IS COVID-19 AN EXCUSE FOR NON-PERFORMANCE AND NON-ENFORCEABILITY OF BUSINESS CONTRACTS? ANSWERS FROM ECONOMIC ANALYSIS WITH A BRAZILIAN PERSPECTIVE.

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1. NUTSHELLING THE CONCLUSIONS

(a) In any contract, parties only perform because it is worthy for them, and law surely can influence their behavior making sure it is not worth breaching.

(b) Business contracts with different moment of payment can be addressed as a form of investment, since the party that pays first holds the default risk while financing the activity of the counterparty.

(c) COVID 19 imposes great burden and uncertainty towards the contracts and courts may aggravate such uncertainty.

(d) Statutory or jurisprudence provisions are not prepared for COVID 19.

(e) For its characteristics as Business counterparties, neither of the parties are interested in losing a recurrent investor or a recurrent investment.

(f) The Coase theorem, once again, shows itself as the best perspective of analysis. Since neither the Courts nor the statutory provisions can interfere efficiently, only the parties, if in a built environment of low transaction costs, will allocate the burdens in an efficient way.

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(g) Economic predictions are negative under the scenario of COVID 19 impacting the business activities. However, such predictions point toward even worse scenarios (especially regarding corporate restructuring or breaches of contract) when taken under courts.

(h) Statutory provision – as soft law - and courts have the mission of building a low transaction cost environment, which can be artificially settled by a nudge to negotiate.

(i) The duty of information and good faith are old worth statutes from Civil Continental Law that can help building a duty of best efforts regarding renegotiation without imposing extra-legal penalties.

2. REVIEWING THE LEGAL ECONOMIC LITERATURE ON PERFORMANCE OF CONTRACTS

From a Law and Economics standpoint contracts make promises enforceable by law - in such a way that performing a contract is keeping a promise[3]. Having that in mind, it is coherent to ask what leads parties to perform. As Adam Smith suggests, it is not from the benevolence of the butcher and of the baker that we expect our dinner, but from their regard to their own interest[4]. Choosing to perform goes beyond a moral expectation from Philosophy or Religion, cooperation is the best way towards efficiency, as it helps the parties to reach their economic purposes within a negotiation. However, it would be unreasonable to expect cooperation if the business dynamics and the laws that involve it do not provide a safe environment for the parties to keep their promises.

Within this subject, Ejan Mackaay and Stéphane Rosseau explain that there are different types of contracts concerning the importance of law enforcement for the promises to be kept. For example, when one buys oranges in the grocery store nearby, the parties will most likely achieve their interests regardless of what the law states, since payment is made immediately by both parties[5]. However, this is not exactly true for contracts that are not instantly performed. Within contracts such as sales of goods with instant payment and future delivery - if there is no law enforcement for the promises to be kept - the seller may: (i) simply choose to appropriate since there is no liability for the delivery (ii) not perform since unexpected events create obstacles for performance (iii) deliver goods that do not specifically fit the expectations of the buyer.

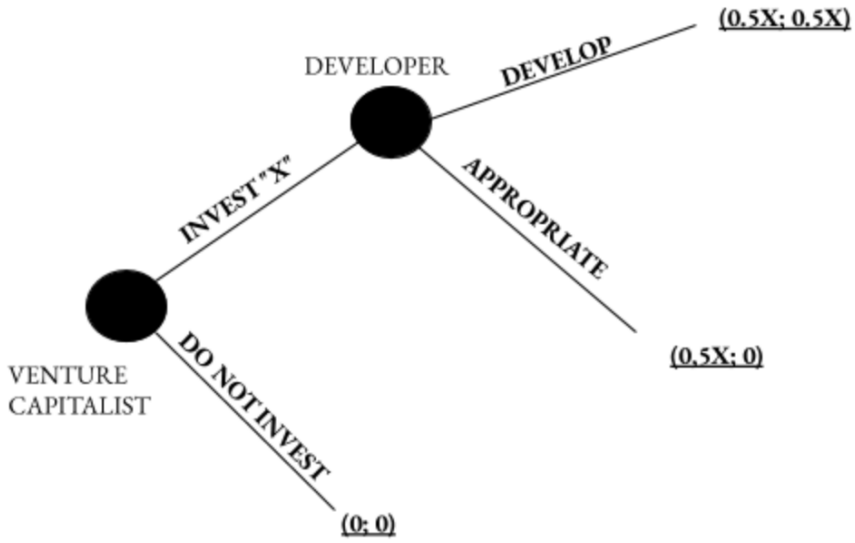
In this sense, Ulen and Cooter have taught us that it is efficient for the economic legal system to enforce promises - making the parties legally responsible for them - to guarantee that either the terms of the contract will be respected or that if a party breaches the contract, the counterparty will be remedied for it. Ulen and Cooter also affirm that this not only provides internal efficiency to the relation between the parties, leading them to achieve the interests that were explicit at the time of the conclusion of the contract, but also external efficiency, since it generates wealth.

