

Research Article

Contractual Behavior Between Contract and Context

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Abstract

A contract can only be fully understood - in terms of its formation, obligations, interpretation, and execution - when analyzed within the context in which it operates, and the conduct adopted by the parties involved. Beyond its legal framework, a contract embodies social, economic, and even cultural dimensions that influence its meaning and practical application. It is not merely a legal document, but a dynamic instrument shaped by the environment in which it is created and performed. This paper explores the foundations of a General Theory of Contracts through the lens of contextual legal reasoning. It argues that contracts should not be interpreted in isolation but rather considering the broader circumstances surrounding their negotiation and execution. A contextualized understanding of contractual relationships is essential to accurately define the obligations undertaken by each party and to assess the legitimacy of their expectations. Starting from the premise that the market constitutes the primary context of contractual relations, the analysis focuses on how markets are formed and sustained through the interaction of various factors - including trust, predictability, economic rationality, and institutional stability. These elements are not external to the contract; they are embedded in their logic and structure. The paper then examines the rationality behind the parties' behavior, recognizing that such behavior is influenced not only by legal norms but also by strategic and economic considerations. The emergence and scope of contractual obligations are shaped by this behavioral context, which determines when obligations arise and what they entail. Ultimately, the contractual context provides the interpretive framework necessary to understand not only what was agreed upon, but also why and how the agreement was reached. A contextual approach offers a more realistic and effective method for interpreting and applying contracts, aligning legal analysis with the complexities of real-world transactions.

Keywords

Contractual Law, Contextual Legal Reasoning, Context, Circumstances, Conduct, Contracts

1. Introduction

“A contract creates a special form of association between people. Unlike many forms of human relationships such as kinship, friendship, or membership of a community, contracts in all their variety share the qualities of voluntariness and boundedness” [1]. Nevertheless, contracts are “embedded in conventions, norms, mutual assumptions and unarticulated expectations” [1].

These statements, although they may seem straightforward,

carry an inherent complexity. The idea embodied in such statements reveals that a contract, or a contractual relationship, can only be understood thoroughly and integrally - in terms of closing, obligations, interpretation, execution - from the context in which it is inserted and the behavior adopted by the parties. In addition to legal content, it also includes social and economic content.

An example helps to better understand the importance of

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the context of the relationship in determining the type of relationship which one enters, and the obligations assumed by each party. When a person orders a cup of coffee in a coffee shop, the meaning of this conduct and that of the person selling the coffee depends on shared implicit understandings: the intention to exchange a cup of coffee for money can only be understood in the context in which these conducts are carried out.

New contexts bring about new (and different) expectations: if we ask a friend for coffee at their place, this conduct does not generate an expectation of payment, nor that the “service” provided or that the coffee beans offered are of high quality, nor that the coffee is served in a thermal cup. In other words, only within the context in which the relationship is inserted can the parties not only comply with the explicit aspects of the relationship (the cup of coffee in exchange for payment in cash), but also seek that the result of the operation generates other benefits to the parties (that the acquirer has a positive experience and starts to make regular purchases in that place, as well as begin to recommend it in their relationship circles) [1].

From this example, which has also been seen in Brazilian Law [2, 3] and follows the same line of reasoning as one long established in German Law [4], Collins demonstrates that a contract cannot be understood in an eventful way, i.e., as a voluntary and punctual human association, which fully describes the obligations of parties isolated from each other. The simple purchase of apples by a consumer in a street market requires an understanding of a particular context, while the elaboration of a joint venture agreement between companies to design and manufacture an advanced technology fighter aircraft involves an understanding of another specific context [5].

To reinforce this understanding, one may recall the teaching of Antonio Junqueira de Azevedo in Brazil, who, paraphrasing Ortega y Gasset, stated that “the legal transaction [negócio jurídico] is the legal transaction [negócio jurídico] and all its circumstances” [6].

Collins is an author who analyzes the law in action, not the law in the books; an author who seeks to understand “what is the contract for?”, and not “what is the contract?” - as did authors such as Stewart Macaulay [7] and Ian Macneil [7]. Collins is an author who critically reflects on the law and proposes a new legal model for contracts, as a result of moving beyond the so-called “Classic Contract Law”, understood as those “elegant doctrinal constructions of nineteenth-century jurists and judges” [9-11], inadequate for allowing the understanding of contracts as decontextualized associations between individuals.

For Collins, the notion of contract must necessarily be integrated into its context, as contracts always work in specific contexts: “contracts always function in particular social contexts” [5]. And it is precisely the diversity of contexts that influences the meaning of contractual relations. How does the context influence the closing of a contract and the obligations

assumed by the parties? How does the context impact the incidence of the rules of the General Theory of Obligations and the General Theory of Contracts on contractual relations concretely considered? History has taught legal scholars to read a written contract; however, the need to learn to read and understand the context of the contractual relationship has long been highlighted.

I do not intend to present a single or definitive answer to these questions. What I do intend to analyze are some contributions of how Contract Theory can develop techniques and processes to give legal meaning to context and conventions that surround the practice of closing contracts [1]. To this end, two more general questions can be addressed: first, what is the context of the contract? Second, what is its influence on the rationality of the parties' behavior? These questions guide this study, which is thus divided into two parts: one aimed at analyzing the context of the contract; the other, at analyzing the behavior of the parties.

