FILLING THE GAPS: A CIVIL LAW TRADITION

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"*A vida ali não é completamente boa nem completamente má*"

(MACHADO DE ASSIS, Joaquim Maria. *Quincas Borba*, Rio de Janeiro, Garnier, 1891, p. 5, available at http://www.brasiliana.usp.br/)

I. INTRODUCTION

Everything that is perfect is constituted by all its parts[2]. Perfect literally means done until the end. Nothing exceeding. Nothing missing. The elements relate to each other with harmony and without flaws, leaving no space for disorder, questions or doubts. By

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[2] "[...] in omnibus rebus animadverto id perfectum esse, quod ex omnibus suis partis constaret" (D. 2,1,1).

definition, perfection should be acknowledged, not discussed. All the parts are already there. One has just to realize it.

Unfortunately, perfection is not easily found among human societies and its creations. This is certainly the case of Law. Disorder, questions and doubts are frequent, for the rules are not perfect. A major effort is then required to find coherence and to construct a set of rules that could be deemed fair and reasonable altogether.

Gaps are a sign of the imperfection of Law.

Although they have always been acknowledged by Civil Law tradition, they have never been welcome. The struggle to codify the Law along the centuries shows how hard civil lawyers have fought against gaps. The story of codification can be retraced to Roman Law and shows an impressive development both of the rules and its organization[3].

The Civil Code of France, of 1804, is a milestone on this never ending process. It is one of the most precious monuments ever built by Civil Law tradition. Its rules are clear and precise, aimed to be understood by its mere reading. Compared to the prior attempts of codification, the French Civil Code represents a major development. The rules were never before so well written or better organized.

Thus, it is no surprise that the Civil Code of France has caught the attention of the Civil Law tradition during the entire 19th Century. It has even led some enthusiastic scholar to state that he did not care about Private Law, for it was enough to teach what was in the French Civil Code. There was a whole movement dedicated to studying every detail of its

[3] See SCHIPANI, Sandro. *La codificazione del diritto romano comune*, Torino, Giappichelli, 1999.

rules. It was labeled school of exegesis and its devotion to the text of the Civil Code was total[4].

Yet, not even the most faithful member of the school of exegesis could deny that the Civil Code of France contained gaps. The Code says it itself. Its article 4 states that a judge who refuses to rule under the pretext of silence, obscurity of insufficiency of the law, could be pursued for denial of justice[5]. This article reveals that the Civil Code does not have every answer. Sometimes, gaps should be filled to decide a given case.

The simple recognition of gaps in the Law did not suffice to solve legal issues that are not specifically regulated by Civil Codes. It is necessary to go further and to define how a gap can be filled. With this purpose, the Introduction Law of Brazil from 1942 uses a widespread formula that is worth mentioning. In case a specific provision in the Law lacks, gaps can be filled by recurring to analogy, to customs or to the general principles of Law[6].

Considering that most Civil Codes have thousands of articles, analogy is a very important tool to fill gaps. It is based on resemblance and allows applying the rule designed for a similar situation to a case that is not specifically regulated. The method of analogy is the most frequently used and allows filling the majority of the gaps of the Law.

If analogy fails, gaps can be filled with rules extracted from the customs. Customs may be defined as the conjunction of two elements. The first is the behavior constantly observed by the people during a relevant period of time. The second is the belief

[4] See GILISSEN, John. *Introdução histórica ao direito*, [translated by A. M. Hespanha and L. M. Macaísta Malheiros], 3rd ed., Lisboa, Calouste Gulbenkian, 2001, pp. 515/518. The saying is usually attributed to a Professor called Bugnet.

[5] "Art. 4. Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice".

[6] "Art. 4º Quando a lei for omissa, o juiz decidirá o caso de acordo com a analogia, os costumes e os princípios gerais de direito".

that such behavior is right and should be respected[7]. Customs are easy to identify and also help to fill gaps. Still, most customs are already incorporated in the Law, meaning that this source is not as fruitful as analogy.

In case analogy and customs are not available, gaps can be filled with the rules extracted from the general principles of Law. Such principles are not necessarily expressed but may be inferred by the consideration of rules that share a common ground. It is a method that operates through induction, revealing the guidelines that govern the entire spectrum of a branch of Law in a given country.

By recognizing and facing the challenges posed by the gaps of Law, civil lawyers have gradually built a whole library on such matter. There are indeed several books and innumerable articles that deal with this issue, discussing the related questions almost to exhaustion. Such books and articles can be found in almost every country affiliated to the Civil Law tradition.

This fortunate circumstance barely hides the fact that the questions raised by gaps are not exclusively related to the legal rules created by the legislator. Most of the countries that belong to Civil Law tradition can also be qualified as Private Law societies, for they acknowledge their citizens' powers to create rules to govern their own relationships. In fact, one of the main characteristics of a Private Law society is party autonomy, which gives its citizens the freedom to enter into transactions that are legally binding, provided that some limits are respected. In a Private Law society, the citizens are free to make their own choices, but they also have to live with the consequences of their decisions[8].

[7] See SILVA PEREIRA, Caio Mário da. *Instituições de Direito Civil*, v. I, 23rd ed., [reviewed and udpdated by Maria Cristina Bodin de Moraes], Rio de Janeiro, Forense, 2010, pp. 56/57.

[8] See CANARIS, Claus-Wilhem. A liberdade e a justiça contratual na sociedade de direito privado, *in* A. Pinto Monteiro (coordination), *Contratos: actualidade e evolução*, Porto, Universidade Católica Portuguesa, 1997, pp. 49/66.

Contracts are the main instrument of party autonomy. In a Private Law society, they appear in several forms and shapes. They bring into life all kinds of economic transactions. Because contracts are binding, they must be drafted carefully. Ideally, all aspects of a legal transaction should be covered by its clauses, leaving no room for disorder, questions or doubts.

However, contracts are also a product of human society. As much as the Law, they are far from perfect, no matter how well prepared and dedicated their drafters could be. Gaps will possibly occur. There will be disorder, questions and doubts that have to be faced in order to understand and correctly apply the clauses crafted by the parties.