To better understand what is suggested by the authors, let us analyze a hypothetical situation: a software developer needs an investor for his start-up company. With the investment, the developer will be able to turn "x" into "2x". The developer tells a venture capitalist that

[3] 6 ULEN COOTER & THOMAS ROBERT, LAW AND ECONOMICS, (Pearson 2012).
[4] ADAM SMITH & CANNAN EDWIN, THE WEALTH OF NATIONS, (Bantam Classic 2003).
[5] EJAN MACKAAY & STÉPHANE ROUSSEAU, ECONOMIC ANALYSIS OF LAW, (Atlas Juridico 2015).

they will share the expected profit of "x" if the venture capitalist decides to invest "x", which the developer does not have. If the promise made by the developer is not enforceable by the law, i.e. by a court, the investor will probably not invest, since the developer will be able to appropriate the investment without actually developing the software. If the promise is enforceable by law, the developer commits a breach of contract if he does not develop the software for which he will have to pay damages. Therefore, the venture capitalist will feel safe enough to invest. In this sense, both parties want the promise to be enforceable, since the developer knows that the venture capitalist will not invest if there is no liability for appropriation.

The parties perform because they understand that it is better for both of them to cooperate.



- *THE NUMBERS IN PARENTHESIS REFER TO HOW PROFITABLE EACH CIRCUMSTANCE IS FOR THE INDIVIDUALS - BEING THE FIRST ONE THE VENTURE CAPITALIST'S PROFIT AND THE SECOND ONE THE DEVELOPER'S PROFIT.*

- *IF THE DEVELOPER APPROPRIATES - BREACHING THE CONTRACT - HE WILL HAVE TO PAY DAMAGES IN THE AMOUNT OF THE EXPECTATIONS HE CREATED.*

- *COOPERATION PROVIDES INTERNAL EFFICIENCY - SINCE BOTH PARTIES ACHIEVE THEIR HIGHEST PROFIT IF THE SOFTWARE IS DEVELOPED - AND EXTERNAL EFFICIENCY - SINCE "X" OF WEALTH IS CREATED IF THE SOFTWARE IS DEVELOPED.*

- *THE MAIN REASON WHY THE PARTIES COOPERATED WAS BECAUSE BOTH OF THEM KNEW THAT THE PROMISE MADE BY THE DEVELOPER WAS ENFORCEABLE BY LAW*

The example helps us to answer the question from the first paragraph: parties perform because it is worthy for them, and law surely influences their behavior. In the investor-developer situation, law acted coercively when assuring that a party in breach would have to pay damages. Nevertheless, law not always has to be operated like that. Eric Posner teaches that sometimes the legal system interferes in cooperation and sometimes enhances it, as the present article will further elaborate within the COVID-19 context[6].

Moreover, the developer-investor situation is connected to the lessons of Eric Posner in the sense that it helps us to understand the application of *damages.* Eric Posner affirms that "*contract remedies should (...) give the party to a contract an incentive to fulfill his promise unless the result would be an inefficient use of resources*"[7]. We will also analyze this concept regarding COVID-19 in the future topics of this article.

Concerning specifically the developer-investor situation, the damages are *expectation damages*. Since expectation damages refer to compensating the injured party putting he/she in a position he/she would be if the contract had not been breached, its application is efficient for the example because it leads the promisor to take the maximum level of commitment to keep the promise, as he has to fully compensate the promisee (counterparty) in case of a breach.

The referred concepts from the law and economics analysis on contracts make it easier to comprehend the importance of having a legal system that enforces agreements, a principle

[6] ERIC A. POSNER, LAW AND SOCIAL NORMS, (Harvard University Press 2000).
[7] RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW, (Aspen 1972).

usually referred as *pacta sunt servanda* - i.e. agreements must be kept - for both Civil Continental Law and Common Law, even though its application varies regarding these two bodies of law.

Nevertheless, the situation that was analyzed through the perspective of the referred authors did not consider the alteration of relevant context for the agreement due to unexpected circumstances. This appears to us to be the case of COVID-19 in many business and commercial contracts, which the present article will examine.

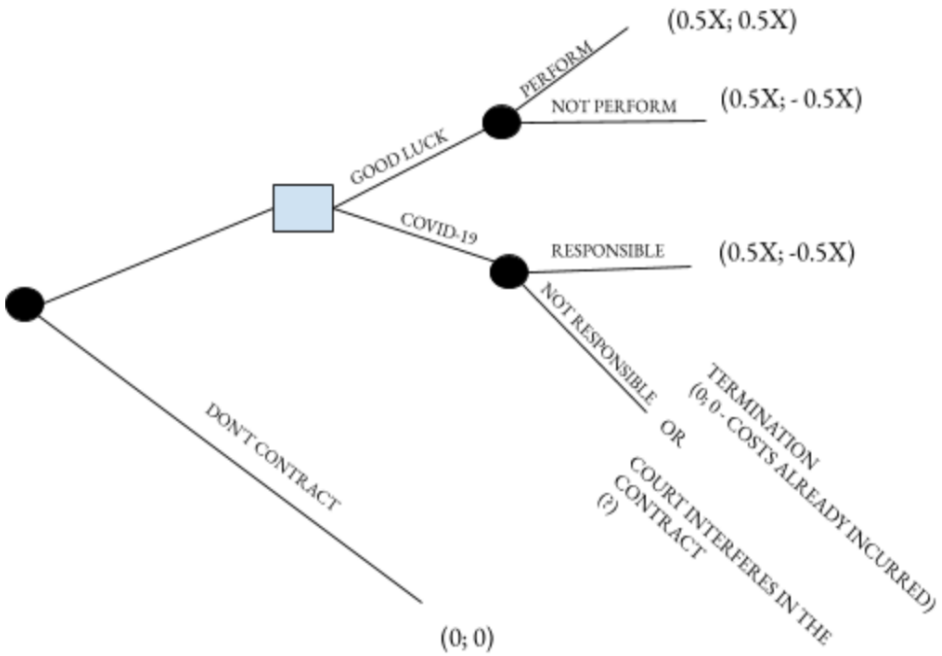
3. SOME CHARACTERISTICS OF BUSINESS CONTRACTS