To address these questions, I will draw on Anglo-American legal scholarship – in which the tradition of Law & Society is more strongly rooted, especially the studies of Collins, while also referring to Brazilian Law and legal scholarship perspectives on the proposed topics. My aim is to present different views on contractual theory that may prove useful and that may challenge existing understandings within Brazilian law, based on the premise that the problem analyzed is common and uniform to contractual theory. In other words, I follow the teachings of Gordley [12], for whom there would no longer be so many differences between civil law and common law in Contract law.

The presentation of this panorama will allow, in future studies, a better understanding of the importance of the context of the contractual relationship in the delimitation of the emergence, content, interpretation, and execution of obligations.

This paper does not merely synthesize existing theories; it aims to advance a normative understanding of contractual behavior by proposing a framework that integrates context and conduct as co-constitutive elements of contractual obligations. By doing so, it seeks to contribute to the development of a more dynamic and socially embedded theory of contracts, particularly relevant to Brazilian legal scholarship. This is why, methodologically, this study adopts a socio-legal approach rooted in the Law & Society tradition. It combines doctrinal analysis with insights from empirical legal studies and comparative law, aiming to bridge theoretical reflection with practical relevance. The use of illustrative examples and interdisciplinary references supports a contextual reading of contracts that transcends formalist boundaries.

2. The Market as a Contract Context

In analyzing Contract Law, Collins assumes that the market is the context of the contract [13], an idea that has also been supported by different authors in different legal systems

[14-16]. Contracts, as the main instrument of exchange and circulation of wealth - true “formal legal garment of economic operations” [17] - represent a factor that constitutes and defines the market, the place where economic goods and services are exchanged [18].

“Market” is a polysemic term, whose meaning varies depending on the circumstances [19, 20]. In addition to being considered an ‘arena of exchange’ (that is, the market encompasses the relationships between the agents operating within it and the outcomes of those interactions), the market is also and simultaneously a social institution (being a product of history, considered in view of the implementation of public policies aimed at redistributing wealth), a political institution (regulating power structures and the prevalence of specific interests), and a legal institution [21].

The idea of a market as a legal institution represents a legal order characterized by normality (being in accordance with the norm), uniformity (recurrence and constancy), and regularity (predictability). In addition to a static and descriptive framework, through which these characteristics inform the being of certain human behaviors in each situation, they also indicate a dynamic and normative framework, enunciating a duty to be or a criterion for judging future behaviors [22]. The market, therefore, regulates behaviors subject to legal and social acceptance [19, 20].

The ideas above were developed based on Brazilian legal scholarship. However, they are very similar to those put forward by Collins. According to this scholar, the economic operations that take place in the market can be analyzed from at least four perspectives: the economic one (how do these operations generate wealth?); the sociological one (is there a pattern of behavior of the parties acting in this context?); the moral one (is the system fair?); and legal one (how should these operations be regulated?). The objective of the legal perspective is largely achieved through Contract Law [13].

To this end, Contract Law must contain a set of legal concepts used simultaneously in the analysis of market operations to then regulate the conduct of the parties. When analyzing market practices, Contract Law must allow the determination of the moment when the parties enter contractual relationships and the moment when obligations arise regarding future behavior to be adopted by the parties to the relationship [13]. This idea is also consistent with Ribeiro’s notion, according to whom freedom of contract should be understood not only as an expression of the parties’ self-determination, but also as a principle for organizing the market economy, or, alternatively, as a principle for coordinating the plans and decisions of agents who act freely within the market [23].

This, however, is probably not enough. Contractual discipline must also be in constant interaction with the other perspectives - an arduous task, given that each perspective tends to operate in its own closed system, but a necessary task, because the understanding of the contractual relationship depends on a vast number of variables: communication, cooperation, normative standards, and shared expectations

[24]. Thus, there is a real need for coordination and conciliation of these perspectives. If the Law has the task of sustaining market transactions, these conventional and implicit understandings cannot be ignored when one applies legal rules [5]. In the absence of this interaction, one faces Teubner’s “trilemma”: legal rules may have no impact on social life, or they may subvert the system (imposing unfeasible practices), or the Law will lose its coherence when trying to include sociological and economic perspectives in its reasoning [13].

An interesting parallel can be drawn with the ideas presented by Ribeiro, who indicates the existence of three different plans for the construction of the “contract system”: the “interaction plan” between the parties; the “institution plan” in which, at an intermediate level, institutional connections are at stake, namely with the market, and the “society plan”, in which the requirements that the social system, as a whole, or some partial systems (with emphasis on the legal system) place on the contract are thematized. Each plan indicates a prevailing direction of meaning that requires a reflective integration of the other functional dimensions and their conforming principles: “given the reciprocal interferences, and the distinct, sometimes contradictory, rationalities that inspire them, the problem of contract theory is basically to coordinate and make compatible in coherent ‘expectations structures’ the different stimuli and regulatory guidelines that come from each element” [25].

This is why a contract can be understood as a form of communication system [5], or as a “purpose-oriented communicative activity, meaning that subjects not only ‘act’, but act to communicate” [26]. As such, a contract cannot be understood outside its context, which highlights the questions of how the market is formed and maintained. And, based on the notion of contract as order, the answer would be to build trust between the agents who act there from different elements, such as experience, reputation, different forms of association between people, and the applicability of different types of sanctions in case of breach of that trust. This analysis is important because, although the act of contracting is commonplace [5, 27], every contractual relationship bears with it the risk of breach: each party is always susceptible to the other’s decision not to effectively comply with its obligation [5].