Historically, contractual gaps have not received the same attention of those related to the Law itself. It is generally perceived as a very important and intriguing problem, but not many books or articles deal specifically with the issue. Its library is considerably smaller. Since contemporary economies are often distinguished by long-term agreements, gaps are always more frequent, for no one is able to foresee all the implications that such contract may have when lasting in time. That means that academic contributions are not just welcome, but necessary.

This is particularly true regarding international arbitration. This kind of dispute is frequently related to long-term agreements executed between foreign parties, adding complexity to the economic transactions and leading to the appearance of contractual gaps. Experience also shows that even an arbitration clause may present gaps that should be filled to solve a dispute in a given case.

To meet the intellectual challenge posed by contractual gaps, it is wise to proceed orderly. That is why this paper is divided in four sections. The first will deal with the concept of contractual gaps. The second will examine the methods developed by Civil Law tradition to fill gaps contained in contracts in general, dedicating special attention to the results achieved by using good faith and analogy. The third will address the same issue, but

specifically related to the arbitration agreement. The fourth will examine the boundaries of the gap-filling process. The results obtained throughout this reasoning will be summarized in a conclusion.

Having set the aim and the structure of the path to be followed, it is time to try to better understand what a contractual gap is.

II. CONTRACTUAL GAPS

Gaps are a sign of contractual imperfection.

They are usually unwanted and they are certainly not welcomed. It is always better to deal with a contract which clauses regulate all the relevant aspects of a given transaction. Still, such contract is not free from discussions. As practitioners know, there could be a dispute related to the exact meaning of its wording, with important consequences for the development of the relationship between the parties.

In this case, it is necessary to interpret the contract. The aim of interpretation is to acknowledge the deepest sense of contractual clauses. To interpret a contract is to clarify what was actually agreed between the disputing parties, as interpretation seeks to reconstruct their common intent. Several elements could help to interpret a contract, such as the parties' prior relations, the negotiations and the performance of the agreement. Nevertheless, the point of depart and arrival is always the text. Interpretation enlightens the meaning of the clauses, but does not add anything to the agreement.

By definition, in case of contractual gaps, there is no text to rely on. Interpretation is no longer available, for it is necessary to provide what was left out by the disputing parties. In other words, integration is required. This a very complex task to be performed, because the aim of integration is to fill gaps without changing the balance of risks agreed by the parties.

To move towards integration, it is necessary to define how a gap in an agreement can be identified. This question leads directly to the problem of contractual completeness.

There are two perspectives from which we can distinguish contracts in accordance to their completeness. The first emerged from Law and refers to the formation of a contract. The second originates from Economics and considers the range of subjects covered by a contract.

From the first perspective, all contracts are complete. Either the parties have reached an agreement about all the essential terms or there is no contract. The essential terms of a sales contract, e.g., are well-known to every student: object, price and agreement. There can be no sales contract if there is no agreement regarding the object and the price.

From the second perspective, all contracts are incomplete. Time and resources are limited, meaning that the parties cannot or will not agree on every single aspect that could be relevant for their relationship. Instead, they will concentrate on what is most important to them, trying to obtain the maximum profit within the shortest amount of time. Traditionally, the agreement to exchange an object for a sum of money is enough to generate a sales contract, but it does not imply that all relevant issues are covered by its clauses. There could be several unattended aspects, such as the transfer of risk or the guarantee for payment.

The same could be said about the arbitration agreement. From the first perspective, it is enough to empower the arbitrators to deal with the case, provided that the parties have agreed to submit their conflict to arbitration and also have defined the object of the dispute. From the second perspective, not all issues are covered. There could be gaps relating to the institution responsible for handling the procedure or even doubts about the extension of the powers granted to the Arbitral Tribunal.

This means that the different perspectives of Law and Economics do not bring enough insight to identify contractual gaps. Either all contracts are complete, in accordance with the Law, or all contracts are incomplete, in accordance with Economics.

To prevent such dilemma, it is necessary to create another definition. The key to do that would be to find an appropriate distinction, which should be based upon the relevance of incompleteness. If the clauses crafted by the parties allow the contract to be regularly performed, it can be deemed as complete. On the other hand, if the missing clause is relevant to define their relationship, the contract should be taken as incomplete. A gap is a relevant omission. Therefore, incomplete contracts can be defined as those contracts distinguished by a relevant omission, which has to be filled to allow its regular performance[9].

In accordance with such concept, relevant omissions are always related to the performance of the agreement. This should be emphasized. Every contract should be performed exactly as agreed. Yet, sometimes the terms of the agreement are not sufficient to define what each party should do to fulfill its obligation. In this case, integration is mandatory; not with the aim to change a contract, but in order to preserve the distribution of risks agreed by the parties.

Both contracts in general and, specifically, the arbitration agreement, may contain relevant omissions. For centuries, civil lawyers have dealt with this problem with respect to several types of contracts. In light of that, it is worth to consider the methods developed by tradition to fill gaps in contracts in general, in order to later examine the particular issues raised by the arbitration agreement.

[9] PENTEADO, Luciano de Camargo, *Integração de Contratos Incompletos*, São Paulo, USP, Tese de Livre-Docência, 2014, passim, not yet published.

III. GAPS IN UNDERLYING CONTRACTS

In case of contractual incompleteness, it is necessary to provide what was left out by the disputing parties. The first option is legislation, as Civil Codes provide a conspicuous number of default rules to fill contractual gaps. In the lack of default rules, scholars debate about the best method to promote integration. Practices and usages are often mentioned in this context, but they are not always present, so there must be other methods available. With respect to the Civil Law tradition, at least two resources should be considered: good faith and analogy. For their importance, each one of them will be treated on a separate topic.

III.A. Good faith

Good faith is at the core of contract law. It requires both parties to be loyal and to honor the trust generated by their behavior over the course of their contractual relationship. This is the objective sense of good faith: a standard to be observed by the parties, to preserve the values of loyalty and trust[10]. It is this objective sense that allows labeling someone as acting in accordance or in deviation of good faith.