As mentioned on the first topic, contracts that have gaps between different payments of the agreed obligations are the ones related to which more obstacles to perform may arise, since unexpected events can affect them. And this not only presents one of the main characteristics of business contracts, but also a relevant discussion regarding COVID-19.

Business contracts that concern this element of different moment of payment of the obligations can be addressed as a form of investment, since the party that pays first holds the default risk while financing the activity of the counterparty. These risks can be mitigated by mandatory provisions, but these are not the only sanctions that involve the relation between the parties. Even if there is uncertainty whether a promise is enforceable or not, long-run business contracts, which are common, may have performance guaranteed by the existence of *social sanctions*, such as reciprocity in behavior, and attacks to reputation. For example, when parties engage in a contract of supply of goods, if the demander delays payment, the supplier may perform poorly until the demander starts to pay properly. This kind of practice can be understood as a social sanction and may prevent wrongdoing even if the law does not enforce the promises made by the parties. The practice of rewarding cooperation and punishing appropriation within the environment of a relational contract is called *tit for tat*. And if a party constantly performs poorly it will hardly engage in new business contracts since its reputation will be attacked by the other party.

Combining this perspective with the concepts presented on topic 1, let us analyze a hypothetical scenario that may be facilitated by the events regarding COVID-19: Individual A owns a drugstore and wants to expand it. During the expansion, the drugstore will be closed.

The expansion will be worth "2X" to Individual A. Individual A contracts with Individual B, who promises to expand the drugstore and complete the construction by a specific date. The expansion of the store costs "X" to Individual B, so he charges Individual A "1.5X" for the construction. The contract requires Individual A to pay "X" in advance and "0.5X" when the construction is completed. If no unexpected event impedes Individual B to perform, this relation will follow the same structure of the developer-investor example: both parties will cooperate and make a "0.5X" profit. However Individual B may have bad luck. Let us imagine that Individual B needs the state to issue a construction permit to start a certain stage of the construction and that, due to COVID-19, the state suspends the issuing of all construction permits for works such as the one Individual B is operating for Individual A. What happens in this case?



- *IF THE PARTIES ARE LUCKY AND NO UNEXPECTED EVENT CREATES OBSTACLES FOR THE PERFORMANCE, THE STRUCTURE REMAINS THE SAME AS THE ONE PRESENTED ON THE INVESTOR-DEVELOPER SITUATION*
- *IF THE PARTIES ARE UNLUCKY AND AN UNEXPECTED EVENT SUCH AS COVID-19 CREATES OBSTACLES FOR THE PERFORMANCE, TWO SITUATIONS MAY ARISE (UNDER BRAZILIAN LAW, WHICH MAY BE SIMILAR TO OTHER*

BODIES OF LAW) IF THEY DECIDE TO LITIGATE. (I) A COURT MAY FIND EITHER THAT COVID-19 DOES NOT FALL WITHIN THE SCOPE OF EXEMPTION OF LIABILITY IN SUCH A WAY THAT THE CONSTRUCTOR HOLDS ALL THE RISKS REGARDING HIS PERFORMANCE OR (II) THAT THE CONSTRUCTOR SHOULD NOT PAY DAMAGES SINCE PERFORMANCE WAS IMPEDED BY THE COVID 19.

- *IF THE CONSTRUCTOR IS RESPONSIBLE UNDER THE LAW, THE COURT WILL DECIDE THAT HE HAS TO PAY DAMAGES TO THE OTHER PARTY AND THE OTHER PARTY WILL BE ENTITLED TO TERMINATE THE CONTRACT. IF THE COURT FINDS THAT THE CONSTRUCTOR IS NOT RESPONSIBLE FOR THE NON-PERFORMANCE, THEN IT MAY LEAD EITHER TO A TERMINATION OF CONTRACT PLACING THEIR PARTIES ON THEIR "STATUS QUO ANTE" OR TO AN INTERFERENCE BY THE JUDGE ON THE CLAUSES OF THE CONTRACT (WITHIN THE BRAZILIAN LEGAL FIGURES THAT WILL BE PRESENTED IN THE NEXT TOPIC).*

Therefore, we can see that regardless of what is written in the law, the parties will be able to achieve an efficient contract without reaching a court. And here's why: neither of the parties want the contract to be terminated. The store owner most likely plans to operate his business after the COVID-19. Also, the constructor surely wants to perform a contract that is actually concerned to his main activity after all. Reaching a court may lead either to the unsatisfactory termination of contracts or to the interference by a third party on what they had negotiated. Since decisions regarding COVID-19 are still uncertain, the risks within this procedure are too high. Also, as we have seen on the investor-developer situation, the performance of contract generates wealth, so the states are also benefited if the parties perform. In this sense, it is more efficient to enhance cooperation *stimuli* than to create strict rules for contract interference by the state.