The risk of breach is never fully eliminated in any contractual relationship, since every exchange relationship represents assuming a calculated risk that the probability of profit exceeds the probability of loss arising from breach. Thus, one may question: what is the reason that convinces people to accept this risk and enter contractual relationships? What causes agents to continue contracting in the market? Why have contractual relations become commonplace in contemporary society, to the point of one stating that markets are formed from the prevalence and frequency of contractual relations? [5].

The equation of different factors, which are not necessarily legal ones, can help us answer these questions. These are factors that contribute to the effective calculation of the re-

ferred risk, and it is its equation (presence and combination) that will provide the necessary conditions for the constitution and maintenance of the markets.

The best-known factor is the profit to be obtained through the contract: people enter into contracts only if they believe that the profit to be earned is greater than any losses they may suffer. Or even, “the parties will only contract if they believe that the binding will bring some advantage to themselves” [28].

Two other factors, however, are important for the proper calculation of the risks of the transaction: trust and sanctions. By trust, I mean the situation in which each party believes that the other will act to fulfill its obligations or, then, to try to avoid or minimize any losses arising from the breach; by sanctions, the situation of each party being able, convincingly, to threaten or punish the other in case of breach [5].

2.1. The “Trust” Factor as a Reducer of the Complexity of Relationships

The importance of trust in contractual relations, and more broadly, in commercial relations, has already been emphasized by several prominent legal scholars. For instance, and in a broader sense, Larenz stated that “a society in which everyone distrusts the other would resemble a state of latent war between all, and not peace but discord would dominate. Where trust is lost, human communication remains deeply disturbed” [29]. One can interpret that statement as follows: economic agents hardly engage in contractual relations with those who are not trusted.

Another interesting example is found in the historical research conducted by Atiyah. This scholar identified that, in nineteenth century England, amid urbanization and industrialization, a new order emerged, one that demanded adherence to new norms and standards, alongside the rise of individualist ideals. Among these new norms and standards, one can highlight the ideal of self-discipline – “the self-imposed restraint on the urge to immediate pleasures” [30] – and one of its most important forms, promise-keeping: “a man who kept his promises, and paid his debts, became known as a trustworthy person. This was to his advantage because it meant that when he required the co-operation of another which involved that other’s reliance upon him, it would be more likely to be forthcoming” [30].

Trust has several impacts on contractual discipline. Think, for example, of the interests involved in a relationship. Trust implies the necessary existence of divergent interests between the contracting parties. Of course, if people always had the same interests, then it would not be required to analyze this factor: each party would do its best to fulfill its obligations and, consequently, serve its own interests - which would be the same as those of the other party [31]. Talking about cooperative behavior does not mean abandoning the existence of individual interests: “without the possibility, at least, of a divergence of interests between contracting parties, and the risk to one or both of exploitation, the presence or absence of

trust would have little significance” [32].

This idea is well summarized by Burchell and Wilkinson: “every business relationship is therefore by its nature both rivalrous and cooperative. [...] each business relationship, then, has elements of immediate self-interest and of mutuality and reciprocity [...] whatever the parties’ mutual interests and their facilities for progressing them, each retains clear and separate interests of his/her own” [33].

Likewise, trust necessarily presupposes the freedom to contract. This variable presupposes the possibility of decision making in a situation that involves risks - the freedom to contract or not to contract. If the action and its risks are avoidable, then a person is not obliged to enter exchange relations; on the other hand, if there is no choice, the analysis of this factor is unnecessary [31].

The effects of trust are also perceived in the freedom of choice of the contractual partner. First, because if there were no possibility of choosing the contractual partner, there would be no need to invoke the trust factor to explain the behavior of the contractors. Second, because trust involves believing in the character of the other party. In an interview, an entrepreneur has already warned: “Never sign a contract with someone you don’t trust” [34].

This trust does not stem from moral standards, such as the idea that promises must be kept, but rather arises from the relationship between the parties: to trust means to believe in the character of the other party. And this belief may result either due to past relationships between the parties or due to other social interactions that allow one to assess and become familiar with the reputation of potential contractual partners [5]. There is a greater weight for hiring with those who have had some positive experience in the past - “reputation is important but no substitute for experience” [31] – or with people with whom some social interaction is shared, such as degree of kinship, friendship, affiliation to the same association, or the same ethnic group [5].

Two examples may illustrate these considerations well. The first example has to do with the notion of promise - the act of promising to act in a certain way - as a factor of trust. In a market in which behavior is stable, the fulfillment of promises makes the context a vital means of demonstrating the reliability of the subjects who work there: “the main means of creating trust in the other is in the very exercise of acts of private autonomy, considering that making promises implies recognizing the other as a person and committing oneself ethically and morally to him” [2].

The second example concerns trust encouraged by an institutional environment. Consider the well-known case of the diamond market in New York: in this market, agents know that a handshake accompanied by specific words creates a binding agreement, allowing traders to trust each other in these situations [35, 37].

For these reasons, it has already been argued that the choice of the contractual partner “is the first step towards the success of the contract” [36], and that trust “acts as a cost reduction

factor in economic transactions, as it saves the contractors from greater expenses in the selection of their commercial partners” [36].