There is also a subjective sense of good faith. It is more related to the law of property than to the law of obligations. It is only mentioned here for the sake of contrast. In a subjective sense, good faith is the belief in acting according to the law. This belief is at the basis of several legal rules related to property, as those concerning acquisition of fruits and adverse possession reveal[11]. Based on the subjective sense, it is possible to establish if someone acts with or without good faith.

[10] See MARTINS-COSTA, Judith. *A boa-fé no direito privado*, São Paulo, RT, 1999, pp. 410/427, distinguishing both senses of good faith.

[11] Once again, the Civil Code of Brazil can be used as an example of rules widespread in the whole Civil Law tradition: "Art. 1.214. O possuidor de boa-fé tem direito, enquanto ela durar, aos frutos percebidos" and "Art.

In its objective sense, good faith is strictly connected to the commitment undertaken by the parties to perform their obligations. The Roman jurist Ulpian, who lived during the third century, said that the correct performance of a contract was the utmost protection of good faith[12].

He also made the remarkable argument that, sometimes, even with the aid of the agreement, it is not possible to define what is to be performed by the parties. In this case, he said, the parties were obligated to perform what was required by good faith.

This is a statement full of meaning, as it implies that a contract contains not only what is expressly agreed in it, but also what results from good faith. By adding what is necessary to preserve the values of loyalty and trust that are at the basis of every agreement, good faith enhances the content of the contract.

Having that in mind, it should come to no surprise that contracts that are important to every economy were firstly legally protected to preserve the good faith of the parties. This is the case of sales, lease, mandate and partnership contracts, all protected in Roman Law because of good faith[13]. In the Civil Law tradition, party autonomy and good faith are connected from the very beginning.

Nowadays, the very same idea can be found in several Civil Codes. This is the case of the Civil Codes in France[14], Germany[15] and Italy[16] in Europe, and Argentina[17], Peru[18]

1.242. Adquire também a propriedade do imóvel aquele que, contínua e incontestadamente, com justo título e boa-fé, o possuir por dez anos".

[12] "Et in primis sciendum est in hoc iudicio id demum deduci, quod praestari convenit: cum enim sit bonae fidei iudicium nihil magis bonae fidei congruit quam id praestari, quod inter contrahentes actum est. Quod si nihil convenit, tunc ea praestabuntur, quae naturaliter insunt huius iudicii potestate" (D. 19,1,11,1).

[13] See LIMA LOPES, José Reinaldo. *O direito na história*, 3rd ed., São Paulo, Atlas, 2008, p. 364.

[14] In France, two articles are worth mentioning on such behalf: "Art. 1134. Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi" and "Art. 1135. Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature".

and Brazil[19] in South America. Yet, the Roman rule is better preserved in the Codes of Chile and Spain.

Both the Civil Code of Chile[20] and the Civil Code of Spain[21] clarify that a contract must be performed in accordance to the requirements of good faith, thus obliging the parties not only to what is already agreed, but also to what emerges from the nature of the contract itself. Party autonomy and good faith are strictly and explicitly connected.

By using good faith, civil lawyers can solve quite a number of cases. Good faith requires the parties to cooperate, to act coherently during the performance, to avoid contractual uncertainty and, under the condition that this does not lead to relevant sacrifice, even to protect the other party's interest[22].

Some examples help to clarify the point. In case the seller delivers more merchandise than what was agreed-upon, the buyer is not allowed to refuse performance.

[15] "§ 242. Leistung nach Treu und Glauben. Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern".

[16] There are two related articles in the Italian Civil Code: "Art. 1374. Integrazione del contratto. Il contratto obbliga le parti non solo a quanto e nel medesimo espresso, ma anche a tutte le conseguenze che ne derivano secondo la legge, o, in mancanza, secondo gli usi e l'equità" and "Art. 1375. Il contratto deve essere eseguito secondo buona fede (1337,1358,1366, 1460)".

[17] "Art. 1198. Los contratos deben celebrarse, interpretarse y ejecutarse de buena fe y de acuerdo con lo que verosímilmente las partes entendieron o pudieron entender, obrando con cuidado y previsión".

[18] "Art. 1362. Buena Fe. Los contratos deben negociarse, celebrarse y ejecutarse según las reglas de la buena fe y común intención de las partes".

[19] "Art. 422. Os contratantes são obrigados a guardar, assim na conclusão do contrato, como em sua execução, os princípios de probidade e boa-fé".

[20] "Art. 1546. Los contratos deben ejecutarse de buena fe, y por consiguiente obligan no sólo a lo que en ellos se expresa, sino a todas las cosas que emanan precisamente de la naturaleza de la obligación, o que por la ley o la costumbre pertenecen a ella".

[21] "Art. 1258. Los contratos se perfeccionan por el mero consentimiento, y desde entonces obligan, no sólo al cumplimiento de lo expresamente pactado, sino también a todas las consecuencias que, según su naturaleza, sean conformes a la buena fe, al uso y a la ley".

[22] See ROPPO, Vincenzo. *Il contratto*, Milano, Giuffrè, 2011, pp. 467/470, also the source of the examples of the following paragraph.

Instead, he has to retain the outstanding merchandise and invite the seller to withdraw it as soon as possible. Such measure does not depend upon an explicit agreement, because it is required by good faith. It is the same good faith that demands the principal to confirm, to an interested third party, the power granted through a mandate contract. The principal could not leave the third party uncertain and speculate about the fate of the contract concluded with his representative.

Good faith also defines the content of a contract by controlling the behavior of the parties during its performance. The Civil Codes of Portugal[23] and Brazil[24] determine that the rights that arise from a contract must be exercised in accordance with the requirements of good faith. By considering this role of good faith, scholars have created several legal figures to protect the values of loyalty and trust. *Venire contra factum proprium, tu quoque*, *Verwirkung* and *Erwirkung* are examples of those legal figures, all forged by German legal science[25].

