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Legality And Applicability Of The Washout Clause In Commodity Contracts

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Abstract:
The present work has as its object the washout clause in a contract for the purchase and sale of delivery of a future soybean crop, with quotation in dollars, inquiring about its lawfulness in view of article 421-A, of the Civil Code, and the possibility of judicial review. The present study is justified by the absence of normative and dogmatic delimitation of the institute, requiring the understanding of its function and legal nature, in order to conform it to positive law. The specific objectives cover the description of the dynamics of long-term contracts involving commodities and the consequences of factual changes external to the contract, but related to it, when the variation of the dollar and the respective delivery provision of the rural producer occurs. In this bias, the legal nature of the clause is debated, based on the institutes of indemnity and the penalty clause. The results point to the legality of the washout clause and its translation as its penalty clause. The methodology of this research is bibliographic, through descriptive analysis and deductive method.

Key Word: *Civil law; Washout clause; Crop delivery contract.*

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I. Introduction

The study has as its theme the contractual law in agribusiness and the discussion about the legality of the washout clause in the contract for the delivery of future crops. Future harvest delivery contracts, used in agribusiness, are of deferred execution in time, where the parties agree that their object will be a future thing (harvest). It turns out that, especially in relation to soybeans, this good was transformed into commodities and its price was fixed to the dollar, because it was traded on the commodity and futures exchange.

In view of this, between the fixing of the soybean price at the time of the execution of the contract and that verified in the future, at the time of its delivery, there may be an abrupt oscillation in the exchange rate of the US dollar, with appreciation and consequent repercussions on future delivery contracts. Thus, in order to curb the unilateral termination of the contract by rural producers, the so-called washout clause was inserted in these contracts.

It so happens that, in a systematic review of the literature, it was found the absence of dogmatic investigation and, also, the legislative omission on the washout clause in these contractual species. Thus, the relevance of the theme in view of its economic repercussion is verified, since the agribusiness activity corresponds to 27.4% of the Brazilian GDP – Gross Domestic Product, and there is no legal certainty about the legality, nature and scope of the institute.

To this end, the present work seeks to define the legal nature of the washout clause, analyze its legality and discuss the possibility of judicial review, also investigating the philosophical and dogmatic bases of the principle of autonomy of will, the correlation between the oscillation of the dollar and random contracts, and the agreement in the context of business contracts, through bibliographic research, using descriptive analysis and deductive method.

II. Material And Methods

This article is a literature review intended to analyze the legality and applicability of the washout clause in commodity contracts, addressing the normative and jurisprudential aspects that involve this clause, as well as the practical implications in its implementation.

The research was conducted through a broad review of academic publications, books, journal articles, and legal decisions dealing with commodity contracts, washout clauses, and related topics. The sources were selected based on their relevance, authority and topicality, prioritizing materials published in the last ten years, in order to ensure the approach of the most contemporary and pertinent issues to the theme.

Works that specifically address the concept, legal nature and implications of the washout clause, both from a contractual and regulatory point of view, were included in the research. In addition, studies that discuss

the application of such clauses in commodity contracts, especially in the Brazilian context, and the respective judicial decisions that deal with cases in which the clause was questioned were considered. Works that do not present a direct approach to the theme, or that are difficult to access or excessively dated, were excluded from the survey.

The analysis was conducted with a critical focus in order to identify the divergences and convergences in the interpretations of the washout clause. A survey of the main rules and regulations that guide the inclusion of this clause in commodity contracts was also carried out, observing the possible gaps in the legislation and its practical application in the financial markets. The analysis focused on understanding the legal limitations, the risks involved and the contractual implications of this clause, seeking to understand its function and whether its implementation is in accordance with the Brazilian legal system.

Comparisons were made with other international legislation, in order to broaden the understanding of the applicability of the washout clause, especially in highly relevant commodity markets, such as the European and North American financial markets. This comparative analysis allowed us to verify whether the practices adopted in other countries can influence or even recommend adjustments for the Brazilian market.

