails an interpretive rule that covers all legal transactions, including peer-to-peer contracts, while stressing a hermeneutical guideline related to *favor debilis: interpretation contra proferentem* or *interpretation contra stipulatorem*.

The new prescription, *per se*, might seem positive at first sight, since it fosters self-responsibility<sup>44</sup>. The problem lies on its combination to Art. 423 of the Brazilian Civil Code, which contains a weaker rule applicable to the more sensitive field of template contracts<sup>45</sup>.

An unsystematic interpretation of both articles could therefore lead to an underestimation of the specific protection of adherents to template contracts, to which certain requirements should be met – *ambiguity* or *contradiction* between clauses.

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<sup>43</sup> J. Gediel, A. Corrêa, M. Kroetz, *Interpretações – art. 113 do Código Civil* [in:] *Comentários à Lei da Liberdade Econômica*, eds. F. Marques Neto, O. Rodrigues Junior, R. Xavier Leonardo, São Paulo 2019, p. 346.

<sup>44</sup> E. Capobianco, *La determinazione...*, p. 359.

<sup>45</sup> P. Lôbo, *Condições gerais dos contratos e o novo código civil brasileiro*, "Revista Trimestral de Direito Civil" 2006, no. 27, pp. 103–166.

A systematic interpretation, on the other hand, would lead to questioning why did the Economic Freedom Act not repeal Art. 423, given the greater scope of Art. 113, paragraph 1, section IV? Since the new statutes did not go so far, would it be legitimate to require ambiguity or contradiction between clauses to cases governed by Art. 113, paragraph 1, section IV, as some authors suggest<sup>46</sup>? These questions are nothing but pertinent, since both legal texts are equally generic and part of the very same Code.

The answer, in the light of the precept's *ratio*, is negative. That is, as held by Tartuce: "the protection of adherents to whom the content of template contracts is imposed has been expanded"<sup>47</sup>. But it also seems that, in favor of the regulatory ideal<sup>48</sup> of the Code as a system, it would be at least advisable to expressly revoke Art. 423 and refer the interpretation of distinct circumstances concerning adherents to the broader and more generous standards of Art. 113, paragraph 1, section IV.

The final section of the discussed paragraph commands the interpreter to ascribe meaning to contracts in such a way that it should match a *reasonable negotiation of the contractors*, inferred from other provisions and to their economic rationale, as well as by the information available upon closure. Legal scholars so far are approaching this precept with no major concerns.

Tartuce, for example, holds that this is simply a new indeterminate text, as are so many others within Brazilian written Law. Hence: "the highlighted expression is another general clause, whose content is to be filled by case law over the coming years, as occurred with good faith and social function of contracts in the last fifteen years of efficacy of the Civil Code"<sup>49</sup>.

Gediel and Corrêa, on the other hand, question the ambiguity of the words chosen by the legislator, and present possible legal meanings to *reasonable negotiation* and *economic rationale*, within a traditional civilian mainframe:

The allusion to reasonable negotiation of the parties upon conclusion, inferred by other provisions reaffirms the set of interpretive rules followed in Brazilian Law by emphasizing and objective criterion, based on good faith, which takes into account what has been externalized and which constitutes a reasonable meaning for the set of contractual statements (canon of totality and coherence) and nurtures an objective analysis of the concrete goals of transactions.

(...)

The economic rationality of the parties as an interpretive standard must consider what can be objectively identified in the whole contract, with special prominence of contractual economics aimed at the concrete goal of the transaction. It is impossible to seek

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<sup>46</sup> J. Gediel, A. Corrêa, M. Kroetz, *Interpretações – art. 113...*, p. 351.

<sup>47</sup> F. Tartuce, A "Lei da Liberdade Econômica" (Lei n. 13.874/2019) e as principais mudanças no âmbito do direito contratual, "Revista Jurídica Luso-Brasileira" 2020, no. 6(1), p. 1009.

<sup>48</sup> J. Bengoetxea, *Legal system as a regulative ideal* [in:] *Praktische vernunft und Rechtsanwendung*, eds. H. Koch, U. Neumann, Stuttgart 1994, p. 65.

<sup>49</sup> F. Tartuce, A "Lei da...", p. 1010.

the subjective economic rationality of each contractor. But interpreters may interpret contracts in a way that best fits the contractual balance drawn by the parties in their respective negotiation, in consonance with the concrete goals of the contract in question<sup>50</sup>.

Although one could agree with these authors on the reasonable negotiation of the parties in the context of the circumstances of each transaction<sup>51</sup>, the issue of their economic rationality calls for some elaboration<sup>52</sup>. It is so as a consequence of three intertwined factors. First, for the fact that “economic rationality” is a concept strange to Legal Scholarship. Second, because it is a deeply controversial topic in its own field – Economics. Finally, because it carries substantial issues of normative indetermination.