Those figures are especially useful while dealing with the termination of long-term contracts. Even if termination is allowed by the contract, it does not mean that the party is entitled to do it as it pleases. Prior notice may be required, especially in case of an already long-standing relationship, in which one of the parties depends economically on the other. The making of investments during the contractual relationship could also play a role on integration, if they were acknowledged and stimulated by the party now interested in terminating the agreement. The sudden termination of such contract could lead to deviation of the values of loyalty and trust, therefore violating the requirements of good faith.

[23] "Art. 334º. É ilegítimo o exercício de um direito, quando o titular exceda manifestamente os limites impostos pela boa fé, pelos bons costumes ou pelo fim social ou económico desse Direito".

[24] "Art. 187. Também comete ato ilícito o titular de um direito que, ao exercê-lo, excede manifestamente os limites impostos pelo seu fim econômico ou social, pela boa-fé ou pelos bons costumes".

[25] See MENEZES CORDEIRO, António Manuel da Rocha. *Da boa-fé no direito civil*, Coimbra, Almedina, 2001, passim.

Furthermore good faith is helpful while dealing with the change of circumstances between the execution and the performance of a contract that provokes hardship to one of the parties. The Civil Code of Portugal establishes that a contract may be adapted, if such measure is required by good faith and does not change the balance of risks originally agreed to by the parties[26].

In this case, good faith is called to fill gaps that could not be foreseen by the parties. However, if the change of circumstances was foreseeable, there could be no integration, for good faith does not allow interfering on the division of risks agreed to by the parties. After the reform of 2002, the German Civil Code is clear on such matter, by asserting that every modification has to respect the distribution of the risks already agreed to by the parties[27]. A similar provision can be found in the Civil Code of Italy, although it is considering the question in relation with the problem of termination of a contract[28].

Practice shows that construction contracts are a field in which the change of circumstances is usually relevant. Construction contracts are designed to last in time. That means that they are subject to change of circumstances, which could lead to different economic outcomes. This is particularly evident regarding the situation of the soil. Because it

[26] "Art. 437º. 1. Se as circunstâncias em que as partes fundaram a decisão de contratar tiverem sofrido uma alteração anormal, tem a parte lesada direito à resolução do contrato, ou à modificação dele segundo juízos de equidade, desde que a exigência das obrigações por ela assumidas afecte gravemente os princípios da boa-fé e não esteja coberta pelos riscos próprios do contrato".

[27] "§ 313. Störung der Geschäftsgrundlage (1) Haben sich Umstände, die zur Grundlage des Vertrags geworden sind, nach Vertragsschluss schwerwiegend verändert und hätten die Parteien den Vertrag nicht oder mit anderem Inhalt geschlossen, wenn sie diese Veränderung vorausgesehen hätten, so kann Anpassung des Vertrags verlangt werden, soweit einem Teil unter Berücksichtigung aller Umstände des Einzelfalls, insbesondere der vertraglichen oder gesetzlichen Risikoverteilung, das Festhalten am unveränderten Vertrag nicht zugemutet werden kann. (2) Einer Veränderung der Umstände steht es gleich, wenn wesentliche Vorstellungen, die zur Grundlage des Vertrags geworden sind, sich als falsch herausstellen. (3) Ist eine Anpassung des Vertrags nicht möglich oder einem Teil nicht zumutbar, so kann der benachteiligte Teil vom Vertrag zurücktreten. An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung".

[28] "Art. 1467. Art. 1467 Contratto con prestazioni corrispettive. Nei contratti a esecuzione continuata o periodica ovvero a esecuzione differita, se la prestazione di una delle parti è divenuta eccessivamente onerosa per il verificarsi di avvenimenti straordinari e imprevedibili, la parte che deve tale prestazione può domandare la risoluzione del contratto, con gli effetti stabiliti dall'art. 1458 (att. 168). La risoluzione non può essere domandata se la sopravvenuta onerosità rientra nell'alea normale del contratto. [...]".

is not possible to entirely predict its characteristics before the excavation, the result of the performance of the contract remains uncertain until it begins. The calculation of the price to be paid to the builder takes it into consideration. The outcome will be on his advantage if there are no surprises. Yet, things could go otherwise, if a major inconsistency of the available rocks is found, which would require much more effort to achieve the result agreed-upon.

Whether it is possible to intervene in such contract depends on the division of the risks agreed to by the parties. If they have foreseen such possibility and deliberately accepted the risk, there is no room to fill a supposed gap. By contrast, if the event is left untreated because it was unforeseeable, adaptation may be required.

In Civil Law tradition, good faith helps to integrate a contract, by adding what is necessary to protect the values of loyalty and trust that emerges from a given agreement. It helps to deal not only with congenital gaps, but also with those that appear throughout the parties' relationship. As important as it is, good faith is not the only available source to fill gaps. There is another very profitable method, to be examined on the next topic.

III.B. Analogy

The second method to fill a gap is analogy. Justice requires equal situations to be considered likewise. The aim of analogy is to identify similar situations, which should be treated in the same way, in order to ensure the application of a given rule[29].

In Civil Law countries, analogy is frequently used to fill gaps in contracts performed without an agreement on the amount of money to be paid by one of the parties.

[29] "Non possunt omnes singillatim aut legibus aut senatus consultis comprehendi: sed cum in aliqua causa sententia eorum manifesta est, is qui iurisdictioni praeest ad similia procedere atque ita ius dicere debet. Nam, ut ait pedius, quotiens lege aliquid unum vel alterum introductum est, bona occasio est cetera, quae tendunt ad eandem utilitatem, vel interpretatione vel certe iurisdictione suppleri" (D. 1,3,12-13).

With respect to sales contracts, in countries like Italy[30], Portugal[31] and Brazil[32], it is established that, in the lack of an agreement, a price must be determined considering similar situations. In such case, there is no doubt that a contract was concluded. Yet, it could not be regularly performed, without the definition of the amount of money to be paid, which is the aim of the above mentioned provisions, all related to integration.

