The illegality and nullity of the unconscionable clause of imposition of jurisdiction in the international cargo transport contract:

The protection of the weak contracting party, the victim of the damage or the subrogated insurer

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Abstrato:

O presente estudo (trabalho de conclusão de curso) trata da defesa do contratante débil no contrato internacional de transporte marítimo de carga, expondo sua hipossuficiência e o dirigismo contratual do armador. Referido contrato – que é de adesão – contém muitas cláusulas abusivas, como as que dispõem sobre a limitação tarifada de responsabilidade e imposição de foro. O objetivo será discutir a de imposição de foro, defendendo o foro do lugar de cumprimento da obrigação de transporte ou o que melhor convém ao credor insatisfeito, vítima do dano contratual (ou, ainda, o segurador sub- rogado). Em se tratando de contrato de adesão, é inválida e ineficaz a cláusula em que o armador impõe o foro de sua vontade ao consignatário da carga, o credor insatisfeito. A perspectiva deste estudo é a experiência brasileira. O ordenamento jurídico brasileiro nega vigência à cláusula de eleição de foro pelo armador porque enxerga em seu conteúdonão uma eleição verdadeira, mas imposição de sua vontade, ato típico de absurdo dirigismo contratual. Não se pode admitir renúncia forçada à própria jurisdição, como o armador faz, por meio desta cláusula, ao consignatário de carga. A situação é ainda mais grave quando se tenta impor a mesma cláusula ao segurador sub-rogado, que sequer é parte no contrato. A imposição de foro contraria o espírito do Direito Contratual atual e é forma inaceitável de protecionismo, algo que prejudica o exercício do Direito do credor insatisfeito e que caracteriza grande desequilíbrio de forças. Ao se discorrer sobre esta cláusula, também se comenta a de imposição de arbitragem, talvez ainda mais abusiva, eis que não se concebe a realização de procedimento arbitral sem a voluntariedade expressa, prévia e formal. Pode-se ainda dizer que os obstáculos formais intentados pelosarmadores a que as vítimas de danos contratuais exerçam seus direitos é uma das formaspelas quais tentam escapar de suas responsabilidades e do princípio da reparação civil integral. Toda tentativa de proteção abusiva do causador do dano implica esvaziamento da dignidade da vítima e do próprio Direito, para não dizer da Ordem Moral.

Palavras chave:

Seguro de Transporte Internacional. Jurisdição Nacional. Direito do Seguro. Direito Marítimo. Direito de Danos. Transporte Marítimo de Carga. Responsabilidade Civil. Equilíbrio Contratual. Defesa do Credor Insatisfeito ou do Segurador Sub-rogado. Tutela do Contratante Débil Anacronismo Legal. Cláusulas Abusivas.

Abstract:

The present study (course completion work) addresses the defense of the weak contractorin the international maritime cargo transport contract, exposing its insufficiency and thecontractual direction of the ship owner. This contract, which is an adhesion contract, contains many unfair terms, such as those relating to the tariff limitation of liability andthe imposition of jurisdiction. The objective will be to discuss the imposition of jurisdiction, defend the jurisdiction of the place of fulfillment of the transport obligationor what best suits the unsatisfied creditor, victim of the contractual damage (or, even, the subrogated insurer). In the case of an adhesion contract, the clause in which the owner of the ship imposes the jurisdiction of his will to the recipient of the cargo, the unsatisfied creditor, is invalid and ineffective. The perspective of this study is the Brazilian experience. The Brazilian legal system denies the clause of choice of the jurisdiction by the shipowner because it sees in its content not a true choice, but the imposition of its will, a typical act of absurd contractual leadership. It is not possible to admit the forced resignation to the jurisdiction itself, as the shipowner does, through this clause, to the recipient of the cargo. The situation is even more serious when it comes to imposing the same clause on the subrogated insurer, which is not even party to the contract. The imposition of a jurisdiction is contrary to the spirit of the current Contract Law and is an unacceptable form of protectionism, something that harms the exercise of the right of the unsatisfied creditor and that characterizes a great imbalance of forces. In discussing thisclause, a comment is also made on the imposition of an arbitration, perhaps even more abusive, since there is no conception of carrying out an arbitration procedure without the voluntary, express and prior voluntariness. It can also be said that the formal obstacles brought by shipowners for victims of contractual damages to exercise their rights is one of the ways in which they try to escape their responsibilities and the principle of complete civil redress. Any attempt to abusively protect the person causing the damage resultsin an emptying of the victim's dignity and the Law itself, without mentioning the Moral Order.

Keywords:

International Transport Insurance. National Jurisdiction. Insurance Law. Maritime Law. Law of Damages. Maritime Cargo Transport. Civil Responsibility. Contractual Balance. Defense of the dissatisfied creditor or subrogated insurer. Guardianship of the Weak Contractor Legal Anachronism. Unconscionable Clauses.

I. INTRODUCTION

In this paper our objective is to address unfair terms in international maritime cargo transport contracts, notably the imposition of jurisdiction. The subject is part of our daily professional life. It is one of the most controversial in maritime law litigation, especially in what concerns the Law of Obligations and Insurance Law. The proposal is to show the Brazilian experience and compare it, even if with modest pretensions, to that of other Latin American and European countries, especially Spain, Portugal, Italy and the United Kingdom.

The issue is dear to our hearts. And not only because of its relationship with our professional practice of law, but also because of its moral background. The moral order is part of Law, and in many constitutional systems, such as in the Kingdom of Spain, it has a constitutional nature. We are convinced that in today's world there is no more room for contractual dirigisme, especially in the way it is presented in adhesion contracts, such as the international maritime cargo transport contract.

We believe that the **presentation** made in *Taller 3 of the 46º Curso deEspecialización em Derecho da Universidad de Salamanca*, subject *Contratos y Daños,* fits like a glove to the present introduction and shows well the mood that marks this work.

This *Taller* was one of the activities I actively participated in during my second graduate course in Law at the University of Salamanca, Spain. The first course was a specialization course in Insurance Law. One course fits well with the other, and both subjects expose something very important for the (international) transport insurance portfolio

We open quotation marks

Taller 3: Sociedad del risgo, nuevas amenazas y derechos fundamentales

Título de la comunicación: ***In a society of risks, we can no longer accept norms that limit the liability of those who cause damage.***

Resumen: Civil Liability - Risk Society - Primacy of the Principle of ample and full civil redress - Anachronism and illegality of the normative types with the objective of limiting the liability of the causer of the damage - Defense of the victim.

We live in times of great change and enormous challenges, times of the Fourth Industrial Revolution.

Every day, human ingenuity develops, and economic activities grow stronger. As much as technologies seek excellence, the rich increase.

So much so that the Law has also evolved substantially, and today it is already taken for granted, as a fundamental right, that of no one being a victim of damage, something much greater and deeper than the old 'neminem laedere'.

Current Law even works with the idea of civil liability for the expectation of potential damage.

Far beyond objective civil liability, this idea states that the potential damage that someone can cause to another is, depending on the particularities of the case, enough to cogitate on the duty to redress.

Something fantastic and, perhaps, essential for the development of citizenship.

It is no longer a question of whether or not to accept so-called punitive damages, but of trying to secure, in one way or another, everyone's right not to be a victim of harm.

Vanguardist? No doubt, but something that has to be present in any serious discussion about civil liability, its severance of the case, and its unusual social dimension.