Another effect of the trust factor refers to overcoming the vulnerability of the offeror, the one who takes the initiative to contract (first mover). The presence of this factor encourages the parties to consider the breach as low risk and to focus on the economic benefits projected by the contract [5]. An example of this is the franchise contract, in which, typically, the franchisor obtains from the franchisee an important capital investment, which can be lost by the abrupt termination of the contract: the existence of trust between the parties can mitigate this vulnerability [5].

Finally, trust enables the reduction of operational costs associated with the need to specify, in detail, the exact content of the obligations of each party, as well as to monitor the fulfillment of these obligations by the contractual partner [37].

Therefore, trust reduces the complexity and costs associated with the contractual relationship, which is its function in encouraging the execution of contracts. Consequently, the statement is confirmed that there is a movement of return “to the forms of relationship practiced in the past is confirmed, with reference to a more moralistic conception of commercial law, a greater emphasis on the requirement to keep the given word” [37]. In this sense, it is worth remembering Gordley's lesson [38] regarding the origins of the purchase and sale contract: in pre-commercial societies, the exchange of goods often did not depend on legal sanctions due to the existing trust between the parties. This did not mean, as could be said, that people would be innocent; in fact, to ensure trust, exchanges were not made with anyone, but with someone with whom one had a long-term relationship. Failure to comply with obligations would result in the termination of new agreements, and the breaching party could have difficulties in establishing new relationships. The exchanges existing in these relations had two of the three characteristics of the later Roman purchase and sale: acting in good faith and the transaction entered without formalities.

2.2. The “Sanctions” Factor as a Maintainer of the Order

The example of buying and selling in pre-commercial societies, analyzed by Gordley, mentions not only the trust factor but also the sanction factor. Unlike the other, it tends to increase the complexity of the contractual relationship by requiring the construction of a credible threat to prevent breach: the sanction cannot be so lenient as not to threaten the party with the risks arising from the breach, nor so severe as to dissuade the parties from exercising the freedom to contract [13].

Different mechanisms encourage the performance of obligations, or, more precisely, discourage the breach of obligations. These mechanisms - for Collins, the “sanctions” [5] -

can have a nature that is legal, non-legal, and of security. Their study is important for legal systems that honor the protection of credit - such as Brazilian law, in which it has long been warned that the obligatory relationship must be examined “as something that chains and unfolds towards the performance, that is, the satisfaction of the creditor's interests. [...] The performance attracts and polarizes the obligation. It is its end” [39].

Legal sanctions arise from a Court order for a party to comply with its obligation, under penalty of some punishment, or to pay compensation for the breach. Brazilian law provides for a series of legal sanctions in the event of breach of contract: losses and damages; compensation for damages resulting from default; penalty clause; retention of down payment. Moreover, in the case of granting a provisional remedy, a judge may order the measures deemed necessary in order to enforce it; in the event of an award, the debt will be increased by a fine of ten percent and attorney's fees of ten to twenty percent in the event of no voluntary payment within fifteen days; in the case of conviction to the obligation to do or not to do, the judge may determine the measures required for the satisfaction of the judgement creditor in order to realize the specific remedy or to obtain relief from the equivalent practical result, among other sanctions provided for in the legal system.

However, it is possible to question the effectiveness of legal sanctions, as they depend on external factors, such as the costs for filing a lawsuit (judicial or arbitral) and the (im)predictability of their imposition by the Court [5]. In Brazilian law, it has already been stated that “the fear of losses from future lawsuits markedly influences the present behavior of the parties, casting a ‘shadow for the future’. [...] Economic agents are aware that the path to obtaining a judicial or arbitral decision is usually long and costly” [36].

The need to protect the parties against breach led to the gradual development of the substantive rules of Contract Law and, at the same time, created the parties' claim to obtain legal protection. This decisively influenced the ability of the contracting parties to close a contract and to determine its content. However, it should be noted that the contract does not always require state intervention to impose sanctions; sometimes, a social or economic coercion can be more effective [40]. There is room for the so-called “non-legal sanctions”.

This type of sanction does not require a court or arbitral order. The refusal to contract again and damage to reputation from the disclosure of breach in the market can cause significant economic harm to the breaching party. Betti had already referred to this mechanism by arguing that, socially, the self-regulation of the contract is considered binding by the parties even before it is endowed with lawfulness. Thus, breach is accompanied, in social life, by more or less forceful and safe sanctions, some of a specific nature (retaliation and self-protection measures) and others more generic (loss or reduction of social credit, with impossibility or difficulty of

closing new deals in the market) [41].

These measures, in the first place, result in the sacrifice of the benefit projected by the relationship: in case of breach, for example, the franchisor may revoke the franchisee's right to use the trademark, or a bank may withdraw the credit line of a small company. Second, damage to reputation and image among market participants, thereby missing opportunities for future exchanges. And, thirdly, psychological damage, such as loss of self-esteem and a feeling of guilt [42].

Non-legal sanctions, therefore, represent a removal of the possibility of entering into new operations in the future. In Macaulay's precise synthesis, "the risk of losing the relationship usually is a powerful sanction" [43].

Finally, security sanctions are built from legal rules that do not necessarily require a court order to be imposed. An example of this is the pledge, in which a loan of a certain amount of money is made in exchange for the direct possession of a particular asset. This transfer of direct possession of the asset aims to ensure satisfaction of the debt: if the loan is not paid, the pledgee may keep or sell the asset as a form of payment.