Similar rules regarding contracts of mandate[33], service contracts[34], business and commission agreements[35], brokerage[36], lease[37], deposit[38], agency[39], supply of work and

[30] "Art. 1474. Mancanza di determinazione espressa del prezzo. Se il contratto ha per oggetto cose che il venditore vende abitualmente e le parti non hanno determinato il prezzo, né hanno convenuto il modo di determinarlo, né esso è stabilito per atto della pubblica autorità o da norme corporative, si presume che le parti abbiano voluto riferirsi al prezzo normalmente praticato dal venditore. Se si tratta di cose aventi un prezzo di borsa o di mercato, il prezzo si desume dai listini o dalle mercuriali del luogo in cui deve essere eseguita la consegna, o da quelli della piazza più vicina. Qualora le parti abbiano inteso riferirsi al giusto prezzo, si applicano le disposizioni dei commi precedenti; e, quando non ricorrono i casi da essi previsti, il prezzo, in mancanza di accordo, è determinato da un terzo, nominato a norma del secondo comma dell'articolo precedente (1561)".

[31] "Art. 883. 1. Se o preço não estiver fixado por entidade pública, e as partes o não determinarem nem convencionarem o modo de ele ser determinado, vale como preço contratual o que o vendedor normalmente praticar à data da conclusão do contrato ou, na falta dele, o do mercado ou bolsa no momento do contrato e no lugar em que o comprador deva cumprir; na insuficiência destas regras, o preço é determinado pelo tribunal, segundo juízos de equidade. 2. Quando as partes se tenham reportado ao justo preço, é aplicável o disposto no número anterior".

[32] "Art. 488. Convencionada a venda sem fixação de preço ou de critérios para a sua determinação, se não houver tabelamento oficial, entende-se que as partes se sujeitaram ao preço corrente nas vendas habituais do vendedor. Parágrafo único. Na falta de acordo, por ter havido diversidade de preço, prevalecerá o termo médio".

[33] This is the case of the Civil Codes of Italy and Brazil: Civil Code of Italy. "Art. 1709. Presunzione di onerosità. Il mandato si presume oneroso. La misura del compenso, se non è stabilita dalle parti, è determinata in base alle tariffe professionali o agli usi; in mancanza è determinata dal giudice". Civil Code of Brazil. "Art. 658. O mandato presume-se gratuito quando não houver sido estipulada retribuição, exceto se o seu objeto corresponder ao daqueles que o mandatário trata por ofício ou profissão lucrativa. Parágrafo único. Se o mandato for oneroso, caberá ao mandatário a retribuição prevista em lei ou no contrato. Sendo estes omissos, será ela determinada pelos usos do lugar, ou, na falta destes, por arbitramento".

[34] This is the case of the Civil Codes of Italy and Brazil. Civil Code of Italy: "Art. 2233. Compenso. Il compenso, se non è convenuto dalle parti e non può essere determinato secondo le tariffe o gli usi, e determinato dal giudice, sentito il parere dell'associazione professionale a cui il professionista appartiene. In ogni caso la misura del compenso deve essere adeguata all'importanza dell'opera e al decoro della professione". Civil Code of Brazil: "Art. 596. Não se tendo estipulado, nem chegado a acordo as partes, fixar-se-á por arbitramento a retribuição, segundo o costume do lugar, o tempo de serviço e sua qualidade".

[35] Civil Code of Brazil. "Art. 701. Não estipulada a remuneração devida ao comissário, será ela arbitrada segundo os usos correntes no lugar".

materials[40], and labor contracts[41], appear in several legislations. The German Commercial Code has even a general article on the matter, allowing the Court to fix an appropriate amount of money for measures taken on the interest of the other party[42]. Part of the rules herein mentioned refers to customs and practices and not directly to analogy. Nevertheless, there is no doubt that their rationale is always based on comparing similar situations, which is key to the definition of the analogy technique itself.

Analogy is a powerful method to fill contractual gaps. If integration is mandatory, comparing the case at hand with similar situations could offer a response that

[36] This is the case of the Civil Codes of Germany and Brazil. Civil Code of Germany: "§ 653. Mäklerlohn. (1) Ein Mäklerlohn gilt als stillschweigend vereinbart, wenn die dem Mäkler übertragene Leistung den Umständen nach nur gegen eine Vergütung zu erwarten ist. (2) Ist die Höhe der Vergütung nicht bestimmt, so ist bei dem Bestehen einer Taxe der taxmäßige Lohn, in Ermangelung einer Taxe der übliche Lohn als vereinbart anzusehen". Civil Code of Brazil: "Art. 724. A remuneração do corretor, se não estiver fixada em lei, nem ajustada entre as partes, será arbitrada segundo a natureza do negócio e os usos locais".

[37] So is the case of the Civil Code of Brazil: "Art. 569. O locatário é obrigado: [...] II - a pagar pontualmente o aluguel nos prazos ajustados, e, em falta de ajuste, segundo o costume do lugar; [...]".

[38] So is the case of the Civil Code of Brazil: "Art. 628. O contrato de depósito é gratuito, exceto se houver convenção em contrário, se resultante de atividade negocial ou se o depositário o praticar por profissão. Parágrafo único. Se o depósito for oneroso e a retribuição do depositário não constar de lei, nem resultar de ajuste, será determinada pelos usos do lugar, e, na falta destes, por arbitramento".

[39]So is the case of the Civil Code of Brazil: "Art. 721. Aplicam-se ao contrato de agência e distribuição, no que couber, as regras concernentes ao mandato e à comissão e as constantes de lei especial".