At the end, a synthesis of the results found was carried out, presenting the main conclusions on the legality and applicability of the washout clause in commodity contracts. The legal implications of this clause for the contracting parties were discussed, in addition to highlighting the opportunities and challenges for its adoption in Brazil. This methodology ensures that the analysis is in-depth, based on reliable and relevant sources, providing a broad and detailed view on the topic of the washout clause in commodity contracts.

III. Result And Discussion

Contracts in the age of agribusiness

From its historical origin to the current normative formation, contractual civil law is guided by three fundamental principled frameworks, the free expression of will, from which the obligatory relationship arises; the obligatory force (*pacta sunt servanda*), which compels the contracting parties to comply with what was agreed; and the relativity of effects, which circumscribes the limits of the services to the contracting parties. not benefiting or harming third parties.

This dogmatic-normative triad, based on the value of freedom, found in philosophical individualism and economic liberalism, arising from the liberal revolutions of the eighteenth century, fertile ground to develop. With the hegemony of the capitalist economic system and the complexity of economic traffic, it has become an instrument of legal security for the circulation of goods and wealth in the market society.

The nineteenth century was crossed with the elaboration of civil law norms based on the absolute and supreme intangibility of the autonomy of the will, private property and the legitimate family. This was not only the dogmatic, but especially hermeneutic tripod that guided Brazilian private law, so that the mandatory force and its liberal philosophical basis prevented external factors from being considered to alter the benefits of the obligees. Even if there was an imbalance, all contractual changes should come exclusively from the will of the contracting parties, who should foresee and fix in the contract any future uncertainties.

However, the profound social transformations that occurred in the nineteenth century and in the first half of the twentieth century altered the philosophical-legal bases of dogmatic liberalism with the inauguration of the Social State, which brought with it significant changes in legal instruments, due to the need to protect certain groups or social formations, requiring the harmonization of freedom rights and economic rights. social and cultural aspects. With this, protective normative measures are created, such as the Land Statute and the Consumer Protection Code.

In the twentieth century, the two world wars reinforced the interventionist movement in the autonomy of will, because there was a complete collapse of social, economic and political relations, which interfered with the traffic of contractual relations and made it impossible to fulfill agreed installments. In view of this, exceptional and transitory laws were enacted in France and Italy for the suspension of pacts, the granting of a moratorium, or resolution. In an attempt to find hermeneutical bases that would justify a contractual review without the manifestation of the will of the contracting parties, the doctrine resorted to the lessons of the post-glossers and identified an implicit clause in all contracts: the *rebus sic stantibus clause*. It applies to contracts postponed in time and establishes as a premise that the will expressed at the time of execution, which sets a performance in the future, should only prevail if the state of fact in force at the time of the stipulation is maintained, so that if there is a change in the external environment, due to supervening and unforeseen circumstances, there will be a relativization of the mandatory force. In Brazilian civil law, the theory of unpredictability was incorporated in article 317 of the Civil Code.

The autonomy of the will and the binding force underwent a profound test of legitimacy in the nineteenth and twentieth centuries, either with the enactment of norms protecting specific social situations, such as vulnerable or hyposufficient, or with legislative authorizations for the revision of legal transactions postponed in time, in the face of external events not considered at the time of celebration and which would

make the provision impossible to fulfill. Contractual dirigisme and autonomy of will formed an antinomy present in normative systems, because, from the economic system, they tried to find the point of balance between freedom and control.

The economic and social transformations that led to major normative changes in private contractual relations also affected the rural environment. From the middle of the nineteenth century, Brazil changed the migratory flow with the reduction of the occupation of rural spaces instead of urban spaces, with a greater population density in large coastal metropolises.

With this, having identified the need to increase food production, until then dependent on its importation, the search for food sovereignty became a state public policy. That was how between the 1970s and 1990s, the combination of public subsidies, technological development, investment in research with the creation of EMBRAPA – Brazilian Agricultural Research Corporation and the entrepreneurship of the Brazilian rural producer, led to one of the greatest economic transformations in the countryside, with the resignification of the relationship between industrial and agrarian productive sectors, inaugurating a complex agro-industrial chain, also inserted in the balance of state intervention *versus* freedom to contract.