Despite the differences between civil law and common law legal systems, it is undeniable that practice is the true driving force behind the creation of new mechanisms to safeguard creditor risks. New mechanisms are continuously developed to address these risks, as the law is, in general, driven by practical need [26]. The complexity of society and the wide variety of transactions bring with them new risks for creditors; new risks call for new forms of security. The context in which relationships are developed makes it possible for these new securities to emerge.

These considerations allow us to reach some conclusions. The trust factor appears to ensure more robust fundamentals for market construction, as it acts on both sides of the equation to calculate the risks of breach; however, this factor is much more challenging to establish and maintain in market transactions when compared to legal sanctions. Therefore, in practice, legal sanctions provide the second best, and even more prevalent, solution to the risks of default. Also, Contractual Law has a secondary function in building trust between the parties, but it contributes in some way through legal sanctions and security sanction [5].

Naturally, there are those who opposed the understanding mentioned above. For example, Forgioni says that, according to Jacques Ghestin, the reference to trust is useless, since it would be the factors related to the fear of sanctions, and not trust, that would incite cooperation [36]. Collins even acknowledges the existence of currents of thought that support a preponderant role of legal sanctions in the construction of markets, such as the economic analysis of law [5]. However, this does not rule out the merit of demonstrating the importance of the context of the relationship in the search for social norms and conventions that will better characterize the type of relationship developed and, thus, better determine the obligations contracted by the parties.

3. Rationality of Contractual Behavior

The previous section answered the question about what guarantees the execution of contracts today, to the point of one being able to state that the market is formed from the prevalence and frequency of contractual relations, despite the always-present risk of breach. The answer would be to equate different factors, whose presence or absence affects the complexity of the relationship and (dis)encourages, to a greater or lesser extent, the entry into contractual relations.

This analysis does not exhaust - nor does it intend to do so - the study of the behavior of the parties in the contractual relationship. Legal scholarship has already shown that there are several cases in which the parties, especially in long-term relationships, fail to comply with the strict terms of the contracts and no longer use the legal means to request protection of their position, or even modify the obligations established initially in the written contract, without this necessarily determining the end of the relationship or the preparation of a new contractual document [5].

As a result, Collins asks: why would the parties not follow the commitments established in a contract? Why would they not use, in case of non-performance, the legal means to request the fulfillment of the obligations or the reparation for damage suffered? [5] In this second part of the study, I propose a non-exhaustive reflection on these questions.

3.1. Normative Frameworks of Contractual Behavior

The answer to these questions lies in the distinction of three rationalities or normative frameworks that govern the actions of the parties in a contractual relationship. They are the business relation, the economic deal, and the contract. Each framework establishes different standards that guide the behavior of the parties, i.e., each framework "can be described as a closed, self-referential communication systems, which have their distinct 'internal point of view' of the rules and standards which are appropriate to processing information and resolving conflict" [5].

The business relation framework addresses the idea that the contract does not encompass the whole relationship between the parties. There is a social relationship that may precede or even persist after the business operation. This rationality thus tries to comprise the whole relationship between the parties, which may involve contracts, but often consists of consultations, debates, problem solving, or even informal social relations, such as meetings, family or friendship contacts, affiliation to associations and ethnic identity [5].

This relationship establishes a fundamental source of creation and preservation of trust: the conduct of the parties, when analyzed under this rationality, can be interpreted as a demonstration of loyalty or, conversely, infidelity. Therefore, "an important ingredient of this normative context will be the customary standards of trade, for conformity with these

standards and support for their institutional framework will have served to create trust between the parties” [5]. The recognition of the relevance of the uses and customs of the exchange, as well as the individual practices followed by the contracting parties, is an issue related to trust and predictability in the market, since they translate what is uniform, regular, and, therefore, allow expectations to be made objective [19, 20].

In a way, the business relation normative framework is connected to the legal dimension of the market, as the market is composed of legal norms that can be subdivided into exogenous norms (the law) and endogenous norms (customs and trade usages).

Customs and trade usages create behavioral expectations among contracting parties, because it is presumed that the parties will behave according to the usual model, which allows each party to plan their market strategy with a greater degree of certainty [19, 20]. The customs and trade usages require legal practitioners to analyze the context in which the relationship develops, compelling them to conduct an empirical examination, or “to ascertain the spontaneous conception of legality that arises within a given social group, based on the repetition of a particular conduct” [44]. In short: customs and trade usages help to identify what is legitimately expected within a given economic sector, thus being related to a source of trust in the market.

This point is thoroughly analyzed by Collins, for whom Private Law cannot develop in complete isolation from the legal dimension of market practices. That is, “the law could not ignore conventional understandings of when binding commitments have been made, when they have been broken, and where unfair market practices have been deployed” [5]. In civil law systems, this idea is well illustrated by Ribeiro through the expression “materialization of the contract”, which views the contract not as an isolated act, but as a legal relationship embedded within broader economic and social processes [23].

If a legal system is intended to support routine transactions – even those not expressly regulated by statute –, then it must be closely aligned with the expectations conventionally held by the parties. These include, for example, the understanding that the buyer has the right to receive the goods or services once the price has been paid; that if the product is defective, the buyer is entitled to a replacement or a refund; and that a signature at the end of a written document signifies agreement and consent.