[40] This is the case of the Civil Codes of Germany and Italy. Civil Code of Germany: "§ 632. Vergütung. (1) Eine Vergütung gilt als stillschweigend vereinbart, wenn die Herstellung des Werkes den Umständen nach nur gegen eine Vergütung zu erwarten ist. (2) Ist die Höhe der Vergütung nicht bestimmt, so ist bei dem Bestehen einer Taxe die taxmäßige Vergütung, in Ermangelung einer Taxe die übliche Vergütung als vereinbart anzusehen. (3) Ein Kostenanschlag ist im Zweifel nicht zu vergüten". Civil Code of Italy: "Art. 1657. Determinazione del corrispettivo. Se le parti non hanno determinato la misura del corrispettivo né hanno stabilito il modo di determinarla, essa è calcolata con riferimento alle tariffe esistenti o agli usi; in mancanza, è determinata dal giudice".

[41] So is the case of the Civil Code of Germany: "§ 612. Vergütung. (1) Eine Vergütung gilt als stillschweigend vereinbart, wenn die Dienstleistung den Umständen nach nur gegen eine Vergütung zu erwarten ist. (2) Ist die Höhe der Vergütung nicht bestimmt, so ist bei dem Bestehen einer Taxe die taxmäßige Vergütung, in Ermangelung einer Taxe die übliche Vergütung als vereinbart anzusehen".

[42] "§ 354. (1) Wer in Ausübung seines Handelsgewerbes einem anderen Geschäfte besorgt oder Dienste leistet, kann dafür auch ohne Verabredung Provision und, wenn es sich um Aufbewahrung handelt, Lagergeld nach den an dem Ort üblichen Sätzen fordern. (2) Für Darlehen, Vorschüsse, Auslagen und andere Verwendungen kann er vom Tag der Leistung an Zinsen berechnen".

allows defining the object of the performance without altering the distribution of risks originally agreed-upon by the parties.

Analogy is a technique based on resemblance and should only be used when it is not possible to fill a gap by considering the particularities of the contract actually executed by the parties. This means that one should only resort to analogy when no answer can be constructed based on good faith.

The difference between these two methods is that good faith allows defining terms that are directly related to the common intentions already expressed by the parties, while analogy could only provide an approximated answer, based on relations established among third parties. Considering the exceptional character of integration and the aim to respect at most the balance of risks specifically agreed to by the parties, it is clear that good faith precedes analogy as a method to fill contractual gaps.

Along with default rules, practices and usages, good faith and analogy are methods that historically have helped filling contractual gaps. Having that in mind, it is worth to look at some questions specifically related to the integration of the arbitration agreement.

IV. ARBITRATION AGREEMENT

Gaps in arbitration agreements are more frequent than one would think. This is probably due to two main reasons. First, the arbitration agreement is almost never at the heart of the discussion between the parties, which sometimes leads to a pathological clause. Second, the choice of arbitration and the definition of the object of the dispute are usually enough to bind the parties, which could leave important aspects unregulated, as the seat, the applicable law, the language of the procedure, the institution that is responsible for handling the procedure and even the extension of the powers granted to the Arbitral Tribunal.

Those issues certainly have to be defined with the beginning of the arbitral procedure. They are relevant omissions that have to be filled, in order to allow the regular performance of the arbitration agreement. The seat establishes the Law that will govern the validity of the arbitration agreement itself. The definition of applicable law is necessary to exam the merits of the case. The language is mandatory to start the procedure. It is also fundamental to decide whether it will be an institutional or an *ad hoc* arbitration. Lastly, in every case it is extremely important to establish the boundaries to the extension of the Arbitral Tribunal's powers.

To fill those gaps it is worth remembering that the arbitration agreement can be seen as a special type of contract. In that respect, it is interesting to analyze its history in Brazil. The Civil Code of 1916 regulated the arbitration agreement within the general framework of the law of obligations. By then, the legal authorities already acknowledged the special characteristics of the arbitration agreement and questioned its qualification as a contract[43]. The Arbitration Law of 1996 revoked the Civil Code, as it established a separate and specific set of rules for arbitration, further to emphasizing its peculiarities. Nevertheless, the Civil Code of 2002 included the arbitration agreement among the nominate contracts, reinforcing its ties with the law of obligations.

As a figure which grounds clearly lie upon consensus, the integration of the arbitration agreement can benefit from the solutions provided by the Civil Law tradition concerning contractual gaps in general. This means that good faith and analogy are methods that may also help to fill gaps contained in the arbitration agreement.

A case from Switzerland might illustrate the point. Two foreign parties had drafted a pathological arbitration clause, by, among other issues, referring to an institution that did not exist. The clause was so poorly written that there were even doubts as to the

[43] See BEVILAQUA, Clóvis. *Código Civil dos Estados Unidos do Brasil*, v. IV, Rio de Janeiro, Francisco Alves, 1938, p. 200.

parties' intentions to have the case decided by an Arbitral Tribunal or to have only the arbitrators helping them to settle the case[44].

In case of a clause that refers to a non-existent institution, the arbitrators could have concluded that it had been an *ad hoc* arbitration, allowing them to define all the applicable rules to the procedure. Instead, they decided that both parties had expressed their intentions to have their dispute decided by an arbitration institution in Geneva. Hence, they determined that it would be the most prominent institution of that location, which was the Geneva Chamber of Commerce and Industry[45].

[44] The case is described on the ASA Bulletin 2001, v. 19, Issue 2, pp. 265/275. The text is available at the data basis of Kluwer Arbitration and was lastly consulted on March, 23rd, 2014. The arbitration clause reads as follows: "All disputes arising in connection with this [agreement] shall be settled in accordance with the laws of conciliation and arbitration of the Geneva Chamber of Commerce. In case of non-settlement, the dispute will be submitted for a final decision to the arbitrators of the Geneva Court of Justice. The rules of conciliation and arbitration of the said court will be binding for both parties".