If, on the one hand, the country experienced economic advances, it also noted the evolution of the underlying legal relations, since while in the past the rural contractual bases were relatively simple, on everyday objects and immediate executions, in the context of the development achieved, contractual relations reached new heights. The agribusiness activity was faced with new contractual arrangements or the sophistication of existing contracts to reduce the time deficit between the economic-social reality and the Law.

This occurred with the contract for the delivery of future crops, whose *washout clause* seeks its own identity so that, finally, it is understood whether or not there should be intervention by the Judiciary in its reduction, or exclusion.

Purchase and sale agreement for future crop

The purchase and sale contract that has as its object a future thing was not unknown to the operators of the Law. Although not specifically provided for within the chapter dedicated to purchase and sale in the Civil Code of 1917, it was a discipline between the so-called random contracts, among arts. 1,118 to 1,121 of the revoked civil law.

In the current Civil Code, it was specifically disciplined in the chapter dedicated to purchase and sale, in article 483, allowing the negotiated asset to be of current or future existence. In the latter case, the contracting parties may, by express provision, agree on it as being commutative, whose contract will be ineffective if the good does not exist, or random, where it inserts the element of risk in order to maintain the agreement even if the thing does not exist or is in a different quantity.

That said, the purchase and sale of future soybean crops is a bilateral contract, because both parties have installments; onerous, because both seek economic benefit; deferred execution, in which the parties agree that its object will be a future thing (vintage); and commutative or random, depending on the manifestation of will, according to article 483 of the Civil Code. If the parties establish randomness, the provisions relating to random contracts provided for in arts. 458 to 461, of the Civil Code.

Washout clause: definition and nature

In rural areas, likewise, it was not unknown to establish the fulfillment of the obligation in the future, with the delivery of agricultural production. However, the new factors related to the transformation of seeds into commodities with the fixing of the price in dollars and the commercialization on the stock exchange, reflected in the economic and financial bases of the contract. Thus, for example, a rural producer who sold, in April 2020, a 60kg bag of future soybeans worth R$ 87.71, was faced, on delivery to the buyer, in April 2021, with the appreciation of the dollar to the point that the good reached the value of R$ 163.29. In view of this, the producer could default on his contract, pay the amount corresponding to the sale and resell it to another buyer at the highest price, due to the exchange rate appreciation.

In order to avoid willful default by the producer, the so-called washout clause was created, which suffers from a scientific-dogmatic deficit, despite the economic development experienced by agribusiness, making the task of categorizing it and identifying its legal nature complex.

In the semantic aspect, the word *washout* comes from English and means failure. From the perspective of economic agents – producers, buyers and *trading companies* – it is considered a market operation in which the rural producer refuses to deliver the soybeans and renegotiates the repurchase with his original buyer, with the difference in price between the value he sold and the price updated by the market falling on him. From a normative point of view, it is a contractual clause that obliges the rural producer to pay a monetary value to the buyer, obtained by the difference between the negotiated value and the one quoted in the commodity market at the time of delivery, if the crop is not delivered. As a contractual clause, however, there is divergence about its legal nature.

Future; or successive treatment (or continuous execution), when the relationship imposes autonomous installments prolonged in time (GONÇALVES, C. R. *Brazilian Civil Law*, Vol. III, Saraiva, São Paulo, 2004). This classification is similar to that adopted by Nelson Nery Júnior and Rosa Maria de Andrade Nery, for whom contracts are of immediate execution, whose performance is performed immediately; of deferred performance, whose performance will take place in the future, at which time the obligation will be extinguished; or it may also be of successive execution (or successive treatment) where it is periodically renewed with the fulfillment of the obligations contracted and successively fulfilled (NERY, NERY, 2019).

In the Civil Code, published in the Official Gazette of the Union of Rio de Janeiro on January 10, 2002, which establishes Law No. 10,406, it says:

Article 458. If the contract is random, because it concerns future things or facts, whose risk of non-existence one of the contracting parties assumes, the other will have the right to receive in full what was promised to him, provided that there has been no intent or fault on his part, even if none of the agreement exists.