It is worth noting that even before this more recent and innovative vision, the desire for fair compensation for the damage suffered by the victim and exemplary punishment of the person who caused it was already present in almost all legal systems around the world through the principle of full civil redress.

In the specific case of Brazil, the principle is clearly stated in art. 944 of the Civil Code and implicitly present in item V of art. 5 of the Federal Constitution, which ensures broad and full civil redress.

Considering that art. 5 addresses fundamental rights and guarantees and is marked with the seal of a permanent clause, it can be said that in Brazil fullcivil redress is, more than a principle of a civil nature, a fundamental constitutional right, anchored in citizenship.

For this reason, the existence, nowa-

days, except in very specific, absolutely special and extraordinary cases, of norms, rules, clauses, in short, any type of normative that has the objective of limiting the liability of the party causing the damage, is unacceptable.

Every limitation of the liability of the causer of a damage is the emptying of the right of the victim, of the offended party.

I add, based on Natural Law and the moral order itself, that the limitation of liability applied in favor of the author of the illicit act offends the dignity of the victim and of Law as a whole.

There is no superposition of the concept of Justice to that of Law if the latter is used to benefit those who cause undue harm to others. The Law becomes clumsy, deformed, an enemy of Justice.

This is because he who causes damage has to bear the full results and effects of his wrongful conduct, nothing less, perhaps everything more.

Hence, the insurgence, almost with an air of a Holy Crusade, against legal and/or contractual norms that limit liability.

Take the Montreal Convention, which is the encore of the Warsaw Convention. It provides for the limitation of liability of the international air cargo carrier in cases of shortages and damage.

The norm is unfair and intolerable, to say the least, and anachronistic!

When the Montreal Convention was born - at the beginning of the last century - of which the Montreal Convention made substantial use, the air navigation industry was in its infancy, the risks were too high, and legal protection mechanisms were needed.

Today, the industry is strong and healthy, so much so that the major aircraft manufacturers, Boeing and Airbus, work with the so-called "zero risk" and air navigation is increasingly safe. Now, if this is so, what is the point of the old legal protection, the limitation of liability?

Precisely because of current technology, the shortages and malfunctions in cargo entrusted for transportation are nothing more than ordinary operational negligence, administrative negligence, inexcusable business failures of the air carriers. Do they deserve, then, regulatory benefits such as limitations on their liability? Is this fair and morally orderly with regard to the cargo owners or their insurers?

It is stated here with categorical confidence: no, it is not fair or even tolerable in the eyes of morality!

The concern of the renowned University of Salamanca in studying "Sociedad del risgo, nuevas amenazas y derechos fundamentales" must necessarily include the principle of full redress and the rejection of the concept of limitation of liability, even of a tariff nature.

It is true that perhaps in a few cases, when confronted with other important postulates of the Law, such as the theory of preservation of the company, the limitation may be admitted, but always on an exceptional basis and with strong justification.

But, with the exception of exceptions, the Law has to prioritize full civil redress under pain of intolerable injustice, excessive formalism, and serious prejudice to the victim.

In fact, it is the victim who must be the target of all attention in modern civil liability, not the one who caused the damage. In the maximum protection of the victim lies the social good and the restorative, rebalancing, principled and edifying functions of Law, the concrete arm of Justice.[1]

<u>We close quotation marks</u>

In the presentation of Taller 3, we approached the subject in a broader way than we intend to do here; there we had a particular inclination to international air cargo transportation, with due criticism to the anachronism of the Montreal Convention. In this paper, the focus will rest on maritime transportation and, within it, will reach the so-called choice of jurisdiction clause[2], imposed by the unilateral fingers of the shipowner in an adhesion contract.

At the time of the concluding work of the *Specialization in Insurance Law*, on the occasion of the *45th graduate Course in Law* at this same University of Salamanca, under the advisory of Professor **Eugenio**

Llamas Pombo, we addressed the limitation of liability clause, demonstrating its unconscionable nature and its illegality in light of the principle of integral civil redress.

At this point we will attack the clauses that impose jurisdiction, or arbitration (the latter merely in tow), emphasizing its harmfulness, the poison it distills in Contractual Law, its incompatibility with the current dynamics and with the principles that inform the Law of Obligations, auxiliary to the Law of Damages, which is the originator of Civil Liability.

We cannot admit, as we said in a previous opportunity, any contractual clause that intends to limit the responsibility of the person who caused the damage and, in this way, bring damage to the effective exercise of the Right by the unsatisfied creditor. By preventing the damage victim from accessing the jurisdiction that best suits it, the search for full civil redress, the full exercise of the right, is seriously harmed.

The shipowners make use of contractual mechanisms that are incompatible with the spirit of contemporary Law, enemies of phenomenal reality. It is especially present, in the international contract of maritime cargo transportation, the figure of the weak contracting party; she who has to be the center of attention, materialized in the person of the *subrogated insurer*[3]. Without being a party in the contract, the insurer appears as the great protagonist of the maritime law litigation, specifically of the civil liability of the shipowner for contractual damage.

In Brazil, as well as in Mexico and Panama, such clauses are null and void. In England (United Kingdom), they are accepted and defended. In Southern Europe, they are partially respected because of the International Maritime Law Conventions, which, however, are not in harmony with other normative sources present in national and European Union legal systems, such as those addressing the Consumer Law, defense of the weak contracting party and civil liability of those who manage risks.

If it is not an excess of pretension on our part, instigated by the flame of the ideal, we intend at least to inspire discussions around possible adjustments in the European legal systems. Unfair terms in international maritime contracts, especially in cargo transportation, can no longer be accepted; and if they are, they should seek a better alignment with the new perspectives of Law.

In a scenario in which much is said about creditor satisfaction, in the objective imputation of liability of those who cause damage and act under the sign of risks, one cannot accept casuistic, asymmetric, unreasonably protective contractual clauses, which for this reason end up destroying rights and duties.

The rejection of contractual dirigisme stands at the doorstep of necessity. And the help that many in the world are waiting for may come from the least expected place: the Brazilian positive experience, and in harmony with the best in terms of contemporary doctrinalconstruction, especially in the European community.

Unconscionable clauses is a topic that goes far beyond the Law of Obligations and lies, solemnly, in the Public Order. In fact, when dealing with the ground clause, in the article *La nulidade de las clásulas suelo*, the great Spanish civil scholar **Eugenio Llamas Pombo** concluded: "*Más bien sucede lo contrato, diríamos: la nulidade si es uma custión de ordenpúblico, y por tanto su régimen jurídico no puedo acomodarse a consideracionesabsolutamente ajenas al contrato?*

O es que el pago por un ciudadano, durante años, de un tipo de interés que la propria resolución declara abusivo (puesto que la clausula que lo estabelece lo és) *no há afectado, y de qué manera, al orden público económico*?"[4]

The above thought fits well to the study, since public order is seen with more reason claiming defense. The clause that imposes the shipowner's jurisdiction violates the fundamental constitutional guarantee of access to the jurisdiction of the victim of the damage, the unsatisfied creditor and/or the subrogated insurer.

In many litigations of Maritime Law, the attacks on public order also reach the field of Insurance Law.

With this, the principles of subrogation and mutualism, essentially social, suffer greatly, since the subrogated insurer, who acts on behalf of the mutual, has its right of recourse devastated by a contractual imposition to which he never formally and expressly agreed. The injustice of the hypothesis seems quite clear to us.

As **José Ortega y Gasset** said: "*It would have been good if man had been forever reduced to the higher values discovered up to now: science and justice, art and religion*".