4. LEGAL FIGURES THAT CAN BE ADDRESSED ON BUSINESS CONTRACTS WITHIN THE COVID-19 CONTEXT

The spread of the COVID-19 has been impacting the dynamics of many businesses. Since there is no concrete solution to the disease by the present moment, governments all around the world have adopted social distancing as the strategy to avoid major impacts on their health system, which appears to be the most coherent plan to be followed given the situation.

However, this policy involves the suppression of different economic activities, since most stores had to suspend physical operations, borders had to be closed and almost all events that would gather a large amount of people had to be either cancelled or postponed. Due to these new circumstances, the performance of contractual obligations of many kinds can become impossible or at least extremely hard to be executed by now.

One of the main principles in Civil Continental Law countries is the so called *pacta sunt servanda*, which means that the parties to a contract are obligated to comply with their contractual obligations or else they will be held liable for a breach of contract. Nonetheless, if the parties face circumstances that make the performance impossible or that are extremely different from the circumstances that were expected by the conclusion of the contract, *pacta sunt servanda* can be avoided.

In some cases, coherently dealing with performances that are not instantaneous regarding the conclusion of the contract, under the Brazilian Law, if an unexpected event creates extreme difficulties for a party to perform a contractual obligation with an advantage provided to the other party, this contract can be avoided under article 478 of the Civil Code, which refers to the *excessive burden* doctrine.

Also, legal scholars - such as Nelson Nery Jr. - discuss the possibility of addressing article 317 of the Brazilian Civil Code to analyze that if there is an unexpected event that creates high imbalance between the performance of the obligation at the time of the conclusion of the contract and the performance of the obligation after dealing with the unexpected circumstances - generating disequilibrium to the *value* of the obligation for the parties as well - a court could interfere in the terms of the contract without the necessity of analyzing how difficult one of the obligations itself became to the other party[8].

[8] NELSON NERY JR., THE BASIS OF THE LEGAL BUISNESS AND THE REVIEW OF THE CONTRACT, (2004).

The referred understanding of article 317 is related to the Theory on the Objective Basis of a Negotiation, suggested by Karl Larenz[9]. In accordance with the author, this Objective Basis is affected either if the obligations between the parties are not as balanced as they were at the time of the conclusion of the contract due to an unexpected event - which some authors understand to be the nature of article 317 - but also if the purpose of the contract is frustrated. The latter, by a broad analysis of the intentions of the Brazilian Law, can even be understood as incorporated in the Brazilian Civil Code in articles 421 and 422, which also would provide the possibility of termination of contract.

To summarize this brief description of the Brazilian contract law, we can understand that, in theory, the Brazilian law provides the parties with many possibilities to attempt either termination of contract or a judicial interference on the terms of the contract in circumstances that are at least similar to the COVID-19 crisis.

However, what is written in the law may not always be the best alternative to the parties to solve their problem.

4.1. Cooperation and internal efficiency

In the beginning of the 1960s, Ronald Coase brought an intense discussion to Law and Economics with his article *The problem of social cost.* Within the debates around *externalities* - i.e. the benefits and costs held by third parties to a contract that are not taken into account by the party that performs - Coase suggested that reasonable parties were surely able to agree on the most efficient contract regardless of what was stated in the law[10]. If Coase were correct with this assumption, that could mean that tort law was not as efficient as people expected.

To understand Coase's Theorem, let us analyze the following situation inspired by the economist himself: a small factory produces useful goods for the neighboring community. The production of these goods is worth 1.5X. The factory also sends smoke - a sub product of its activity - to the environment. This smoke is harmful for the neighboring properties. The legal framework can create the responsibility for the factory to pay damages of X for all the owners of the neighboring properties. However, this can be extremely expensive for the factory,

[9] KARL LARENZ, BASIS OF LEGAL BUSINESS AND CONTRACT ENFORCEMENT, (2002).
[10] R. Coase, *The Problem of Social Cost*, 3 JOURNAL OF L. & ECON.1, 1–44 (1960).

creating huge obstacles for its operation. The factory could also install a device in the chimney that would contain the harmful emissions, but this is just as expensive as the damages that the factory would have to pay for the owners. On the other hand, if the legal framework is silent regarding the subject and neither the factory nor the owners attempt to communicate and cooperate, it is no-win situation as well, since the owners will suffer losses concerning their property and this may lead them to boycott the factory and attack its reputation. But, considering that communication is easy between the factory and the owners, the parties can cooperate.