Article 459. If it is random, because future things are the object of it, and the purchaser takes the risk of any quantity existing, the seller will also be entitled to the entire price, provided that there has been no fault on his part, even if the thing comes to exist in a quantity lower than expected. Sole Paragraph. But if nothing of the thing comes into existence, there will be no alienation, and the seller will refund the price received.

Article 460. If the contract is random, because it refers to existing things, but exposed to risk, assumed by the purchaser, the seller will also be entitled to the entire price, even if the thing no longer existed, in part, or in full, on the day of the contract.

Article 461. The random sale referred to in the preceding article may be annulled as intentional by the injured party, if it proves that the other contracting party was not unaware of the consummation of the risk, to which the object was considered exposed in the contract.

On the one hand, it is possible to see its categorization under the cloak of compensation for material damages, specifically the subspecies of loss of profit, thus conceptualized as the increase in assets not earned due to an unlawful act committed, that is, an indirect loss generated by a reflection of the main damage, in this case, the breach of contract. José de Aguiar Dias explains the loss of profit as follows:

The damage must be certain, it is an essential rule of reparation. With this, it is established that the hypothetical damage does not justify reparation. As a rule, the effects of the harmful act affect the current assets, whose reduction it entails. It may happen, however, that these effects are produced in relation to the future fact, preventing or reducing the patrimonial benefit to be granted to the victim. (…) The *loss that the creditor derives from the culpable delay in fulfilling the obligation, when the non-existence of the object of the payment due in his assets protects him from certain profits,* has already constituted a lucrum cessans.

Stoco (2013) points out that it is about the frustration of reflex and future gain:

Loss of profit, therefore, is the expression used to distinguish the profits of which we were deprived, and which should have come to our assets, but which did not come due to impediment, that is, from a fact or act that happened independently of our will (or against our will). They are, therefore, the gains that were certain or proper to our right, which were frustrated by the act of another or the fact of another.

Thus, it can be seen that in the loss of profit there is the interruption of a causal chain, in which the next fact (profit) ceases to occur due to a previous fact, which may be a contractual or non-contractual unlawful act. The expected gain or advantage does not occur because there was the practice of an unlawful act, in this case, the breach of contract. It acts as compensation for the loss of the expected gain or the frustration of the expectation of future profit, having as a direct and immediate cause, in this case, the non-compliance with the contract by the rural producer (art. 402, of the Civil Code). By way of illustration, the Administrative Council of Tax Appeals – CARF, of the Ministry of Economy, conferred this nature to insert it in the COFINS calculation basis.

On the other hand, in obligation law, penal clauses are reserved the sanctioning function, of a conventional penalty, or compensatory for the damages caused when the provision is non-complied with. This is because "the greater the instabilities of an economy, and the stronger the crises that plague peoples, or the less evolved the moral conscience of people, generally the more the default of obligations grows, giving rise to mechanisms for the defense and protection of rights and credits".

In this context, the penalty clause has become one of the main responses of the contractual liability system to the problem of contractual non-performance, by offering the contracting parties an accessory clause that is part of the legal transaction with a dual role, punishing the contracting party who has incurred in default (punitive clause) or previously fixing the losses and damages (compensatory penalty clause). Limongi França (2007), in turn, presents a triple function to penalty clauses:

We consider that its nature has a threefold feature, corresponding to the three functions that it ordinarily, and simultaneously, exercises in relation to the legal acts to which it is adjected. It does not constitute only a reinforcement of the obligation, nor only a pre-assessment of the damages, even if

exceptionally, only a penalty. It is clothed together with these three features. It is reinforcement, because it effectively assumes the character of a guarantee of the main obligation. It is a pre-assessment of the damages because its payment is compulsory, regardless of proof of the damage caused by non-performance or inadequate performance. And even if there is no loss, the payment is due. And, finally, it is a penalty, in the broad sense of the term (but no less technical), because it means a punishment, inflicted on the one who transgresses the contractual order and, as a consequence, the legal order itself.