[45] "Once admitted that the Parties have agreed on arbitration, they also appear to have agreed on Geneva as the place of arbitration. This conclusion may be drawn from their reference first to a conciliation under the rules of the Geneva Chamber of Commerce, then to a final decision to be rendered under the *rules of conciliation and arbitration* of the *Geneva Court of Justice*. This intention of the Parties to choose Geneva as the place where their disputes were to be settled was confirmed by their agreement to appear in Geneva for the conciliation hearing and especially, on the Defendant's side, by the fact that while contesting the existence of an arbitration clause, the defendant admitted that *"the dispute should be settled judicially by the courts of Geneva"* (Statement of Defense p. 4). The next question is what kind of Geneva arbitration the Parties were contemplating. One could argue that they were thinking to an *ad hoc* arbitration by arbitrators appointed by the Geneva Court of Justice. That could appear like a reasonable interpretation of the words *"arbitrators of the Geneva Court of Justice"*, especially in view of the fact that at the time the clause was drafted, the appointing authority was the Geneva Court of Justice pursuant to Art. 3 of the 1969 Intercantonal Arbitration Convention. But this interpretation, which has not been proposed by any of the Parties, is inconsistent with the last paragraph of the [agreement] under which *"the rules of conciliation and arbitration of the said court will be binding for both parties"*, which shows that for the signatories of the agreement, the Court of Justice was an arbitration institution. From the erroneous reference in the [agreement] to the Geneva Court of Justice and its rules of conciliation and arbitration, one should draw the conclusion that the Parties agreed to an institutional rather than *ad hoc* arbitration. Since they referred to a (non existent) Geneva institution, their intention was certainly not to submit the arbitration to an institution having its seat in another city or country, such as the ICC. Is it possible to go further and interpret their reference to the Court of Justice as relating to any other specific institution? A reasonable interpretation, which the Arbitral Tribunal will adopt, is to consider that the Parties have shown their intention to refer to the prominent arbitration institution of the place of arbitration. This broad interpretation is justified by the *favor arbitri* which prevails in the interpretation of arbitral clauses in Switzerland, and under which: *"Ut res magis valeat quam pereat,* an arbitration clause must be interpreted in such a way that the purpose that the parties wanted to achieve is as nearly realized as possible" (Pierre A. KARRER, *Pathological Arbitration Clauses, Malpractice, Diagnosis and Therapy*, in *The International Practice of Law, Liber Amicorum for Thomas Bär and Robert Karrer*, Basel, Frankfurt, 1997, pp. 109 ff., 118-119). In the case of Geneva, the prominent arbitration institution is the Geneva Chamber of Commerce and Industry (P. A. KARRER, *op. cit.*, p.123)".

Although the award does not mention it, this decision was based on good faith and best preserved the common intentions of the parties, by conducting them to discuss their dispute before the institution that had the closest connection to what they had expressed in their agreement. The parties were obliged to do what was required by loyalty and trust on the given case.

Moreover, the Arbitral Tribunal decided that its intervention was not limited to the attempt of conciliating the parties, as it also had power to judge the case. The arbitrators considered relevant that it was a dispute related to the payment of a consultation fee in connection with the settlement of a conflict between a foreign company and a government. It was a dispute that, for a number of reasons, including the confidentiality of the procedure, is typically submitted to arbitration[46].

By comparing the case at hand with similar situations, the Arbitral Tribunal used the method of analogy to fill the gap represented by the pathological clause and ensured the same treatment to situations that are equal in the eyes of the Law.

This example shows that the methods of good faith and analogy can be a valuable resource to fill contractual gaps not only in general, but also within the particularities of an arbitration agreement.

However, sometimes integration is forbidden, for a reason that is common both to contracts, in general, and to the arbitration agreement, in particular. As we will see in the next topic, integration could never change the agreement and is consequently prohibited if the

[46] "The context of the contractual relations between the parties and the usages of international trade also are in favour of the interpretation of the clause as referring to arbitration. The [agreement] relates to the payment of a consultancy service fee by a German Company to [a citizen of country W resident in country Y] in connection with the settlement of a dispute between the German Company and the [W] Government. This is typically the kind of matter which the parties usually agree to submit to arbitration for a number of reasons, in particular the need for confidentiality, the need for flexible and prompt settlement of the disputes, the wish to avoid translating documents into the judge's language, etc. This context reinforces the likelihood of an agreement to arbitrate which has been seen to result from a litteral and systematic interpretation of the clause wording. The Arbitral Tribunal is therefore of the opinion that the Parties have agreed to submit their disputes to arbitration".

events that are not specifically regulated on the contract fall within the risks taken by the parties.

V. BOUNDARIES

Every contract involves risks.

By pursuing an opportunity, one must leave several other alternatives behind. Power and responsibility are two sides of the same coin. The parties are free to engage themselves in a legally binding contract, but they have to support the consequences of their decisions.

That means the outcome of a contract could vary immensely. The contract could benefit both parties, only one of them and, unfortunately, even none of them. The projections of the parties can be very accurate or full of flaws. Irrespective of that, they will remain obliged to comply with what they have agreed to do, unless they jointly decide otherwise[47].

To assure the regular performance of a given contract, it is usually enough to carefully consider its clauses and the elements left by the parties to interpret them. Again, the rule is that a contract is to be performed exactly as agreed. Clarification is required in several cases, but its aim is only to define the correct meaning of the clauses, for the parties have provided everything that was necessary to preside over their relationship.

The fact that sometimes integration is necessary does not concede disregarding party autonomy. Integration is directed to allowing the regular performance of the agreement. Gaps should be filled in order to allow the parties to achieve their common objective that

[47] See ZANETTI, Cristiano de Sousa. *O risco contratual*, in T. Ancona Lopez; P. Faga Iglecias Ramos and O. L. Rodriguez Jr. (coordination), *Sociedade de risco e direito privado*, São Paulo, Atlas, 2013, pp. 455/468. The text is also the source of the following criteria.

justified the execution of the contract in the first place. Integration is designed to second, and not to confront, party autonomy.

That means that the process of filling gaps cannot interfere on the balance of risks already agreed to by the parties. It implies that there are two boundaries that should not be crossed while dealing with integration. First, there is no room for contract improvement. Second, the parties cannot be released from the risks that they decided to take. If the parties have consciously accepted some risk, they have to bear its consequences, regardless of whether or not those are in accordance with their expectations at the time they executed the agreement.