	FACTORY'S SITUATION WITHOUT COOPERATION	PROPERTY OWNERS' SITUATION WITHOUT COOPERATION	COOPERATION
FACTORY HAS TO PAY DAMAGES/ INSTALL DEVICE BY ITSELF	DAMAGES OR DEVICE (-X)	DO NOTHING BUT THEN WILL LOSE THE FACTORY NEARBY (-1.5X)	SPLIT THE COSTS OF THE DEVICE (-X/2) AND THE FACTORY STILL OPERATES (1.5X)
FACTORY DOES NOT HAVE TO PAY DAMAGES	DOES NOTHING BUT THEN *SOCIAL SANCTION/BOYCOTT* LEADS THE FACTORY TO INTERRUPT OPERATIONS (-1.5X)	PROPERTIES WILL BE HARMED (-X)	SPLIT THE COSTS OF THE DEVICE (-X/2) AND THE FACTORY STILL OPERATES (1.5X)

It is clear in the table that bargaining within their own and specific situation is the most efficient solution for their relation. But looking at it with a broader perspective, this internal

efficiency also provides external efficiency because it guarantees the operation of a factory that regards an interest of the whole economic system and generates wealth.

Ronald Coase, nevertheless, made it clear that the only reason why cooperation would be possible for that specific situation was because the costs of reaching an agreement were low. These costs are *transaction costs*, obstacles for the parties to properly bargain between them, such as not possessing all the information within the context of the contract or having a hard time to reach the party that you want to negotiate with.

The conclusion suggested by Ronald Coase is that, assuming zero transaction costs, the parties will definitely reach the most efficient agreement for both of them, i.e. *Pareto Efficiency*, which means that a party cannot better off its situation without making the other party's situation worse off. For situations in which parties do not have all the elements of negotiation on their hands, tort law still has huge importance. What is important to comprehend is that law should not only determine sanctions, but also reduce transaction costs for the parties to negotiate, providing them with the most proper environment to achieve efficiency.

Regarding the enforceability of contracts, and now addressing the COVID-19 situation, addressing the courts to enforce a contract facing unexpected events may not only be expensive as usual but can also provide unexpected results (specially concerning Brazilian law, according to which there are many legal figures that can be applied for different circumstances within the context of the agreement).

In such wise, since the parties may not even know what to expect from a court regarding their contract - since the court can even change its clauses or terminate under the Brazilian law - the fairest and most efficient alternative for the parties is for them to renegotiate themselves the clauses pursuant to the new circumstances. Nonetheless, to avoid opportunistic approves to the uncertainty of courts concerning the change of circumstances, the legal system, i.e. the state, has to provide conditions for the individuals to feel safe enough to renegotiate and have the new contract clauses enforced by law.

4.2 Commercial relations and external efficiency

When it comes to most business contracts, as already discussed above, the payment of contractual obligations does not occur immediately. In such wise, one cannot evaluate an idea

until after he knows what it is, and after its disclosure he has little reason to pay for it[11]. This is the problem that arises when attempting to unite ideas and capital, a combination that benefits the economic system internally and externally. The investor must trust the developer not to steal capital and the developer must trust the investor not to steal his idea. It is a similar controversy faced on the developer - investor analyzed on the article if the promises were not enforceable. The solution comes from contracts, promises with material sanctions for breaking it, especially legal sanctions.

Business contracts, within this context, present the characteristics of investments, in such a way that the company that pays first expects to receive benefits, pursuant to the contractual obligations, in the future, in such a way that, while the second payer does not perform, the other party finances it. This structure was already mentioned above, but now we will desiccate the different "stages of investment" that may regard the contracts. We can have relational contracts, private contracts and public contracts, as the level of investment expands. Cooter and Schaefer teach us that there are different sanctions for the different stages. For relational contracts, we have social sanctions as a strong element that arises in case of non-performance. For private contracts, social sanctions are combined with civil sanctions. And for public contracts, those two combine with regulatory sanctions. However, since business contracts are the agreements that regard the development of the parties' core activity, they do not want to terminate the contract or to have strong sanctions applied. They do it in the worst-case scenario. They want the contract to be performed. Reaching the courts is expensive and the procedures may take a long time, as we will see on the results from the ABJ[12] research, especially given the present circumstances. Also, it must be considered that “writing down a law does not make it effective; it is as effective as its supporting sanction"13. The civil sanctions depend on the understanding of the courts (which are not very clear regarding unexpected events as the COVID-19 may be considered)[14]. But what is relevant to consider concerning the different types of business relations described above is that - according to the investor/developer situation analyzed on the first topic - law must guarantee that there is a comfortable environment for the parties reach an agreement to perform, since the economic