As a matter of fact, the recognition that affixing a signature at the end of a document signifies consent and binding agreement to its terms is referred to by Wightman as one example of the implicit dimensions of contracts, specifically, those arising from a shared language and a shared “market mentality”. This mentality encompasses various tacit understandings regarding sale and purchase, private property, modes of performance of obligation, expectations, and interests. These constitute the minimal social institutions neces-

sary for exchange in developed societies. They are general in nature, as they are not specific to any particular type of obligation, but rather are widely understood in societies with long-established market economies [45].

This framework is thus an essential instrument for interpreting contracts, especially long-term ones, as it will determine the practices adopted by the parties throughout their relationship and also the uses of the place where the contractual relationship was entered into and developed. Consequently, there is a significant concern with the protection of the legitimate expectations of the parties.

The second framework refers to the economic agreement, which specifies the reciprocal obligations created by the commercial operation and establishes the economic incentives and non-legal sanctions. Economic rationality implies a calculation between short- and long-term interests, the result of which will influence the contractual behavior of the parties. It is, therefore, an argument about the economic interests of each party, about whether the benefits arising from the performance exceed the costs of breaching and the costs of carrying out alternative operations in the market [5].

The attention each party gives to their own economic interests guarantees a certain predictability regarding the behavior of the counterparty. And it is possible to increase this predictability through non-legal sanctions: in addition to the costs of noncompliance and to carry out alternative operations in the market, the conduct of the parties must also consider the losses arising from a possible reaction by the other party [5].

There is an inherent correlation between this framework and the economic analysis of law, based on efficiency or, more precisely, on wealth maximization, in which contracts are described as an opportunity for parties to optimize their wealth. In this sense, it is possible that one of the parties performs the calculation between short- and long-term interests and realizes that it will have a greater advantage in case of non-compliance with the contract (including after repairing the damage suffered by the other party): this is the hypothesis of efficient breach [46].

According to Collins, the admission of the efficient breach theory by a legal system means that, in certain cases, the legal order should tolerate non-performance as the wealth-maximizing outcome, rather than compelling the performance of the contractual obligation. Furthermore, as previously mentioned, in such cases legal sanctions acquire significant importance, as they serve as the true mechanism to ensure that neither party is left in a worse position as a result of contractual breach. Regardless of its (non) acknowledgment by a particular legal system, it is an aspect that should be highlighted when analyzing the behavior of the parties in a contractual relationship [5, 13].

The third framework consists of the standards established in the contract, to the point of guiding the parties in identifying their related rights and obligations. While the previous frameworks refer to the interaction between the contract and its context, the framework of the contract isolates the opera-

tion from its economic and social context [5].

Each rationale has its own regulatory standards, from which the parties guide their behavior in the contractual relationship. Therefore, a particular conduct may be compatible or rational in relation to one of the frameworks, but incompatible or irrational regarding the others. Think, for example, of the hypothesis of delivery of goods after the agreed deadline [5]. Analyzing the situation from the framework of the business relationship, the creditor may ignore the default to preserve the existing relationship between the parties, or the debtor may adopt some attitude not provided for in the contract to compensate for any damage caused to the creditor, seeking to maintain the trust of the parties and to avoid non-legal sanctions. Considering the framework of the economic agreement, the creditor will calculate its interests in the short and long term - that is, whether the relationship yields more benefits than the losses suffered due to the default. From the result of this calculation, it may, for example, accept or reject the delivery, seek judicial compensation for damages, disclose the breach of the party in the market, among other measures. Finally, suppose the creditor uses sanction mechanisms provided for in the contract (such as fines). There would be a risk of losing the contractual partner and being perceived by the market as an agent that does not tolerate delays, which may prevent new and future contract executions. It would be preferable, in these terms, to adopt alternative mechanisms as a means of preserving the trust of the parties in the relationship. Moreover, the debtor himself could use this rationality by raising a clause of limitation or exclusion of liability or even alleging unforeseeable circumstances or force majeure.

The dispute between these frameworks does not exist only in the relationship between the parties in opposite poles, but also within the same party - in this case, a legal entity: the commercial representative of a company can analyze a particular fact and act according to the framework of the business relation, while the legal department of the same company, analyzing the same fact, can act according to the framework of the contract to verify the appropriate legal measures; also, the administrator of the company can, in the same situation, weigh the interests in the short and long term to determine then the measure to be adopted regarding the alleged breach [5, 43]. This is mainly because it is not necessarily the one who enters into the contract who will execute it [37].

This reinforces the idea that the legal transactions originate from certain contexts, and it is from said context that the resolution of disputes must be analyzed [47]. As Ribeiro points out, there are "external" connections of the contract, representatives of its insertion in the "world of life" (*mundo da vida*), and a reductionism of the element of the declaration "tends to neglect the constricting dynamics and the binding effects of relational aspects not subsumable to the declarations of will of the contracting parties" [23].

3.2. The "Non-Use" of Contracts

The finding that a framework of the contract is often disregarded given the other two would allow us to conclude that entrepreneurs do not use contracts in their relationships, or that the contract is irrelevant to commercial relations, or that the contract makes it difficult to enter into commercial agreements. These inferences are clear in the empirical studies of Macaulay, who, precisely for this reason, started one of his studies with the following questions: What is the purpose of the contract? What is its role? When and how is it used, and by whom? [7].