When comparing the two institutes, it is found that the *washout clause* is a penalty clause and not an indemnity for loss of profits. This is because the loss of profits refers to an indemnity that will replace an equity increase that will not be incorporated in the future, because the main installment was not fulfilled. This loss of the expected gain must be a reflection of the default, and not the delay of the rural producer's provision in itself, that is, the non-delivery of the harvest. When the rural producer refuses to fulfill his installment (deliver the soybeans), with willful default, there is a loss of assets of the buyer who did not receive his own installment, although he has fulfilled his, and there is no immediate concern about another future equity situation, only reflex or indirect, covered by the loss of profit. However, this does not prevent the purchaser of the crop from seeking satisfaction of the obligation, with specific relief, and, at the same time, losses and damages, including loss of profits, as authorized by article 389 of the Civil Code.

In the crop delivery contract, the penalty clause becomes the means used by the parties to punish the rural producer for failing to comply with his provision, and can be set as a moratorium, where the buyer of the crop demands the fine and the main installment (delivery of soybeans); or compensatory, when the purchaser waives the main obligation and receives only the fine, which will serve as losses and damages. In both cases, it is ancillary to the main obligation. It has no relationship of similarity with loss of profits, because they are ontologically and functionally different. While the loss of profits is concerned with the future effects on the acquirer's patrimonial sphere, the penalty clause is present and integral to the main provision, in this case, the delivery of the harvest.

Therefore, the functionality of the *washout clause* is to punish the rural producer because he did not comply with the agreed provision in the purchase and sale, that is, to deliver the soybeans at a future date, which is why it has the legal nature of an obligatory penalty clause, whose normative treatment is found between arts. 408 to 416, of the Civil Code. Random contracts and the price in dollars: a confusing relationship.

In the interpretation of contracts, one coexists with the theories of will and declaration, where, through the former, one seeks to investigate the real will of people, regardless of the declaration, while for the latter the exteriorization of the will predominates, not as it was constituted in the psychophysical world of the agent, but as known in the psychosocial world in which it manifested itself. Thus, the Civil Code accepted the theory of will, and the contract must be interpreted in its context, analyzing its object, which is why it is essential to correctly categorize the future harvest contract to understand whether it will be afflicted by the dollar exchange rate.

The contract for future delivery of soybeans was not unknown to the legal operator, but only recently these contracts were faced with future and uncertain conjectures, capable of causing profound changes in the services of the contracting parties, due to new risks arising from a globalized society. Aspects related to fertilizer shortages, water crises, climate change, stock exchange prices, customs tariffs, international agreements, foreign policies, and agricultural subsidies began to act directly on contracts, with beneficial or detrimental consequences for those involved.

All contractual relationships bring in their essence the element of luck, because they may be affected by external and strange factors, not agreed, which may alter or make unfeasible the execution of what was agreed. As an example, this occurred with service contracts in the tourist area, with the advent of the Covid-19 pandemic, which made it impossible to execute business.

The well-known classification of the contract between commutative or random is related to the existence or extent of the provision of one of the contracting parties at the time of the conclusion of the deal, provided that it is expressed. In general terms, if all the benefits are certain, it will be commutative; however, if one of them is uncertain, it will be random. The doctrine explains that "the contract is random when it is known, in advance, that only one of the contracting parties tends to have an advantage; the other runs the risk of losing"; in this type, there is an expectation of the occurrence or not of an uncertain event, and "what matters is that it is not known to the parties at the time of the execution of the contract"; or even, "in random contracts, at least one of the installments is uncertain as to the enforceability of the thing or fact, or even its value, demanding a future and uncertain event that will depend on chance".

Luck or bad luck, considered as social phenomena, do not transform legal transactions into random ones, because the risk of the existence or not of the thing – or its quantity – must be expressly assumed, under penalty of loss of economic and social utility of any and all contractual relationships. In random contracts, the performance of one or both parties is uncertain, or unlikely as to its amount or extent, because it depends on a future and unforeseeable fact. From this it follows as natural a loss or a profit for one of the parties. The very

meaning of the word leads to uncertainty, as it comes from *alea*, which means luck, danger, bad luck, and uncertainty arises for one or both parties in the reciprocity of benefits and considerations. There is the unpredictability of a future event, which can bring gain or loss. Therefore, the uncertainty of the result is a characterizing element.