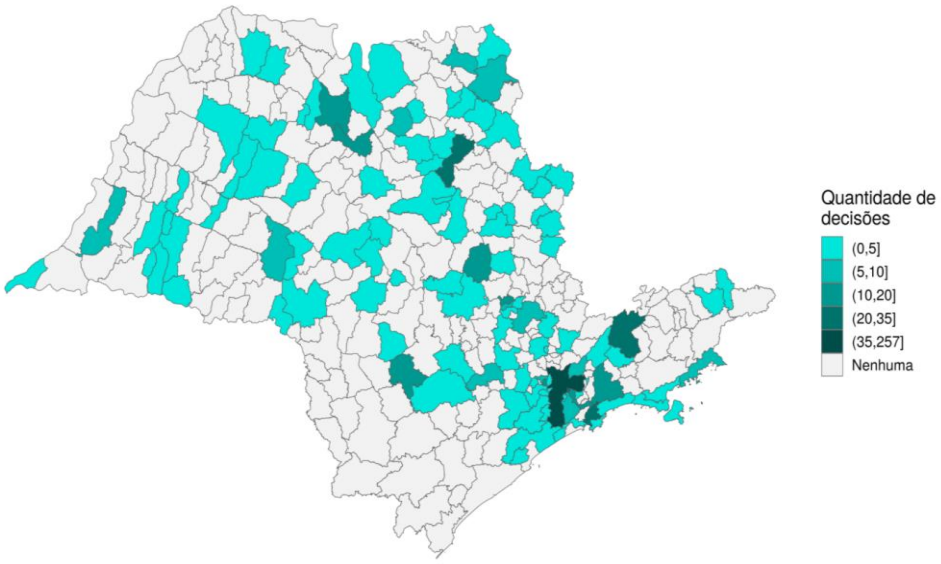
[11] HANS-BERND SCHAEFER & ROBERT D. COOTER, SOLOMON’S KNOT: HOW LAW CAN END THE POVERTY OF NATIONS, (Princeton University Press 2011). (hereinafter “HANS-BERND”)
[12] Brazilian Association of Jurimetrics.
[13] HANS-BERND, supra note 11, at 10.
[14] Cuiabá Plaza v. Minerva Energia, (2020).

gains that both of them will achieve will - simultaneously - be an economic increase for the whole system.

5 EMPIRICAL EVIDENCE FROM THE BRAZILIAN PERSPECTIVE

On the present topic, we will analyze how COVID-19 has changed specifically the Brazilian economic scenario either by its own occurrence or by the consequences of the public measures that were adopted by the country, hoping that this analysis will help to understand the situation of different states.

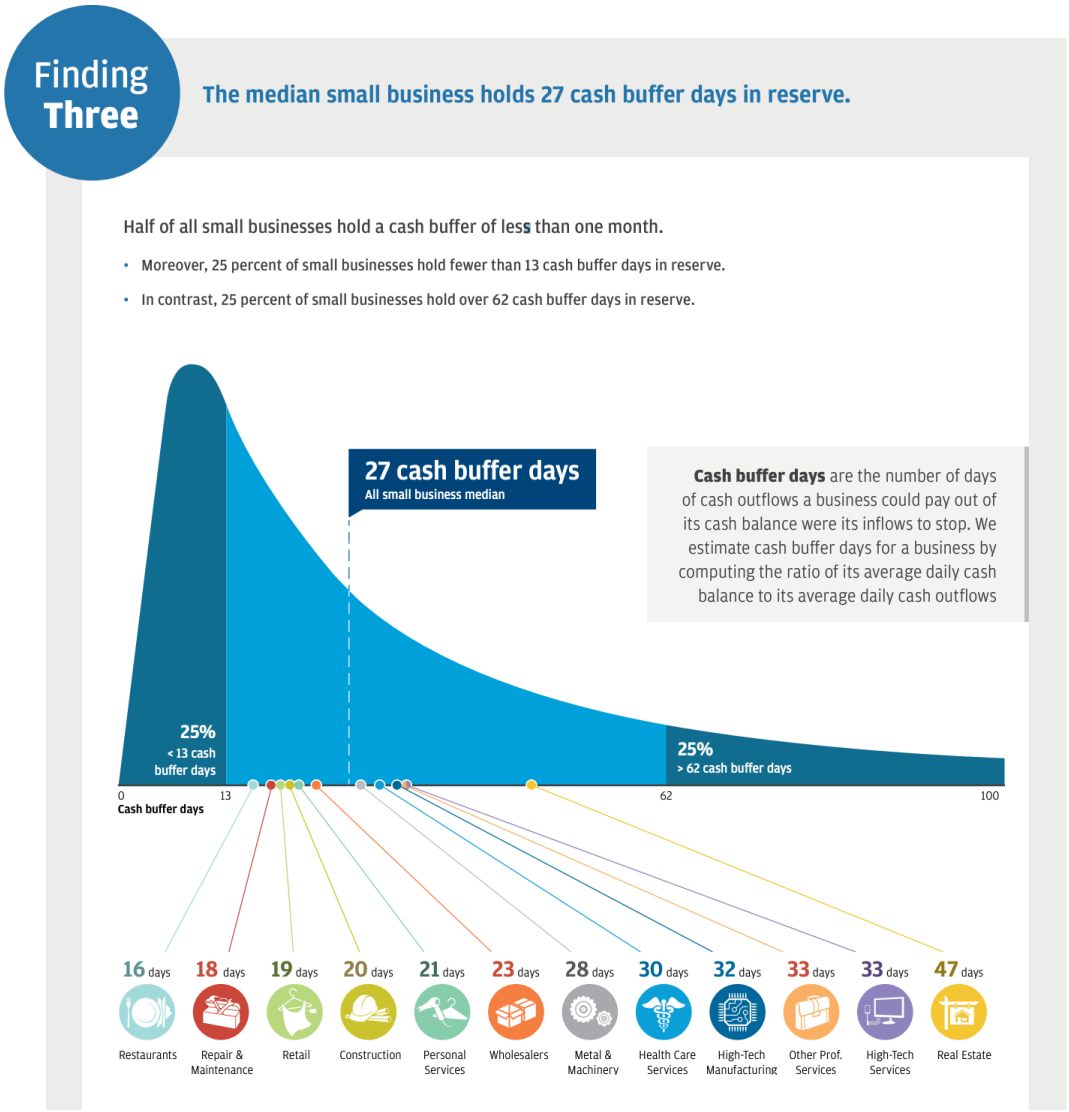
A problem that parties to a contract may face when addressing the courts to analyze their agreement is that a decision may take a long time to be provided to them. Not only COVID-19 brings a new discussion to the table but also it affects many kinds of business, in such a way that a lot of courts will have to deal with a considerable amount of cases concerning an undetermined matter. To highlight that, ABJ, *Associação Brasileira de Jurimetria*, provided data from a research on the impact of COVID-19 on the Justice Court of Sao Paulo, according to which 112 districts from 319 total had already dealt with a COVID-19 by April 4th, 2020. 811 decisions regarding COVID-19 were identified by the same date[15].