Macaulay exemplified the problem from the distinction made by entrepreneurs between "contract" and "request" (or "solicitation"). When customers cancel an "order", they would not, in fact, be in breach of a contract: all the sales managers interviewed by Macaulay replied that they often accept order cancellations, with one of them stating that "you cannot ask a man to eat paper when he has no other use for the required paper" [7].

In this example, the conduct of accepting the cancellation of the order without requiring strict fulfillment of a contract or imposing any sanction is guided, mainly, by the framework of the business relation as a way of preserving the existing relationship between the parties. This conduct can also be analyzed within the framework of the economic agreement, through which the agent considers it more economically appropriate to cancel the order without applying penalties, as this will facilitate future orders.

Macaulay also found that, time and again, contractual disputes were resolved without resorting to the terms of the contract or the imposition of sanctions. In this sense, interviewed entrepreneurs highlighted that any disputes should be resolved directly by the parties, and not through the invocation of contractual clauses or involvement of lawyers and accountants - who would lack understanding about the necessary negotiation in the trade [7]. This thought can be synthesized with the statement of another businessman, interviewed by Lyons and Mehta: the contracts (or, in that case, the conditions put forward in a standard form purchase order) "don't mean a thing" [34].

These empirical studies even demonstrate that the option for the normative framework of the contract can be interpreted as a sign of distrust. Beale and Dugdale reported the importance given by interviewed entrepreneurs to the company's reputation, so that "any attempt to shelter behind contractual provisions or even frequent citation of contractual terms would destroy the firm's reputation very quickly" [48]. In another study, British companies expressed skepticism about the importance of contracts, to the point that an entrepreneur stated that "if you have to have resort to the precise wording of a contract, the relationship is beyond the point of no return" [32], referring to the end of the contractual relationship.

Collins presents a critical view of this 'non-use' of contracts by entrepreneurs. Apparently, this idea would confuse

the normative framework of the contract with the (non) use of the legal system to endow it with feasibility. The finding that there are disputes resolved without judicial or arbitral proceedings does not mean that the self-regulation established by the contract is not an important guide to the parties' conduct. There are several reasons for the absence of litigation due to contractual breach: the costs of the lawsuit, unpredictability of granting the claimed relief, damage to reputation and long-term relationship, unfeasibility of relief in the face of the weak financial position of the debtor, among others. This, however, does not mean disregarding the normative framework of the contract [5].

In addition, the concept of "non-use" of the contract would not adequately encompass the existence of the three normative frameworks. The parties to a contract will act according to the framework prioritized at that specific moment, and the contractual frame may be invoked at any time: for example, when the parties realize that the relationship is close to its end, or even when the economic interests of each party require strict compliance with the contract, in its exact terms [5].

Likewise, studies on the "non-use" of the contract had as context the North American industry in the 1950s-1960s, stimulated by the post-World War II period - a different scenario from the current one, in which the strong influence of globalization on the way business is conducted stands out, through a greater integration between the economy, the culture and the legal system of the countries.

It is possible, however, to approach the issue from a terminological perspective. The empirical investigation of Macaulay and other researchers seeks to understand the notion of contract from a business "common sense". The contract is then defined as a "device for conducting exchanges", involving both the rational planning of a transaction, with the adoption of precautions against possible future contingencies, and the existence or use of legal sanctions, such as mechanisms to induce performance or compensation for breach [49].

It is in this scenario that the distinction between "request" and "contract" is useful. In common sense, the "request" may not constitute a contract, even if the requisites for doing so are present. Macaulay describes a phenomenon in which the contract is viewed more in its economic and social mechanics than in its legal consequences from a formal point of view. It is not, in fact, the "abandonment" or the "non-use" of the contract, but the finding that a solemn, static contract concept, linked to a certain formalist theory (the "Classic Contract Law"), would not be adequate as a mechanism of organization of the company. Contracts have never ceased to be used; they have only been used differently: "it is the classical law of contract that Macaulay has done much to falsify" [49].

As stated by Macaulay, the word "contract" used in his study "is not treated as a synonymous with an exchange itself, which may or may not be characterized as contractual"; also, the word "contract" is not "used to refer to a writing recording an agreement". "Contract", as used by said author, "involves two distinct elements: (a) Rational planning of the transaction

with careful provision for as many future contingencies as can be foreseen, and (b) the existence or use of actual or potential legal sanctions to induce performance of the exchange or to compensate for non-performance". And Macaulay goes on to add: "these devices for conducting exchanges may be used or may exist in greater or lesser degree, so that transactions can be described relatively as involving a more contractual or less contractual manner (a) of creating an exchange relationship or (b) of solving problems arising during the course of such a relationship" [7].

This is an idea that is thoroughly analyzed by Campbell, for whom Macaulay's definition of contract "breaks the complete identification of economic exchange and legal contract, which in effect extinguishes the former, in the classical law's conception of contract" [49]. And he goes on to tell us that this definition "has an integral economic component": the promise – in which the Classical Contract Law centers itself – is a unit of an economic exchange; the economic exchange is the object of the contract; and the legal contract is "a means of achieving that object" [49].

Macaulay's merit is, in a period of intense criticism of classical contractual theory, to analyze how the relationship actually develops, that is, to examine the context of contractual relations and the importance of this context for the contract.

This does not mean, however, that the context fully commands the contractual relationship, given the impossibility of thinking of the contract as an isolated institution in society, as could be inferred from the works of Ian Macneil.