Legal theorists argue that the Law has a *touch of Midas*. This means that “just as whatever Midas touched turned into gold, any concept taken up by the law turns into a legal concept, in the sense that a conception specific to the law has to be adopted”<sup>53</sup>. This predicate stems from “institutional and doctrinal practice of law, which develops methods, doctrinal standards, and institutions that set the parameters for legal conceptions”<sup>54</sup>. It is, therefore, something usual in the ambience of Law, which does not mean, however, that the Law is indifferent to the scope of such conceptions in their respective natural *habitats*, as a consequence of the language game<sup>55</sup>. More simply, their original meaning integrates the set of requirements to cohere to the Law<sup>56</sup> – i.e.: the aggregate of positions to which the legal conception as to adapt to *make sense*.

This goal is however hampered by the intense dispute between different schools of Economics over the rationality of economic agents. It is also hindered by the apparent *incoherence* of legal rules governing contracts.

The first setback is portrayed by Benevides Pinho, who, in 1976, listed at least *six* Economic schools that attribute conflicting meanings to the *economic rationality of agents* – each of them with internal disputes and oscillations<sup>57</sup>. As the author demonstrates, *Classical*, *Neoclassical*, *Marxist-Leninist*, *Behavioral*, *Gestaltists* and *Realists* economists envisage radically different conceptions of the topic.

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<sup>50</sup> J. Gediél, A. Corrêa, M. Kroetz, *Interpretações* – art. 113..., pp. 355–356.

<sup>51</sup> V.C. Oliveira, *Considerações sobre os planos dos fatos jurídicos e a “substituição do fundamento do ato de vontade”*, “Textos para discussão” 2020, no. 270.

<sup>52</sup> L. Penteado, *Integração de contratos*..., p. 21.

<sup>53</sup> R. Poscher, *The hand of Midas: when concepts turn legal, or deflating the Hart–Dworkin debate* [in:] *Concepts in Law*, eds. J. Hage, J. Pfordten, Dodrecht 2009, p. 103.

<sup>54</sup> *Ibidem*, p. 108.

<sup>55</sup> B. Brozek, *Legal interpretation and coherence* [in:] *Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence*, eds. M. Araszkiewicz, J. Šavelka, Dodrecht 2013.

<sup>56</sup> A. Arnt Ramos, *Segurança jurídica e indeterminação normativa deliberada: elementos para uma teoria do Direito (Civil) contemporâneo*, Curitiba 2021.

<sup>57</sup> D. Benevides Pinho, *A racionalidade econômica – abordagem histórica*, “Revista de História” 1976, no. 54(107).

Today, moreover, approaches centered in cognitive processes query the very pertinence of presupposing the economic rationality of agents, departing from evidence that *people make bad choices*<sup>58</sup>.

The quest for a legal conception of economic rationality, amidst the tumultuous state of the question in Economics, cannot rely on legal parameters. When one takes into account the most immediate context, the legal text under scrutiny is the result of a statute inspired by Economic Liberalism<sup>59</sup>, which partially innovated on the contents of a collectivist Civil Code<sup>60</sup>. Hence, the legal conception of the *economic rationality* of the parties is somewhere in between the independence of *homo economicus*<sup>61</sup> and several levels of paternalism<sup>62</sup>. Besides, as noted by Pedrosa:

The Economic Freedom Act strongly underlined formal freedom, in accordance with neoliberal policies usual guidelines. As shown above, this perspective is insufficient, since it overlooks empirical aspects necessary to the effectiveness of freedom – that is: power structures, relationship patterns and personal practices that foster or weaken self-determination<sup>63</sup>.

If one is to consider a more distant context, both legislations are part of a Legal order which, albeit fragmented, is unitary, complex and governed by a Constitution which tempers free enterprise, the social value of labor, and solidarity. A Constitution, therefore, that overcomes fundamentalist interpretations of one or the others<sup>64</sup> and assumes a remarkable eclecticism. For this reason, a Constitution that fosters various conceptions of freedom, as held by Pianovski Ruzyk:

This leads to the importance of reading individual freedom(s) through multiple lenses, considering the classic concepts of freedom as absence of coercion (negative freedom), formal freedom (hypothetical assurance of the possibility to make choices) and substantive freedom (effective possibility of achieving what is valued by the subject, from a given capabilities set) and positive freedom<sup>65</sup>.

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<sup>58</sup> R. Thaler, C. Sunstein, *Nudge: improving decisions about health, wealth and happiness*, New Haven 2008.

<sup>59</sup> A. Rovai, P. Salles Junior, *Expectativas de desenvolvimento e crescimento sustentável* [in:] *Liberdade econômica: o Brasil livre para crescer*, ed. J. Goergen, Brasília 2019, p. 133.

<sup>60</sup> L. Penteado, *Integração de contratos...*, p. 263.

<sup>61</sup> P. Forgioni, *A interpretação...*, pp. 382–383.

<sup>62</sup> L. Penteado, *Integração de contratos...*, p. 263.

<sup>63</sup> L. Pedrosa, *La autonomía privada y la libertad contractual: evolución conceptual y análisis de las recientes alteraciones en el Código Civil Brasileño*, “Revista Crítica de Derecho Privado” 2019, no. 16, p. 386.

<sup>64</sup> C. Souza Neto, J. Medonça, *Fundamentalização e fundamentalismo na interpretação do princípio constitucional da livre iniciativa* [in:] *A constitucionalização do Direito: fundamentos teóricos e aplicações específicas*, eds. C. Souza Neto, D. Sarmento, Rio de Janeiro 2007.