[15] Julio Trecenti & Marcelo Guedes Nunes, *Mentions to Covid-19 in the lower court decisions of the TJSP*, (2020)

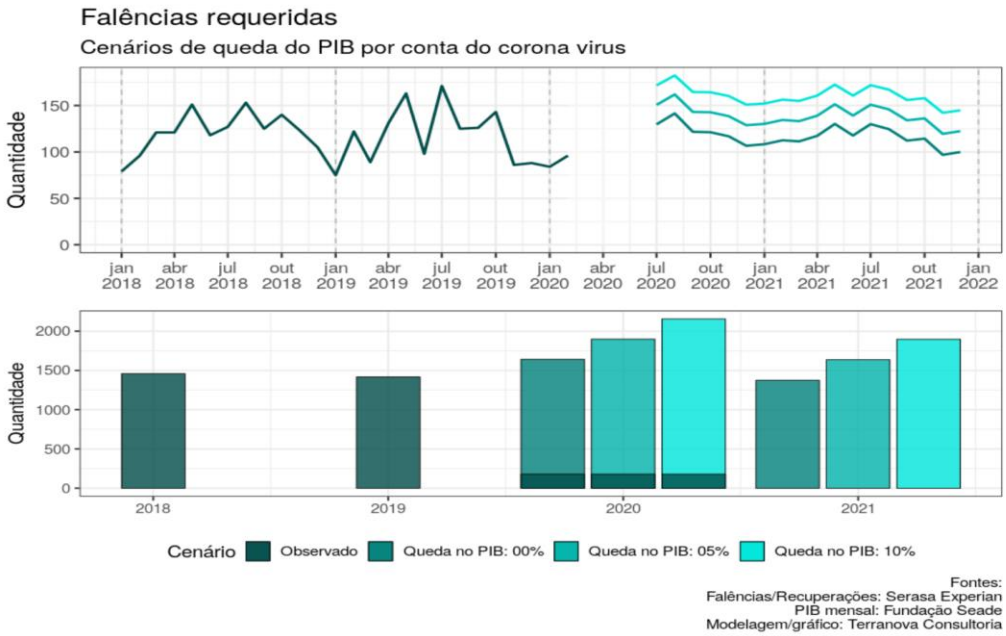
Menções à Covid-19 nas decisões de primeira instância do TJSP; Associação Brasileira de Jurimetria; Julio Trecenti, Bruno Daleffi e Marcelo Guedes Nunes (04.04.2020)

Also, another concern related the COVID 19 regards to bankruptcy. All around the world, stores had to suspend operations due to state programs to contain the spread of the virus. In Brazil, by the end of May 2020, only "essential services" are allowed to regularly function. Depending on how long this kind of policy is adopted, it may lead many business activities to financial distress. In this sense, JP Morgan Chase published, on September 2016, the results of a research according to which around half of the small business cannot survive for more than one month in a situation such as this[16].



[16] JPMORGAN CHASE & CO., https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-small-business-report.pdf. (last visited July 17th, 2020).

Furthermore, considering the possible impacts of COVID-19 on the Brazilian GDP, Terranova was able to reach estimate numbers of bankruptcy requests for 2020 and 2021, which are higher than on the previous years. This not only represents major impacts on the state's economic system, but also a significant increase in volume of cases for the Brazilian courts to deal with[17].