For there are times when man truly lets himself be carried away by forgetfulness, and some notions so clear to times of old, justice is an example, become deformed by the vulgarization of usage, obscured by im-

[1] NA: reproduction of the work presented to the University of Salamanca, 46th. graduate Course in Law, specialization in Contratos y Daños, TALLER 3, Risk Society.

[2] It is no wonder we put the word "choice" in quotation marks, because what we have is a real imposition by the shipowner, through an adhesive and unilateral mechanism with an abusive and unconstitutional involuntary waiver of jurisdiction to the victim of the contractual damage. It is very important to say, from the outset, that what applies to the alleged "choice of jurisdiction (foreign)" also applies to the so-called "arbitration commitment", perhaps even more seriously, since it violates voluntariness, an indispensable condition for the admissibility of arbitration.

precise reference; and then, aged, caducous, yellowed by time, they come to demand a new breath of life, a new expressive form, the unheard of and at the same time nostalgic call of ideal eternity.

Also considering the topic of our previous work, Insurance Law, and the fact that it has been part of our professional routine for a long time, we refer to the motto of the University of Salamanca, already incorporated into our thoughts and hearts: "*decíamos ayer, diremos mañana*".

II. THE INTERNATIONAL MARITIME CARGO TRANSPORT CONTRACT AND UNCONSCIABLE CLAUSES

The illegality of the shipowner's jurisdiction imposition clause

Unconscionable clauses is one of the most debated subjects in Contract Law. It followed the great social changes after World War II, vibrating somewhat more with the advent of Consumer Law. This is the case in Spain, Europe, Brazil and the Americas. Its breadth allows for a remarkable wealth of approaches. Certainly, a river of ink has already flowed over its surface, filling its forms and often discoloring its outlines. Some of the world's best scholars have discussed it with remarkable academic ardor.

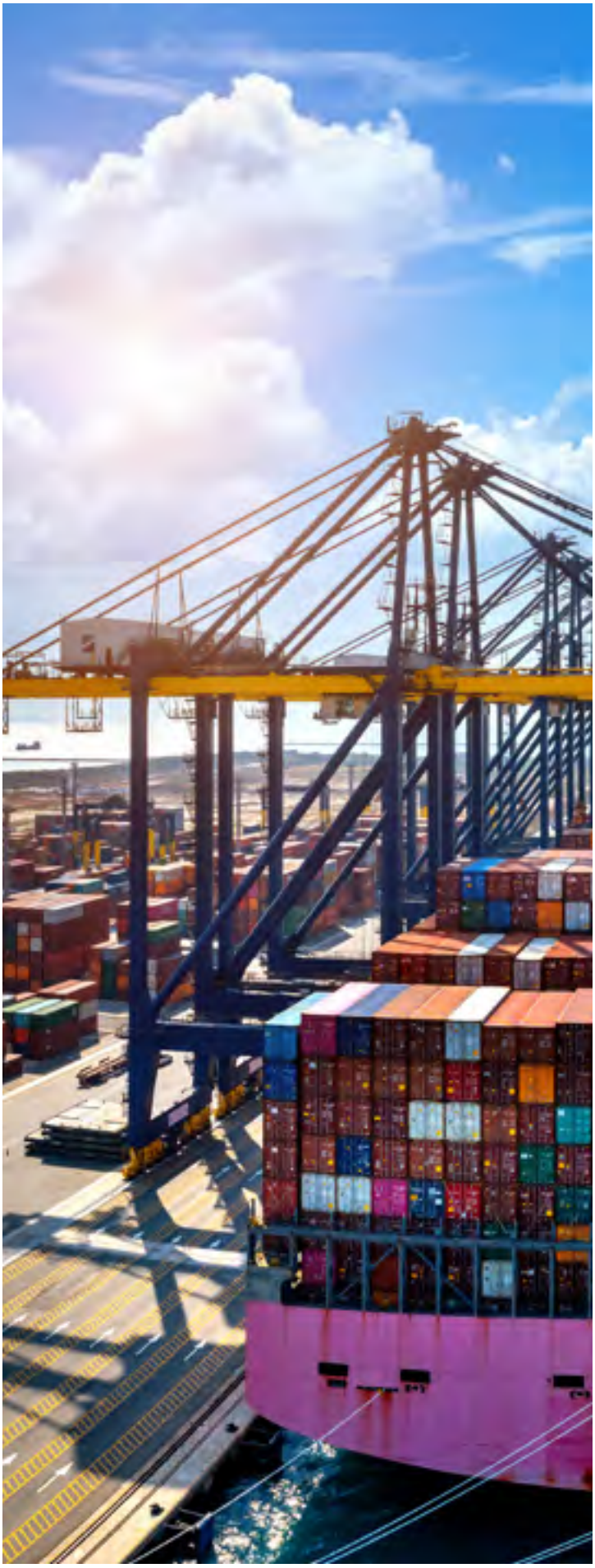
And we have no doubt that this will continue to be the case for a long time to come.

About the unconscionable clauses, said **Nelson Nery Junior**[5]: *"(...) are those notoriously unfavorable to the weaker party in the consumer contractual relationship. Unconscionable clauses are synonymous with oppressive, burdensome, vexatious or even excessive clauses*".

Yes, they are clauses that oppress one of the contracting parties, because they impose excessive, asymmetric burdens and, therefore, are very vexatious to the Law, since *they hurt its fundamental spirit: the incessant search to give each one what is his, the constant, perpetual will that is confused with Justice*[6].

We go further, and we do not limit ourselves to contracts with the consumer seal, but remember contracts in general, to the point of speaking not only of the inherent weakness of the consumer, but of the concept of weakness, of the weak contracting party, present in many Civil Law businesses.

We recognize this. But our goal is more modest,



[3] In the world of Law in Action, insurers are plaintiffs in most civil suits against shipowners for contractual damages. Cargo owners are usually holders of transport insurance policies. Faced with damage, they file insurance claims. Insurers indemnify them and, from then on, seek compensation. Another dynamic emerges at this point. And the subrogated insurers, not being parties to the contract, cannot be opposed to the contractual rules of the Bill of Lading, abusive or not. The equation to the weak contracting party makes sense, therefore, to restrain abuses and guarantee, in honor of the principle of mutualism and the social function of insurance, justice in the reimbursement.

perhaps even comfortable. With the unconscionable clauses in the international maritime cargo transport contract, we maintained a healthy proximity with the habits of the profession. This avoids two terrible consequences for the scholar: the abstractionism alien to the practice of living law and the deadly disinterest that we sometimes devote to very boring subjects about which we are required to talk.

Yes, the objective is to make the speech more particular, but not to emphasize the fundamental basis on which it is based, that is, the evil of unconscionable clauses in general, as well exposed by **Hélio Zagheto Gama**[7]: "*Unconscionable clauses are those that, inserted in a contract, may, if used, cause contractual injury to the party to whom they disfavor".*

Fair enough.

To make the study particular is to address the matter, in itself serious, from the perspective of the international contract of maritime cargo transportation, which is a contract of adhesion and whose clauses are unilaterally imposed on the shipper and the consignee of the cargo. And, in this specific context, we must also remember the situation of the subrogated insurer who litigates for reimbursement against the shipowner and cannot in any way be subjected to the terms of a contract to which he is not a party, not even by adhesion.

When we talk about unconscionable clauses in this type of contract, we refer more specifically to the clause that imposes on the Brazilian owner of the cargo, or the insurer that is liable for it, the exclusivity of the foreign jurisdiction (or arbitration procedure), always very agreeable to the interests of the shipowner.