<sup>65</sup> C. Pianovski Ruzyk, *O caso das “pílulas de farinha” como exemplo da construção jurisprudencial de um “Direito de Danos” e da violação da liberdade positiva como “dano à pessoa”* [in:] *O Superior Tribunal de Justiça e a reconstrução do Direito Privado*, eds. A. Frazão, G. Tepedino, São Paulo 2011, p. 300.

The multiple faces of freedom, as advocated with regard to other norms<sup>66</sup>, guide the interpretation and the application of the legal precept under analysis towards the promotion of the *human person* in the transactions to which it takes part. In addition, they accommodate concerns with institutional guarantees<sup>67</sup>, which are also promoted by the Economic Freedom Act<sup>68</sup>. As a result, the various conceptions of freedom tie the understanding of *economic rationality* not so much to private autonomy, but rather to the social function of contracts. At least if and while understood as:

Requirements of contributions to incrementing freedoms. Not only between the parties – which foster the responsibility of each one for the freedom of the other(s) – but also between the parties and every other person affected by the contract. Besides, the social function of contract conditions contractual freedom to the protection and promotion of institutional guarantees (...). That is: protected positions and interests that belong to each and every person, both collectively and individually, such as environmental, competition and consumer protection. And the scope of normative requirements to perform the social function of contracts is defined with a smorgasbord of reasons that, in turn, must cohere to the Legal System as a whole and with the material facts of each case taken into account<sup>69</sup>.

Seen through these lenses, the economic rationality of parties acquires a legal meaning of its own, which does not exclude competing economic conceptions. This legal conception requires contracts to promote not *efficiency per se*, but *freedom(s)* in its multiple faces and particular conceptions sheltered by Brazilian Law, without neglect for institutional guarantees that shape the gears of the Economic Order, not only protected but also, at least in part, constituted by the Law in force.

## Conclusion

All observations precautionary recommendations and mediations referred to the first paragraph of Art. 113 of the Brazilian Civil Code – as added by the Economic Freedom Act – registered above aim at trimming edges and constructively prospecting solutions to its enforcement. In sum, they target strengthening coherence in Private Law to its main vocation: coexistentiality.

The careful, critical and detailed scrutiny of the interpretive criteria explored in this article shows that although the Economic Freedom Act is strongly attached to a negative conception of freedom, this cannot be held as the only ground of contractual interpretation, nor as the *supreme principle of Contract Law*. As Bessone

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<sup>66</sup> A. Arnt Ramos, *Segurança jurídica...*, p. 181 ff.

<sup>67</sup> C. Salomão Filho, *Função social do contrato: primeiras anotações*, “Revista dos Tribunais” 2004, no. 823, pp. 73–74.

<sup>68</sup> P. Forgioni, *A interpretação...*, p. 366 ff.

<sup>69</sup> A. Arnt Ramos, *Segurança jurídica...*, p. 197.

noted in the first half of the 20<sup>th</sup> Century, “the contract will only be freely contracted when freedom is equally shared by the parties”<sup>70</sup>. Moreover, the most sophisticated contractual scholarship has, with rare exceptions, concluded that “when one party is subject to the contractual power of the other, not enjoying sufficient scope for autonomous affirmation and defense of his or her own interests, his or her consent to the contract and to its terms is of no value as an authentic act of self-determination”<sup>71</sup>.

But this is nothing new for legal scholarship.

As it turns out, at least for now, Hermes has nothing to add.

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<sup>70</sup> D. Bessone, *Aspectos da evolução da teoria dos contratos*, São Paulo 1949, p. 109.

<sup>71</sup> J. Ribeiro, *Direito dos contratos: estudos*, Coimbra 2007, p. 26.

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## Summary

The following article scrutinizes innovations brought by the Brazilian Economic Freedom Act to Art. 113 of the Brazilian Civil Code. Departing from a literature review, it outlines several aspects of these innovations, while underlining the principles of contract law – more particularly, private autonomy and the social function of contract. In its concluding remarks, the survey sets forth a call for debate on some pressing issues concerning Brazilian Private Law under the light of the Economic Freedom Act.

*Keywords:* contractual interpretation, Economic Freedom Act, principles of Contract Law

## WYKŁADNIA UMÓW W BRAZYLII W ŚWIEŁIE USTAWY O WOLNOŚCI GOSPODARCZEJ Z 2019 R.

### Streszczenie

Niniejszy artykuł analizuje innowacje wprowadzone przez brazylijską ustawę o wolności gospodarczej do art. 113 brazylijskiego Kodeksu cywilnego. Wychodząc od przeglądu literatury, zarysowuje kilka aspektów tych innowacji, podkreślając jednocześnie zasady prawa umów – w szczególności autonomię prawną i społeczną funkcję umowy. W uwagach końcowych wzywa do debaty nad niektórymi palącymi kwestiami dotyczącymi brazylijskiego prawa prywatnego w świetle ustawy o wolności gospodarczej.

*Słowa kluczowe:* wykładnia umowna, ustawa o wolności gospodarczej, zasady prawa umów