The expectation for GDP that provided basis for the last chart is convergent with the results published by the CEPAL (The Economic Commission for Latin America and the Caribbean) on *Informe Especial COVID-19 No 2: dimensionar los efectos del Covid-19 para pensar en la reactivación.*

[17] Daleffi, Bruno; Trecenti, Julio; Guedes Nunes, Marcelo. *O que dizem os processos no Tribunal de Justiça de São Paulo sobre a COVID-19*?. 2020

Cuadro 6 | Proyecciones de crecimiento del PIB de América Latina y el Caribe, 2020

	Crecimiento del PIB 2020
América Latina y el Caribe	**-5,3%**
Argentina	-6,5%
Bolivia (Estado Plurinacional de)	-3%
Brasil	-5,2%
Chile	-4%
Colombia	-2,6%
Ecuador	-6,5%
Paraguay	-1,5%
Perú	-4%
Uruguay	-4%
Venezuela (República Bolivariana de)	-18%

Therefore, the sequence of events created within the context of COVID-19 is the following: (i) states, such as Brazil, have to adopt measures of social distancing - which are indeed necessary - to contain the spread of the virus, (ii) many businesses suspend operations, (iii) this leads them to financial distress, (iv) financial distress affect either the judiciary system or the economic system directly, (v) the amount of cases for the courts to deal with also affect the economic system, at least indirectly. In this sense, providing ways to contracts be performed without enforcing then on courts is in our understand the best solution to mitigate the harms of COVID-19, since the generation of wealth benefits the whole dynamics of businesses activities.

6 LEGISLATIVE NUDGE

Throughout the article, we have been arguing that parties must cooperate and renegotiate business contracts before reaching a court to litigate, defending that a so-called safe environment for renegotiation must be provided by law. However, we have not described yet (i) what would be that safe environment and (ii) why it is law's responsibility to facilitate renegotiation. As a conclusion of the article, this is what will be done on this last topic.

Many individuals - whether or not they have studied economics - are usually committed to the idea of the *homo economicus, i.e.* the thought that we think and choose extremely well, always improving the utility of a choice. However, it has been proven by diverse studies on behavioral economics that we, humans, do not behave like that. We make a lot of biased decisions. A good way to explain that is to analyze the sunk cost fallacy. It occurs when one continues a behavior as a result of previously invested resources (time, money or effort)18. For

[18] Arkes, H. R., & Blumer, C.*The psychology of sunk costs. Organizational Behavior and Human Decision Processes.* 1985.

example: it is common for people to attend to events they have paid tickets for regardless of how much they want to do it at the time of the event. And, by doing that, he/she wastes not only the money he/she has paid for the ticket, but also the time doing something he/she did not want to do. Through another perspective of bad choices, an individual may choose to immediately litigate - before attempting to renegotiate a contract - because he/she has a negative perception of the counterparty that did not perform, even though it may have occurred due to unexpected events which makes the event, in fact, neutral. In this sense, the so-called comfortable environment for renegotiation is a circumstance in which the parties can make a choice with the minimum amount of biases as possible.

To answer the second question suggested on this topic, we must analyze what Richard Thaler describes on *Nudge*: our decisions are heavily influenced by small and apparently insignificant details[19]. The author compares the power to display the options for a decision maker with the profession of architecture. Architects know that the way you locate the bathrooms in a building will have subtle influences on how people interact. Accordingly, the way *choice architects* provide information for the decision makers will influence what path they will take. Choice architects have the responsibility for organizing the context in which people make decisions. In such wise, the state is surely a choice architect in many fields, and law is a tool for the architecture. Within our specific discussion, even though the law cannot make it mandatory for the parties to renegotiate, since legal figures such as the Brazilian ones presented on the article and hardship clauses exist and are important, it can create incentives for a stage of renegotiation before the proceedings start, in which the duty - within the consequences of good faith - and the benefits of this new agreement will be explained to the parties. And it will do so because internal efficiency to contracts increases, external gains arise as well.

7 NUTSHELLING THE CONCLUSIONS

(a) In any contract, parties only perform because it is worthy for them, and law surely can influence their behavior making sure it is not worth breaching.

[19] Thaler, R. H., & Sunstein, C. R.. *Nudge: improving decisions about health, wealth, and happiness*. Rev. and expanded ed. New York: Penguin Books. 2009

(b) Business contracts with different moment of payment can be addressed as a form of investment, since the party that pays first holds the default risk while financing the activity of the counterparty.

(c) COVID 19 imposes great burden and uncertainty towards the contracts and courts inflict such uncertainty

(d) Statutory or jurisprudence provisions are not prepared for COVID 19.

(e) For its characteristics as Business counterparties, neither of the parties are interested in losing a recurrent investor or a recurrent investment.

(f) The Coase theorem, once again, shows itself as the best perspective of analysis. Since neither the Courts nor the statutory provisions can interfere efficiently, only the parties, if in a built environment of low transaction costs, will allocate the burdens in an efficient way.

(g) Economic predictions are negative under the scenario of COVID 19 impacting the business activities. However, such predictions point toward even worse scenarios (especially regarding corporate restructuring or breaches of contract) when taken under courts.

(h) Statutory provisions, in a soft law manner, and courts have the mission of building a low transaction cost environment, which can be artificially settled by a nudge to negotiate.

(i) The duty of information and good faith are old worth statutes from Civil Continental Law that can help building a duty of best efforts regarding renegotiation without imposing extra-legal penalties.