This proposes the problem of identifying the extension of the risks taken by the parties. It goes without saying that the risk is different for every contract. Nevertheless, there are some criteria that could help to establish the risks involved, hence allowing to verify whether there is a gap to be filled.

The first criterion to be considered is the nature of a contract. Broadly speaking, there are contracts that involve greater risks than others. Usually, the distribution agreement is riskier than agency, for the distributor has to buy and sell the merchandise, while the agent only intermediates businesses. Coherently, the profits of a dealer are often bigger than those of an agent.

The second is the market conjuncture. Some markets are characterized by frequent oscillations, some are not. A contract executed between two local companies is subject to less risk than a joint venture concluded between two foreign parties, aiming to promote the reconstruction, for instance, of a country that still has to cope with civil war.

The third is the qualification of the parties. It is directly related to foreseeability. The more expert the parties are, the wider the range of possibilities they could foresee. Construction contracts executed between two neighbors are different from those

executed between large entrepreneurs. This should also be taken into consideration while setting the risks that are congenital to a certain economic operation.

The fourth is the length of the contract. The longer the time, the greater the risk involved. The present is never equal to the past, so contracts that last in time necessarily have to deal with the change of circumstances. In a long-term agreement, a variation could be compensated by another, leaving no room for gap-filling. Things could be different on a short-term agreement, which adaptation may be required in order to allow both parties to regularly perform their obligations.

The fifth and final criterion is external to a contract, as it is related to the change of circumstances that could reveal the existence of gaps. The rarer the event, the more likely it is to be outside the risks taken by the parties. A war in a conflict zone is expected. By contrast, if a historically peaceful country suddenly engages into battle, there will probably be a gap to be filled, for such event could not have been foreseen by the parties when they executed the agreement.

Once the risk is defined, it is easier to verify if there is gap to be filled. If the events are within the risks that have been undertaken, there is no need for integration. On the contrary, if the events are outside the risk that was undertaken, adaptation may be required to preserve the originally agreed upon relation of equivalency.

The same could be said about the arbitration agreement itself. If the parties failed to correctly appoint the institution that is responsible for handling the procedure, there could be a gap to be filled, as it has happened in the Switzerland case above mentioned. Things would be entirely different had the arbitration clause not contained any reference to an institution. In this case, there would be no gap, for the parties would have chosen an *ad hoc* arbitration, giving powers to the Arbitral Tribunal to define everything that is necessary to make the procedure move forward. The parties would have consciously accepted the risks of

attributing greater power to the arbitrator compared to an institutional arbitration. Arbitration agreements are binding and cannot be changed under the disguise of gap-filling.

Integration is a last resource, to be used only when necessary. On the one hand, it could be very helpful. On the other, it could be dangerous. Party autonomy implies party responsibility and does not allow intervention to protect the parties from their own decisions. Integration is an extreme measure and should not be used unless necessary. That being said, it is time to conclude.

IV. CONCLUSION

The Civil Law tradition is struggling against imperfection for centuries.

The imperfection of Law is better known. Even a monument as the French Civil Code must admit that it does not contain answers for every problem. Integration is necessary and there are very well developed methods to deal with questions that remain outside the legislation. Analogy, customs and the general principles of Law have proven to be very helpful. Of course, there could be discussions on a given case, but the instruments to deal with it are well developed and known to every civil lawyer.

Yet, in Private Law societies not all rules come from the legislators. The recognition of party autonomy implies that citizens may engage themselves in legally binding agreements. They have the power to execute contracts, therefore creating rules that they, themselves, should observe, irrespective if they change their minds subsequently to execution of the agreement. Power and responsibility are necessarily linked.

If legislation is not perfect, let alone contracts, which are sometimes drafted in the most peculiar situations. Gaps are indeed frequent, and this is all the more so in the contemporary economies, characterized by long-term contracts. This is particularly evident on the domain of international arbitration, where the fact that the parties belong to different

countries adds more difficulty to predict everything that will happen during the life of a contract. Nevertheless, the amount of work produced by scholars in this context is relatively small, meaning that further efforts are required to technically deal with the issue.

Heaving that in mind, perhaps some proposals may be advanced and hopefully considered of some use.

The first is the identification of an incomplete contract and the subsequently concept of contractual gaps. Incomplete contracts are those distinguished by a relevant omission. This means that there is a gap that must be filled in order to allow its regular performance. A gap is then a relevant omission.

The second regards the methods to fill those gaps. Default rules are indisputably the best option. If they are not present, available practices and usages could be very helpful. Furthermore, the Civil Law tradition has developed two other methods that can also lead to profitable results: good faith and analogy. Good faith is based on the values of loyalty and trust. Analogy seeks to treat similar situations accordingly. They both help to solve several cases on contracts, by filling gaps that should not be there or could not be avoided at the time of the execution of the agreement.

The legacy of Civil Law tradition can also be profited from when it comes to the arbitration agreement. This is the third proposal. Along with practices and usages, good faith and analogy can help to integrate an incomplete arbitration clause, leading to the definition of a content that is in close connection to the common intentions of the parties.

The fourth proposal concerns the boundaries to which the integration is subjected. The aim of integration is to allow the regular performance of a given agreement. That implies that integration could not confront what was already agreed to by the parties. The process of gap-filling must always respect two limits. It can neither lead to an improvement of a contract, nor can it alter the balance of risks agreed to by the parties. Party

autonomy implies party responsibility. In Private Law societies, citizens are allowed to engage themselves in binding contracts, but they also have to bear the consequences of doing so.

The Civil Law tradition is a rich source to deal with gap-filling. Its methods have survived for centuries because they have been useful to generations of jurists. This is a legacy that is worth to be considered while dealing with the complex problems of contemporary economies. There certainly is a lot work to be done. Nevertheless, one can be sure that good faith and analogy still has something to tell in the 21st century. They remain important allies on the combat against imperfection, which qualifies the struggle for justice in human societies. Before such challenge, jurists can neither renounce to battle, nor win it completely, but only perform their task: duly consider every case, find the best possible solution and hope for it to be right.