The starting point is the Brazilian legal system, from which, with emphasis on court precedent, we will seek to compare it to what happens in other countries, notably those of Europe, and of course Spain.

This is not the first time we have addressed it. We did so before, at the conclusion of the 45th Specialization Course in Law at the University of Salamanca, subject Insurance Law. On that time, we addressed the limitation of liability, the illegality of the clauses that provide for it, and its unenforceability against the subrogated insurer.

We will keep our attention on the subject and expand it, dealing directly with the jurisdiction clause and, reflexively, with the arbitration clause.

We will continue, in a way, the previous work, focused on the limitation of liability. Because, in order to escape from the duty of full civil redress, the offender uses and abuses formal expedients, artificially created under a clausular mantle, inhibitors of the full exercise of the Law, enemies of the fundamental guarantee of access to Jurisdiction, present in almost all previous legal systems.

We will use clippings from the previous work, given the pertinence, the relation of continuity, the paternity it maintains with this one, with emphasis on the illegality of each of the clauses, displaying its problems and its opposition to contemporary Law. The dirigisme, the abuse, the contractual despotism exercised by one party over the other, affronts the moral order, the Law of Obligations and Law in its entirety. It is, in the words of **Eugenio Llamas Pombo**, a matter of *Public Order*, which goes far beyond the boundaries of Contract Law.

Regarding the subject matter of this paper and when dealing with contractual legal business in general, **Ximena Raquel Calderón Rojas, Doris Valdez Paredes** and **Marco Obando Fernandez**[8], in authoring an article entitled *Las Cláusulas Abusivas*, refer initially to what was exposed by the *Comisión de Publicaciones*:

"El mercado moderno ha supuesto nuevas formas de intercambio económico que ponen de relieve las implicancias de las características de los nuevos actores, Jo cual ha significado un desafío para la teoria contractual tradicional. En este contexto, la institución de las cláusulas abusivas constituye un capítulo emblemático y actual en el proceso de delineamiento de adecuadas formas de tutela al consumidor. En el presente trabajo se realiza una aproximación a los contornos teóricos de esta figura, se analiza el desarrollo a nivel comparado, y por último, *se revisa su configuración en el Anteproyecto del Código de Consumo, presentando propuestas para su adecuado funcionamiento en países como el nuestro, donde la Protección al Consumidor siempre estará en debate".*

In light of these brief initial considerations, let us move on to what really matters: the international maritime cargo transport contract and its unconscionable clauses, and the spotlight on the figure of the subrogated insurer.

The contract for maritime cargo transport is a differentiated contract. It involves a contracting party, the shipper, and a contracted party, the strong party in this same relationship, the carrier (usually the shipowner), and yet another participant, the consignee of the cargo transported, in whose favor the obligation of transport is stipulated, the weak contracting party par excellence, the largest creditor. An adhesion contract, with printed, unilateral clauses, arranged exclusively by the shipowner, according to its self-centered will.

[4] POMBO, Eugenio Llamas, La nulidade de las cláusulas suelo, Ars Iuris Salmanticensis, Tribuna deActualidade, Vol. 1, 11-17, Diciembre 2013, eISSN: 2440-5155

[5] Code of Civil Procedure Commented, p. 1379

[6] NA: it is never too much to refer to Roman Law and the Justinian Code, with its unsurpassable definition of Law, which is confused with that of Justice, that is: the perpetual and constant will to give everyone what is his or hers.

The other parties, shipper and consignee, do not express their will. They adhere to the contractual package, receiving clauses that are clearly abusive in the eyes of the Contract Law in Brazil and other legal systems.

One of the clauses of which unconscionableness is most compelling is the clause by which the shipowner imposes its jurisdiction (or arbitration procedure) over those of the other parties' choice. In other words, it is the clause by which the parties are obliged to waive their own jurisdictions.

In Brazil, as in other countries, it is possible for the parties to opt, in an international contract, for a particular jurisdiction or arbitration procedure. This, by the way, is not in doubt. However, the principle of the autonomy of the will and the concept of voluntariness must be observed.

This does not occur in the international contract for the carriage of cargo by sea. The jurisdiction is not chosen by two equals, facing each other, arms crossed at a negotiating table. In practice and in theory, it is simply imposed from above.

The clause of choice of exclusive foreign jurisdiction in the international contract, however, will only be effectively recognized and applied if its content perfectly corresponds to the assumptions of validity of the legal transaction, authorized by the unequivocal voluntariness.

Any offense or mitigation of the principle of the autonomy of the will make such clause inapplicable under the new legal-procedural order.

Within this context, therefore, no foreign exclusive choice of jurisdiction clause in the international contract imposed unilaterally in an adhesion contract will be object of confirmation. The characteristics of this form of contracting are admirably exposed by **Cristiano Chaves** and **Nelson Rosenvald**[9]:

"In fact, one of the contracting parties is not free to stipulate the content of the clauses, leaving him/her only free to accept or not the contract (take it or leave it). The qualification of a contract as parity or adhesion will depend, therefore, on whether the content of the clauses can be attributed to both parties, or, whether it arose from a prior non-negotiable imposition by one of the contracting parties. This highlights that adhesion contracts are not distinguished from classic contract models by their type, but by their form."

Considering that every international contract of maritime cargo transport is an adhesion contract, formatted exclusively by the carrier, without any kind of consent from the cargo's consignee, much less its insurer, it is not possible to speak of recognizing the clause of choice of exclusive foreign jurisdiction present therein, and the court precedent has long labeled this type of contractual provision as manifestly unconscionable and illegal.

Another thing that cannot be ignored: the primacy of Justice whenever its participation is required, as an express constitutional fundamental guarantee.

Therefore, even an eventually valid, fully voluntary clause can be set aside when there is concrete injury or threat of injury with the removal of access to jurisdiction.

In the specific case of Brazil, article 25, head provision of the new Code of Civil Procedure, in force since March 18, 2016, when addressing the limits of national jurisdiction, states: "*The Brazilian judicial authority shall not process and judge the action when there is a clause of choice of exclusive foreign jurisdiction in an international contract, argued by the defendant in the challenge*."

This rule cannot be reached by the international contract of maritime cargo transport, because it is an adhesion contract, nor can it be enforced against the subrogated insurer, because it is not a party to the contractual relationship in question.

The application of the Brazilian legal rule in question, or of its correspondents around the world, is only applicable when the international contract is voluntary is faithfully observed, not least because it is *a sine qua non* condition for the foreign exclusive jurisdiction choice to be effectively valid and effective.

This issue, therefore, does not exist in the international maritime cargo transport contract, informed by printed, unilateral clauses, considered to be expressly unconscionable by the Brazilian legal system and that of other countries.

Importing the idea of communicating vessels from Physics, what can be inferred from this condition is that without full voluntariness, there is no possibility of electing the exclusivity of the foreign jurisdiction. The autonomous will is indispensable for the perfecting of the legal transaction. This is because the validity and effectiveness of the legal rule are not open to discussion, but the validity and effectiveness of the clause that forms its hypothesis of incidence are. In order for the rule of art. 25, head provision, to be subsumed to a given legal transaction, the most absolute legality must hover over it.