Random agreements may have as their object the certain, but doubtful, thing, if and when it will occur (e.g., insurance contract); the future thing, subject to not appearing (e.g., purchase and sale of future harvest); and an existing thing, but exposed to risk (e.g., purchase and sale of litigious goods). The random contract is formed with doubt and uncertainty of the occurrence of the fact provided for in the contract, from the perspective of any of the contracting parties. As an example, in the insurance contract the insured has a certain performance (premium), while the insurer is not sure of its performance (indemnity), which is under the condition that a claim occurs.

This dogmatic delimitation was stamped in the Civil Code, which dedicated Section VII (Random Contracts), of Chapter I (General Provisions), of Title V (Contracts in General), among arts. 458 to 461, to regulate random contracts. Thus, article 458 provides that the random contract concerns future things and facts that may not occur; article 459 provides for a future object, establishing liability for the non-existence of the thing and concurrence with fault; article 460 deals with existing things exposed to risks, that is, whose contract has as its object an asset that may no longer exist; and article 461 deals with liability in the preceding case, if there is intent by the party in the loss of the object.

Specifically for the purchase and sale contract, there was a special provision for the law for this type of contract in article 483 of the Civil Code, which establishes that once the delivery of a future thing is agreed, the contract will be void if it does not exist, unless the parties agreed that it was a random contract. Thus, it can be seen that the element of luck is restricted to the seller's performance, and not the buyer's. Based on this normative delimitation, the contracts for the delivery of future harvest may or may not be entered into with a random nature, due to the assumption of uncertainty in the provision of the rural producer (seller) in delivering the soybeans (thing), and not due to the fluctuation of the dollar that occurred after the price to be paid by the buyer is fixed. Thus, for example, the parties may agree on the acquisition of a crop by inserting a clause that the price will be due by the buyer, regardless of whether or not there is a harvest by the seller-producer. They may also establish that the price will only be due if there is a harvest, even if in a different quantity than expected.

It is understood, therefore, that the random nature of the purchase and sale contract is placed in the plan of the seller's provision, in this case, the rural producer, since the provision of paying a certain amount by the buyer of the soybean is defined and known at the time of the agreement, with commutativity in the obligation, because the contracting parties fixed the price before tradition, so much so that the denomination of this benefit brings, in its core, the expression 'certain', according to article 481, of the Civil Code, with no doubt or uncertainty about the existence of the benefit (money) and its amount (value).

The economic, social and environmental factors, which are capable of interfering in the delivery of soybeans by the rural producer, with the risk of the existence or not of the good, have no relationship with the buyer's willingness to pay the right amount, even if linked to the dollar and related to the financial basis of the contract. The alley (luck) linked to the future delivery of soybeans, therefore part of the legal transaction, is not to be confused with factual situations external to the contract that, apparently, interfere in its economic aspect, but which, in fact, consist of phenomena indifferent to the legal transaction.

The fixing of the price of a bag of soybeans in dollars, at the price at the time of signing the contract, does not convert this obligation into random, even if the dollar oscillates upwards in the future, at the time of tradition. This is because the fate of the installment is from the perspective of the existence or not of the good that will be delivered by the seller. The market disturbance of the appreciation of the dollar is placed on another plane, completely outside the legal business entered into, and is not, therefore, a problem or an endogenous issue of the contract. As an example, it is as if in a purchase and sale of a residential property the seller received the price at the signing of the contract, but demanded, at the time of future delivery, a monetary complement because in the time interregnum between the expressed will and the deed of the property the asset appreciated for any reason.

Therefore, in the contract for the delivery of a future soybean crop, whose price was agreed upon in a fixed term, that is, at a certain time in time, it takes on a commutative aspect from the perspective of the financial provision, at the expense of the buyer. The future appreciation of the dollar does not have the power to change the economic and financial bases of the contract, because the buyer's provision was established at the conclusion of the deal, and the *washout* clause must apply to punish the rural producer who willfully defaults on the deal.

Therefore, the hermeneutic effort employed by the Superior Court of Justice to justify that the fluctuation of the price of the dollar, in these cases, would be an external risk, but predictable and inherent to the contract, becomes unnecessary, since it does not transmute the commutative contract into a random one.