According to Macneil, the understanding of the contract and the contractual relationship requires the acceptance of some "basic truths", namely: contracts arise from needs created by society; a contract between isolated individuals, who seek only to maximize their gains, is not a contract, but rather war; a contact without social structure and stability is rationally unthinkable [8]. In other words, the contract and its operation can only be correctly understood within a context.

The analysis conducted by Macneil is guided by the distinction between "discrete contracts" and "relational contracts". Classic Contract Law would be compatible with the idea of a "discrete contract", which presupposes the absence of past relationships. It would thus be a contract executed instantly, with no prolongation in time. In turn, the "relational contract" would be the extreme opposite: it would constitute a relationship with a tendency to long duration, without clarity as to its beginning and end, characterized by flexibility of content, resulting from the relationship of cooperation between the parties with a view to the purposes desired by them [8].

This distinction can be summarized as follows: in "relational contracts", the parties treat the contracts more as marriages than as a casual encounter, as the obligations arise from the commitment between them [50].

The distinction between "discrete contract" and "relational contract" presents a possible explanation about the contractual behavior: in the first, there is an isolated, instantaneous

transaction, so that the behavior of the parties will be guided by the terms of the written document; in the second, the parties recognize the need for cooperation and adjustments throughout the relationship to achieve the purposes expected by the parties. This distinction, however, removes the proposal of the three normative frameworks of the contract, which is why it would obstruct a complete explanation about the rationality of contractual behavior.

To support this criticism, Collins takes an example from an everyday scene: weekly grocery shopping [5]. From the business relationship perspective, supermarket managers expect customers to return to the store every week, which is why managers invest in promoting a pleasant atmosphere (for example, offering efficient services, loyalty cards, and willingness to exchange defective products, among other measures). From the economic agreement perspective, customers seek competitive prices, while supermarket managers strive to ensure a profit margin. Finally, each merchandise is sold at a specific price, to be paid in a certain way, allowing for the use of legal measures if payment is not made.

In this context, it would be impossible to categorize this relationship as one of the two categories proposed by Macneil, as characteristics of both would be present. Recently, Macaulay appeared to agree with this statement, arguing that the spectrum ranging from “discrete” to “relational” is not so clear; in fact, one can debate whether there really are “discrete” transactions in the real world [43].

Macaulay and Macneil demonstrated that contractual expectations can only be understood from the social conditions that involve their generation, modification, and purpose [50], which attests to the importance of their studies for a contextualized contractual discipline. Collins, by proposing the analysis of the three normative models of rationality in contractual behavior, goes beyond and greatly contributes to the purpose of helping legal operators better understand contractual relations within their context, rather than just from the written instrument.

4. Conclusions

Contract Law - more specifically, the contractual relationship - can no longer be regarded as static. Although the contractual document guarantees a certain stability, social life is extremely dynamic and fast; the life of the relationship has a strong impact on the behavior of the parties to a contract.

Collins' studies go in this direction: the dynamism of today's society no longer allows the understanding that the contract encompasses the totality of the contracting parties' expectations. There are elements external to the Law, such as the equation of business risks from elements such as trust (from reputation and past relationships) and sanctions (whether legal, non-legal or security), which impact the development of the relationship.

Not only that: there is a diversity of rationalities that guide the contractual behavior of the parties, and they are not re-

stricted to the terms of the contract. Several times, the contractual instrument can be ignored by the parties to maintain a relationship based on the mutual trust of the parties, or that guarantees economic advantages to the parties. It is undeniable that Collins greatly contributed to a better understanding of the contractual relationship and, consequently, to the need to pay attention to the context of relations - in contrast to the excessive formalism existing in past theories.

Context and behavior, therefore, impact directly the contractual relationship. While context refers to the broader socio-economic and institutional environment in which the contract is embedded, behavior pertains to the actions and choices of the contracting parties within that context. The two are interrelated but analytically distinct: context shapes the expectations and interpretative frameworks, whereas behavior reflects the strategic and normative responses of the parties to those expectations.

All the dimensions examined here must be considered when analyzing a contractual relationship - whether from the interpretation of its terms, filling gaps, or even in cases of contractual resolution - to guarantee due protection to the expectations of the parties. Under Brazilian law, this acquires even more relevance, considering the recurrent use of general clauses. The analysis of Collins' triadic model regarding the business relation, the economic agreement and the contract, while maintaining a clear distinction between context and behavior, offers a more nuanced understanding of contractual dynamics and provides legal scholars and practitioners with a relevant tool to interpret obligations in light of real-world practices. From a practical standpoint, contextual interpretation enables courts and arbitrators to better assess the legitimacy of expectations and the fairness of outcomes in contractual disputes. It encourages a more flexible and equitable application of legal norms, especially in jurisdictions like Brazil where general clauses and open-textured standards are a reality. This approach aligns legal reasoning with commercial reality and promotes legal certainty through contextual coherence.

The analysis of the contribution of jurists from the Law & Society tradition can be, in this sense, very valuable, assisting jurists - in particular, legal scholarship - in the elaboration of criteria that guarantee greater security and certainty in the use of these concepts for the resolution of commercial contractual disputes.

Author Contributions

Rodrigo Ustároz Cantali is the sole author. The author read and approved the final manuscript.

Conflicts of Interest

The author declares no conflicts of interest.

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