Because of this, we bring here a judgment from the **Court of Justice of São Paulo**[10]:

[7] Curso de Direito do Consumidor, p.108

"This is an adhesion contract. And there is no denying that the choice of jurisdiction clause, since it does not contain an exclusive jurisdiction, does not fall under the rule of the head provision of article 25 of the Code of Civil Procedure, as well as, according to article 423 of CC ("When there are ambiguous or contradictory clauses in the adhesion contract, the interpretation most favorable to the adherent shall be adopted"), according to the doctrine of Gustavo Tepedino and others ("Código Civil Interpretado", Vol. II, 2ª edição revisada, Renovar, páginas 23/28), in the facts of the case, "It becomes necessary, therefore, in light of art. 423 of the CC, that an ambiguity or contradiction in the clauses of a contract be verified in order for such pathology to be cured by means of the remedy prescribed by the legislator, namely, the interpretation against the contracting party. The notions are almost intuitive: while ambiguity presupposes two possible interpretations within the same clause, contradictory interpretation is caused by the multiplicity of interpretations arising from distinct clauses".

Furthermore, without the participation and will of the contracting party in the preparation of the choice of jurisdiction, the stipulation, as posed, of multiplicity in the choice of the jurisdiction, and at the sole discretion of the carrier's will, brings its intrinsic illegality and nullity. The choice of jurisdiction clause in an adhesion contract would be valid in a situation different from the one in question, according to the case law of the Superior Court of Justice. Let us check this out: "The clause stipulating the choice of jurisdiction in an adhesion contract is, in principle, valid, provided that the necessary freedom to contract is found (lack of weakness) and that access to the Judicial Branch is not made impossible". (STJ, Resp 1.072.911/SC, Justice-Rapporteur Massami Uyeda, 3rd Panel, tried on Dec. 16, 2008). In the trial of REsp 379949/PR, it was reiterated that the declaration of nullity of the choice of jurisdiction clause in an adhesion contract, even in the case of a consumer relation, depends on the recognition of the aggrieved party's weakness, and that the choice of forum is 'capable of hindering his access to the Judicial Branch'. (3rd Panel, Justice-Rapporteur Nancy Andrighi). In the facts of the case, the nullity of the choice of jurisdiction clause can be easily ascertained, since it impairs the defense of the appellant, in addition to everything that this reporter has already allowed himself to point out in this regard."

Thus, a foreign exclusive choice of jurisdiction clause will only be subject to the full scope of the rule in article 25 if its form and content are perfectly adjusted to the Brazilian legal system, without any defect or abuse.

This is especially relevant for the specific case of Maritime Law, a branch that has many points of contact with International Law and is preponderantly informed by legal business relationships instrumented by adhesion contracts.

This is why we emphasize, based on jus-philosophical and on Brazilian case law confidence, both before and after the new Code, that the international maritime cargo transport contractual instrument, the Bill of Lading, especially its clause imposing the exclusive jurisdiction of the shipowner's choice, is not in line with the rules that permit choice of jurisdiction and with the spirit of current Contractual Law.

And it does not fit because it is a contract: 1) of adhesion; 2) with a defect in the full autonomy of the will of one of the parties of the legal relationship; 3) based on international norms and conventions not recognized by the Brazilian legal system; 4) with expressly unconscionable clauses; and 5) without symmetry between the parties.

In the bill of lading, the instrument of the international maritime cargo transport contract, the choice of jurisdiction clause is not the one that deserves the seal of the head of article 25 of the new Code of Civil Procedure, but the one that embraces, and clings to it with familiar affection, the concept of hardship clause.

This is precisely why case law has never recognized them. In this sense, the maritime carriers suffer a continuous, almost traditional defeat. The Brazilian courts have always seen these clauses as unconscionable and incompatible with Brazilian law, affronting the sovereignty of the national jurisdiction.

This is how **Paulo Lôbo** defines them[11]:

"The terms of a consumer contract or the general conditions of contracts that attribute excessive advantages to the supplier or predisposing party are considered abusive, causing in return excessive onerosity to the consumer or adherent and unreasonable contractual imbalance. Through them, the supplier or the offeror, abusing the activity they carry out and the legal weakness of the adherent or consumer, establishes unfair contractual content, with sacrifice of the reasonable balance of services."

In summary, it is possible to state that a foreign exclusive choice of jurisdiction clause will only be valid and effective if 1) it respects the principle of autonomy of the will; 2) it is not inserted in an adhesion contract; 3) it respects all the essential assumptions of the perfect legal business; 4) it has no abusiveness of any kind; and 5) it lacks any illicitness, even if only according to the moral order.

It is certain, therefore, that the international contract of maritime transport of cargo cannot see as valid and effective its clause of choice of exclusive foreign jurisdiction. It is covered, from head to toe, by disdain for the will of others, by the pathology of legal abuse, by the veil of perfect nullity.

[8] Las Cláusulas Abusivas, Derecho & Sociedad, edición 34, Associación Civil, p. 151-164

The clause imposing jurisdiction by the shipowner, perhaps ironically called a choice of jurisdiction, is considered unconscionable and illegal in relation to the unsatisfied creditor, the owner of the cargo, respecting the concept of the weak contracting party.

This concept can and should be used in favor of those who, even though they are not the contracting party, exercise the right of recourse under the cargo insurance contract. If there is abuse and injustice in relation to the owner of the cargo, there will be much more in relation to the subrogated insurer.

In fact, the situation becomes even more complex when the practical reality of maritime law in the judicial sphere is taken into consideration.

Most lawsuits involving international maritime cargo transport contracts are brought by insurers, not by the cargo consignees, the insured.

The dynamics are sort of as follows: the cargo consignee (sometimes the shipper and exporter) contracts insurance for international transport to cover the risks of a sea voyage. In the event of an accident, partial or total loss or damage to the cargo, the insurer indemnifies the insured, owner of the cargo, and then subrogates itself to the original claim of the insured against the ocean carrier, who did not faithfully fulfill the contractual obligation of result. Because of the subrogation and the right of recourse, the insurer is clothed with the mantle of active legitimacy *ad causam* and, by provoking the State-judge, starts the judicial dispute.

The Clause of choice of exclusive foreign jurisdiction in the body of the ocean bill of lading is considered abusive, therefore, null, in relation to the insured, shipper and/or consignee of the cargo; and being so, it is also null in relation to the insurer. If it is void for the closest to the business relationship, it will also be void for the one who keeps a considerable distance from it.

The insurer, legally subrogated to the insured's claim, cannot be required to comply with the provision of a legal transaction to which it was not a party, strictly speaking, and to which it never agreed. The illegality, flagrant abusiveness in relation to the adherent of the contract, is even more pernicious and undue to the insurer.

And let it not be said that subrogation is a two-way street. This is a mistake. Subrogation legally and legitimately transmits rights, but not all duties, especially those stamped with the signs of vice, legal defect and illegality.