849.228 the Court reinforced the principles of autonomy of will and binding force, and rejected state intervention in the contract. The rapporteur, Justice Antônio Carlos Ferreira, stated that "the exchange rate variation that changed the price of soybeans did not constitute an extraordinary and unpredictable event, because both contracting parties know the market in which they operate, as they are professionals in the field and know that such fluctuations are possible".

It so happens that, as demonstrated, the fixing of the price in dollars does not transform the legal transaction of delivery of future harvest into a kind of random contract, maintaining the commutativity of the installment, without the external fact (exchange rate appreciation) interfering in the business entered into.

Economic freedom and private autonomy

In future crop delivery contracts, the *washout* clause is valid, without elements that justify its review, because it is framed by constitutional freedom and State protection of the autonomy of private will, conceptualized as follows:

The concept of freedom to contract encompasses the powers of self-governing interests, free discussion of contractual conditions and, finally, the choice of the type of contract convenient to the performance of the will. It manifests, therefore, under three aspects: a) freedom to contract itself; b) freedom to stipulate the contract; c) freedom to determine the content of the contract.

Despite the doctrinal reflection according to which there are other levels of understanding of legal transactions, especially in the aspect of justice in contractual matters, which would justify the mitigation of the principle of autonomy of will as placed in liberalism to add commutativity or equivalence of provision, the freedom of economic initiative, in the constitutional historical process, was confirmed in article 170, caput, of the Federal Constitution.

There is no doubt that this liberal conception has undergone abrupt changes throughout history due to mass contracts and the standardization of relations. In the timeline, the Law offered everything from the protection of individual freedoms, through contractual commutativity, to predictability in social relations, with legal certainty as an equal value. But revisionist theories and contractual dilemmas presuppose contractual imbalance, with protection of the vulnerable or the hyposufficient, which, apparently, does not occur, because the rural producer, in this situation, is not protected by the Land Statute (Law No. 4,504/1964).

In view of the prospects of contractual revisions, promoted by the legislation, Law No. 13,874/2019 – known as the Economic Freedom Law – was enacted, which inserted article 421-A into the Civil Code, in an attempt to pave the way for classical liberalism, unrelated to contractual dirigisme. The new article 421-A established that civil and business contracts are presumed to be equal and symmetrical, until the presence of concrete elements that justify the removal of this presumption are proven, except for the regimes of special laws, such as the Land Statute (Law No. 4,504/1964 and Decree No. 59,566/1966) and the Consumer Protection Code (Law No. 8,078/1990). It also determined that the parties may establish parameters for the interpretation of the clauses; whereas the defined risks must be respected and observed; and the review will only occur in an exceptional and limited way.

The normative adequacy of the contract for the delivery of future soybean crops to the provisions of article 421-A of the Civil Code, mentioned above, involves identifying the model that serves as its ideological support, since each economic order expresses a respective normative system that supports it. The applicability of the rule that encloses the principle of freedom to contract as a rule and, consequently, its intangibility, involves realizing that, although not yet specifically categorized, the business that involves agents who enter into contracts for the delivery of future harvest with price fixing in dollars, externalizes, in principle, a business activity, because it is economically organized for the production of goods, in a professionalized way and with an economic purpose, bringing it closer to Business Law.

But it must be understood that this new normative construction, reinforcement of the constitutionally protected freedom to contract, came to meet the organic phenomenon that occurred in Brazilian agribusiness, marked by globalized contractual relations, with integrated world markets, trading on the stock exchange and participation of *trading companies*. It was not only the new contracts that mirrored this reality, their clauses became equally intricate.

In this normative context, item II, of article 421-A, of the Civil Code, established the intangibility of the contract when the parties insert defined risks, showing, in principle, that it is of great use to protect the future delivery contract against the appreciation of the dollar that occurred between the signing of the deal and the tradition of the harvest. By this new provision, factors exogenous to the contractual relationship – such as the oscillation of the dollar – which are capable of changing its economic bases, may be repelled by the contracting parties, without the application of the theories of unpredictability, excessive burdensomeness or the objective basis of the legal transaction, and the expressed will must be respected and observed.