Regarding the non-opposability to the subrogated insurer, the Brazilian jurisprudential position is also old and traditional: "*The choice of jurisdiction clause contained in the transport contract or bill of lading is ineffective as to the insurer subrogated to the shipper's credit, since the insurer is not in the contractual position of the insured shipper, holding only the latter's credit*".[12]

In a given forensic litigation, in a lawsuit in which the plaintiff is the insurer legally subrogated to the insured's claim (shipper or consignee of the cargo), the eventual application of the clause, in detriment to its reimbursement, is only wrong, hence the precise and fair court precedent response, uniform and very consistent, well represented in the judgment highlighted below[13]:

Interlocutory appeal against the decision that rejected the plea of lack of jurisdiction filed by the Appellant in the recourse lawsuit for compensation filed by the Appellee before the 4th Corporate Court of the Judicial District of the Capital City. Appellant that intends to recognize the jurisdiction of Singapore, or, in case it does not understand this, of the Courts of Contagem or Santos. Insurer that seeks reimbursement for the amount of insurance coverage paid due to breach of international maritime transport contract, subrogating itself to the right of the insured. Subrogation that does not cover the choice of jurisdiction clause agreed to in a contract in which it did not participate. Precedents of the TJRJ. Jurisdiction that must comply with the general rule of the jurisdiction of the domicile of the defendant, having the Appellant affiliate in the Judicial District of Rio de Janeiro. Non-existence of prevention of the Court in which the protest interrupting the statute of limitations was processed. Dismissal of the interlocutory appeal.

The subrogation changes the factual-legal status, requiring differentiated treatment. Thus, even if such contractual clause were not abusive and, therefore, illegal, it could never project legal effects against the subrogated insurer, under penalty of offending the insurance business itself.

About the importance of subrogation, we can repeat here the words of **Abel B. Veiga Copo**[14], renowned Spanish jurist:
"La subrogación presenta, además, una finalidad indirecta, a saber, evitar que el terceiro causante del daño pueda sustraerse a las consuecuencias jurídico económicas de su responsabilidad si al pagar o abonar la insuradora el sinistro, este no tuviere la obligación de reparar el daño causado ante el imperio del principio indemnizatorio y el no enriquecimento del asegurado. La subrogatoria mitiga la liberación del responsable que de otro modo se esconderia en el contrato para no tener que reparar el daño infigido. Y el princípio indemnizatorio impede, mitiga a su vez que, en caso de que el danado asegurado decida reclamar directamente al terceira reponsable, una vez satisfecho o percebida la in-

[9] FARIAS, Cristiano Chaves de; ROSENVALD, Nelson. Curso de Direito Civil. 2ª ed., rev., atual e ampl. Salvador: Editora Juspodivm, 2012, p. 52

[10] Appeal no. 1009760-89.2018.8.26.0562- TJSP- j. 22.11.18 – Judge-Rapporteur Hélio Nogueira

demnización por parte del responsable, adolece de sentido la posibilidad de exigir a su vez la indemnización al assegurador al buscar una transgresión del principio indemnitario y con él, un lucro o doble satisfación reparadpra por encima del daño real causado y efectivo."

Veiga Copo[15] teaches that: "*El terceiro tiene la obligación de reparar un daño que causa pero es resarcido en primera instancia por la asseguradora del assegurado.*

Repara porque es responsable civilmente de la producción del sinistro. La asseguradora indemniza porque está obligada contractualmente a harcelo dentro de los perímetros delriesgo asumido."

In compliance with the cargo insurance contract, the insurance company indemnifies the cargo owner for all damages incurred during transportation. In turn, armed by the principle of indemnity, he becomes entitled to seek compensation on his return against the negligent carrier, demanding from him nothing more than the amount he paid to the insured. This is the universal outline of subrogation[16]:

"Los contornos de la subrogación

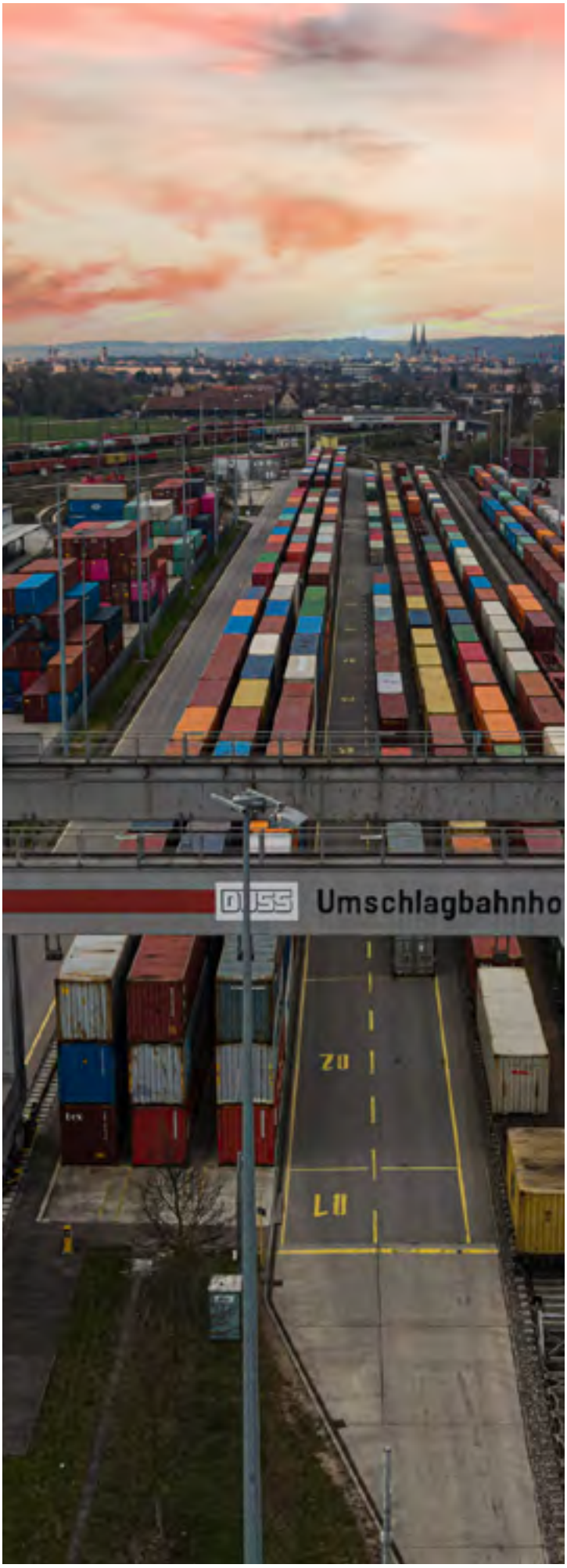
El derecho de subrogación de la entidade asseguradora en los derechos que a priori yal menos ex ante de percibir la indemnización o resarcimiento corresponden al asegurado por los daños causados por la acción u omisión de un terceiro responsable,es el corolario lógico a la efectividad del principio indemnizatório que rige, cuando menos, en los seguros contra daños.

(...)

Y dos son las finalidades de la subrogatio, de um lado, evitar la indemnidad del causante del daño si la asseguradora no pudiere regresar frente a él subrogándese en los derechos de la víctima assegurado y, de outro lado, evitar la duplicidade indemnizatória que podría percibir el assegurado se actuase indistinta y cumulativamente frente uno y outro."

When an insurer seeks redress against the causer of the damage, it is defending not only its right, but the legitimacy of the interests of the group of insureds. Taking into consideration the social function that informs the insurance business, it also defends, even if reflexively, the interests of society as a whole, since the success of the reimbursement impacts positively on the health of the insurance, and this impacts positively on the health of the businesses that are supported by it.

Although it is not the main function of the indemnity at return, nor even of the civil liability itself, it is possible to say that the fight of the insurer feeds the theory of discouragement. It induces possible good busi-



ness practices, since, once the offender is punished, the protagonist of the damage, there will be no way for him to benefit at the expense of the welfare of others.

Regarding the effects of compensation arising from civil liability and the punishment of the offender, something that is also seen in the importance of compensation on recourse, it is worth highlighting the teaching of **Eugenio Llamas Pombo**[17]:

"*Quienes propugnan aquella teoria continúan atribuyendo explicitamente a la indemnización una triple misión: 1) sancionar al dañador; 2) prevenir sucesos lesivos similares; y 3) eliminar los beneficios injustamente obtenidos a través de la actividad danosa. Pues bien, hay que señalar que la segunda no es propriamente una finalidade punitiva, sino más bien preventiva; y la terceira bien pudiera encuadrarse dentro de la teoría del enriquecimiento sin causa*"

There is even more importance in recourse compensation - and therefore any clause that in any way impairs it is unacceptable - when taking into consideration its characteristic, well noted by **Llamas Pombo**, of "*eliminar los beneficios injustamente obtenidos a través de la actividad danosa*".

And we expand the meaning of the words of the Spanish civilist to state that the elimination of the benefits unjustly obtained by the harmful activity also involves the non- recognition of contractual clauses that aim to diminish the responsibility of the offender or inhibit, on the part of the victim, access to convenient jurisdiction.

This is why the reimbursement at recourse, before being a right, is perhaps more of a duty of the insurer, its gesture of loyalty to the insured in general, by virtue of the principle of mutualism, and to society, given the social function of the insurance activity, along with the need to punish the offender.

Subrogation and reimbursement at recourse are united as legal mechanisms to protect mutualism, as well summarized by **Marcos Alberto Lopes Antunes**[18]: "*Subrogation, then, marks the balance in the insurance contract, since it guarantees reimbursement to the insurer, reduces the loss ratio, works in favor of the mutual fund and, therefore, significantly reduces the premium values*".

In view of this, the clause under study, unconscionable in relation to the owner of the cargo, is even more so to the insurer, and is not enforceable against him in any way.

It is then possible to state the following six points:

1) The rule of article 25, head provision, of the new Code of Civil Procedure only affects the clause of choice of exclusive foreign jurisdiction that is included in a contract in harmony with the Brazilian legal system, free of defect or abuse; what is valid for the Brazilian legal system, is valid for those of other countries. Even before this procedural rule, Brazilian law did not recognize a unilaterally imposed jurisdiction in an international maritime cargo transport contract;

2) First and foremost, unrestricted respect for the principle of private autonomy, one of the most important contractual assumptions, should be demanded. The absence of the willfulness of one of the parties mortally harms the foreign exclusive choice of jurisdiction clause, rendering it ineffective;

3) The clause stipulating the choice of an exclusive foreign jurisdiction in an adhesion contract is void, or at least invalid and ineffective, especially in relation to the party required to adhere to it;

4) In the case of the maritime bill of lading (instrument of the international contract of maritime cargo transportation), body of an adhesion contract, formed by printed clauses unilaterally arranged by the maritime carrier (shipowner), the clause of exclusive choice of the foreign jurisdiction is unconscionable, practically a settled court precedent understanding that recognizes it, not being any change of guidance to be considered because the new Code of Civil Procedure and its article 25 in particular have come into effect. **What should be considered is the extension of the Brazilian jurisprudential mentality, which is repeated in Mexico and Panama, American countries with prominence in Maritime Law, to European countries that protect the weak contracting party, respect the rights of the unsatisfied creditor, defend civil or constitutional principles such as integral civil redress and access to jurisdiction, but because of International Maritime Law Conventions value a contract that in essence affronts their legal systems in general terms.**

5) In addition to the systemic intelligence of Brazilian Law, article 25 itself, in its § 2 makes reference to a powerful antidote against unconscionableness, that is,

[11] LÔBO, Paulo. Direito Civil: Contratos. 1a ed. São Paulo: Saraiva, 2011, p.135

§ 3 of article 63; although directed to the defendant, this article can and should also be applied to the plaintiff in a lawsuit involving an issue related to the breach of an international maritime cargo transport contract. Therein lies the effectiveness of combating contractual dirigisme, unconscionable clauses, and the protection of the weak contracting party, especially present in adhesion contracts.

6) In any case, valid or not, effective or not, abusive or not, the clause of choice of foreign exclusive jurisdiction in an international contract of maritime cargo transportation does not affect the insurer that subrogated itself in the original claim of the shipper or cargo consignee (insured), victim of the carrier's harmful conduct and issuer of the contractual instrument, once it is not part of the business relationship, not being possible the attribution of a burden completely foreign to the formation of its free will.

In view of all this, we defend the uselessness of the choice of jurisdiction clause in the international maritime cargo transport contract, which has long been considered unconscionable, and, therefore, absent from the hypothesis of article 25, main section of the new Brazilian Code of Civil Procedure, repeated in many other legal systems, such as those of Spain, Italy, Portugal and Germany, considered the foundation of the Latin American countries' systems.

Nothing should change in the part that addresses the national jurisdiction, primary and applicable, under penalty of offending the constitutional guarantee of access to justice and of eventual damage to the national economy itself. This is in relation to Brazil and countries in general. Most of the world's legal systems foresee access to jurisdiction as a fundamental constitutional guarantee; a jurisdiction that is not the preferred jurisdiction of the victim of the damage can only be validated by a contractual clause if truly chosen, if born from the unimpeded will of the contracting parties.

Everything that has been said about maritime transport fits perfectly with air transport. Their archetypes are very similar.

Moreover, what is true for the choice of jurisdiction clause, is even more true for the arbitration clause, of which imposition operates in a particularly uncomfortable way to the adherent. Arbitration foresees full voluntariness as a necessary condition. Without formal acquiescence of the party, there is only an arbitration deformation. The subrogated insurer, especially, cannot be opposed to arbitration as instituted in such a way. It cannot fulfill what it did not promise. Even if not provided in an adhesive clause, and formally accepted by the insured, it is impossible to project its legal effects to the insurer. Reasons of legal logic, moral order, and, in the specific case of Brazil, on account of § 2 of art. 786 of the Civil Code, prevent it.

Here is a recent trial the Court of Justice of São Paulo that dismisses arbitration, removing it from the insurance-transport context, according to an excellent collective body judicial decision of the main Brazilian Court, reported by the Justice and Business Law doctrinaire, **Carlos Henrique Abrão**[19]:

> *"Inapplicable, it is worth saying, the arbitration agreement and provisions argued of alien legislation, this because the foreign company is being sued through the representative and partner in Brazil for reimbursement of compensation paid to the insured, being the arbitration clause instituted with it, binding only the contracting parties, regarding the understanding embodied in the Civil Appeal No. 0030807-20.2010.8.26.0562, under the Judge-Rapporteur J. B. Franco de Godoi*."

On the issues of preference of national jurisdiction and the possibility of choice of exclusive foreign jurisdiction in international contracts, nothing has effectively changed. And because of this, we are reminded of the famous phrase from *Il Gattopardo*, a novel by **Tomasi di Lampedusa**: *"(...) if we want everything to remain as it is, everything must change (...)*".

Article 25 innovated, it brought good things to Brazilian Law, it is true. However, it left untouched the Maritime Law disputes, informed in its intimacy by contractual relations of international scope. Which is great. The court precedent has already filled in very well the gaps left by the law, and thus promoted Justice, the best Law, the common good. The maintenance of what is best is, precisely, what sustains legal security and, under it, allows Justice to be honored. The Brazilian experience is brought here for dialogue with other legal systems and, thus, avoid the unconscionable clauses wherever they appear, in protection of the duty of full civil redress, in face of the carrier's participation that causes damages, or that inhibits the weak contracting party from the due access to the jurisdiction of its convenience, something that in almost all the world is a constitutional fundamental guarantee, therefore far above contractual provisions and, even, international conventions.