However, the misunderstanding between risk, alea, future harvest and exchange rate fluctuation leads the interpreter to invoke the above provision and, mistakenly, a contrario *sensu,* interpret it in the sense that if the parties did not expressly foresee the appreciation of the dollar, the rural producer will be authorized to seek

this monetary supplementation. It so happens that in the future harvest contract, whose installment of the buyer was defined immediately, with the payment of the price at the signing of the contract, the appreciation of the US currency is a fact alien and external to the contractual relationship, not benefiting or harming anyone, because, from the perspective of this contract, it is a non-legal fact.

Therefore, future harvest contracts, with price fixing in dollars, in the context of agribusiness, are business contracts, covered by article 421-A, of the Civil Code, with presumption of parity and symmetry, without legal authorization for judicial review to occur, given objective parameters for the interpretation of the negotiation clauses and their review or resolution assumptions that, Based on the autonomy of will, it is unnecessary to insert a contractual clause to exempt the parties from responsibility for the exchange rate appreciation of the dollar.

IV. Conclusion

Brazilian contract law has undergone a profound transformation in relation to agribusiness activity, especially from the 1990s onwards, when rural contracts faced an economic-technological expansion. The temporal adjustment between this economic activity, which has come to occupy an important role in the Brazilian gross domestic product, and the underlying contractual relations occur slowly and gradually, having to adapt to its complexities, which include trading on the stock exchange, fixing the price in foreign currency and the imposition of customs tariffs, for instance.

Contracts for the delivery of future crops, in rural areas, are governed by article 483 of the Civil Code, which authorizes, provided that there is an express manifestation of will, the insertion of the element of risk of the good coming into existence or not, without withdrawing the buyer's service. With this, the contract is changed from commutative, where the installments are defined, to random, where one of the installments is uncertain or undefined.

From the moment soybeans started to be traded on the commodity and futures exchange, with its price fixed in dollars, it was identified that in some seasons the price paid by the buyer, at the time of the celebration, was inferred from the price obtained at the time of delivery by the producer. This economic deficit, with the appreciation of the asset, led the market to set a contractual clause to avoid willful default by the rural producer.

In this way, the washout clause has become an integral element of the obligation arising from the future purchase and sale, with the objective of avoiding contractual delay by the rural producer, assuming the nature of a penalty clause and not loss of profit. This is because the loss of profits indemnifies the contractor since he no longer receives a future patrimonial advantage due to the contractual offense, which is not the case; while the penalty clause acts as an accessory to the main obligation to punish and/or compensate the purchaser who did not receive the installment due by the rural producer. Therefore, faced with the risk of default by the rural producer, the market forged the washout clause to impose on the seller a fine corresponding to the difference between the value of the contracted crop and its price on delivery.

As stated above, future crop delivery contracts can be understood as random contracts, provided that the luck is related to the existence or not of the crop to be harvested by the rural producer, according to article 483 of the Civil Code, and this risk has been expressly assumed by the contracting parties. Therefore, from the perspective of the provision of the purchaser of the crop, who pays the corresponding price, there is no random nature, taking care of an evident commutative provision. Even if the value of soybeans fluctuates upwards, due to the appreciation of the dollar, this exchange rate change is a fact external to the contractual relationship, which is not capable of interfering or altering the economic and financial bases of the legal business. Therefore, the provision of the buyer of the soybeans cannot be altered by the mere appreciation of the dollar at the time of delivery, taking care of a fact exogenous to the contract.

If there is a provision for the washout clause, the parties will be protected by the principle of autonomy of will, reinforced by article 421-A, of the Civil Code, which reaffirmed the commitment of civil law to classical liberalism and moved away from contractual dirigisme, with the exception of the application of special laws, which does not occur in this case. Thus, there is a presumption of parity and symmetry between civil and business contracts, among which agribusiness contracts are included, when there are globalized contractual relationships.

Therefore, the washout clause cannot be protected with contractual dirigisme, since it is placed in a presumably equal private business relationship, inserted in the international market, with prices fixed on the stock exchange and whose fluctuation of the dollar does not interfere with the agreed deal. The insertion of agribusiness in a global chain, the legal limits on contractual dirigisme and the risks assumed validate the washout clause.

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