[12] UJ 356.311- TP- j. May 7.87 – Judge-Rapporteur Araújo

[13] 0031172-14.2007.8.19.0000 (2007.002.17947)- INTERLOCUTORY APPEAL- JUDGE ANA MARIA OLIVEIRA – Trial: 8/28/2007- EIGHTH CIVIL CHAMBER

[14] COPO, Abel B. Veiga, "Tratado del Contrato de Seguro", 5a Edição, Volume I, Cizur Menor(Navarra): Civitas, 2017, p. 1070

III. CONCLUSION

We have reached the end of this writing, and we must put to paper a few words that the occasion demands, even though the words of the great **Miguel de Unamuno**[20], in ***A Agonia do Cristianismo***, come back to our memory with sweet insistence: "*I have reached the conclusion of this writing, because everything must be concluded in this world, and perhaps in the next. But does it conclude? It will depend on what is meant by conclude. If it concludes, regarding finishing, that is, it begins at the same time as concluding; if it is in the logical sense, no, not concluding",*

We have finished; even though the theme remains open, like almost everything. We are sure that it will still bring a lot of doctrinal and jurisprudential discussion, in spite of the fact that our eyes, when turned with attention to the Maritime Knowledge, denounce the unconscionableness that it so clearly exhibits. Everything must have a **conclusion**, as the eternal Rector well said; thus, this work shall be concluded. Not before, however, without remembering two details of singular importance:

1 - This study is a kind of continuation of another one, presented in the final paper of the specialization course in ***Derecho del Seguro***, of the 45th **Graduate Course in Law of the University of Salamanca**, when we addressed the *(unconscionable) clause* - in the same *international maritime cargo transport contract - of limitation of liability*, typical of business dirigisme. On that occasion, we also defended its illicit character and, therefore, its invalidity and ineffectiveness, when not absolute nullity. Such remission is important because we understand, with great certainty, that every clause that impedes access to jurisdiction is an artificially legal mechanism with the purpose of emptying the right of the victim of the damage and destroying the duty of integral civil redress.

2 - The exposition on the jurisdictions without choice fits very well with the argument on its sister, the arbitration without compromise. Both subjects materialized by clauses in adhesion contracts, and in particular in this one under study. Likewise, the arbitration procedure is presupposed to be voluntary. None of them can be performed without the express, prior and formal acquiescence of the interested party. Arbitration is not imposed: it is chosen, without forcing it against the reluctant party, in a gesture of contractual violence. The owner of the cargo, a weak contracting party, cannot be forced to participate in arbitration, if he has not chosen it before. Neither can the subrogated insurer, against whom arbitration is not appropriate, even if it was wanted by the insured in his legal relationship with another.

We do not need to go on too long. The conduct of the paper at least made one believe that it is perfectly reasonable and fair to repudiate jurisdiction (and arbitration) clauses in international contracts for the transport of cargo by sea.

We point out, based on the Brazilian experience, the contractual case law of the shipowners, and how this harms the rights and interests of cargo owners, weak contracting parties, unsatisfied creditors; we also point out how the subrogated insurers can avail themselves of the lesser legal benefits of weak contracting parties, even if they are not part of the transport contracts, since they are directly harmed in the search for compensation by the clauses in question.

Anchored in Brazilian legal, doctrinal, and precent experiences, we emphasize that these clauses are unconscionable and, therefore, expressly illegal, invalid, ineffective, in short, and void.

During the professional practice of law, always acting in defense of the legitimate rights and interests of subrogated insurers against shipowners, this author does not recall ever having lost a dispute by reason of limitation of liability or imposition of foreign jurisdiction, much less by arbitration.

In this regard, there are many court decisions in Brazil, single and collective boy, which reach the same conclusion as this work.

In effect, there is a change in the legal framework when a subrogated insurer claims compensation on return against the causer of the damage that generated insurance compensation to the insured, the victim. Maritime law becomes much less important than insurance law. The primacy of the Law of Obligations is maintained, of course, but under a different guise.

The subrogated insurer has the right to have, not by ontological nature, but by legal fiction, in fact quite correct, the same prerogatives and the same interests of the weak contracting party, the victim of the damage. After all, whenever it seeks redress in court, it defends more than just its rights and interests; by force of the principle of mutualism, it acts as the sword and shield of the group of insureds, directly, and of society as a whole, indirectly.

This is a traditional legal reality in Brazil, which, however, assumes a more intense coloring with the new vision of the Law of Damages, of Civil Liability, of the

[15] Idem, ibidem

[16] COPO, Abel B. Veiga, Op. Cit., p. 1069)

[17] POMBO, Eugenio Llamas, "Reflexiones sobre Derecho de Daños: casos y opiniones", Madrid: La Ley, p. 38

Law of Obligations, of Civil Law itself, strongly influenced by Consumer Law, in which the most important elements are the protection of the unsatisfied creditor and the need to rigorously punish the causer of damage who handles a source of risk.

The international maritime cargo transport contract implies an obligation of result, besides dealing with an undeniable source of risks (as the famous accident of the Prestige ship reminds us, all the time), in such a way that this whole set of protections is, above all, conceived in the soil of Moral Law, and better adjusted to Natural Law.

Protecting the weak contracting party is also about allowing it to use whatever jurisdiction it chooses, without forcing it to give up the fight for its right. To protect the victim of damage is to guarantee full civil redress for the damage. To protect the dignity of Law, in its purest essence, is to rigorously punish the causer of the damage.

There is, in the specific case of Brazil, when it comes to subrogation itself, a constitutional element in the equation, dictated by the already mentioned enunciation of Precedent No. 188 of the Supreme Federal Court, considerably changing the dynamics of the compensation on recourse. With this, the civil liability of the maritime cargo carrier is not only provided by Civil Law, Commercial Law and Maritime Law, but also by Insurance Law and Constitutional Law.

Now, in the Brazilian legal system, the principle of full civil redress is in force, as provided in article 944 of the Civil Code, anchored in the fundamental constitutional principles and guarantees, as per the exemplary list in article 5 of the Brazilian Constitution.

How then can one admit that a mere clause in a contract, and even more so in an adhesion contract, has the power to mitigate the duty of ample and integral civil redress, acting in patent disadvantage of a subrogated insurer?

The same system says that no rule, even if agreed upon by the insured, can import a reduction of this right (art. 786, §2, of the Civil Code). Therefore, the clause that impairs the exercise of the right in the jurisdiction of the weak contracting party, directly or by logical extension, is simply unacceptable.

The current challenge is not to allow legislative onslaughts in changing the general framework of Law in Brazil. Or to avoid distortions by new precedent paradigms.

Another, more ambitious challenge is to show that what happens in Brazil, Mexico, Panama, as well as in other legal systems, can happen all over the world, especially in Europe.

Some legal systems, such as that of the United Kingdom, do not like this view. They prefer a more formal, literal, old fashioned contractualism when it comes to Maritime Law. But this is because they are interested in defending their shipowners. It is an almost strategic vision. That is why there is resistance to the adoption of mechanisms to protect the users of cargo transportation services. Besides this, the amount of business they have entered into allows for a certain calibration of interests; that is, it superimposes Economics over Law.

The world reality is different. The protection of cargo owners and their insurers is then extremely important, if not indispensable. Hence the need to recognize the unconscionable nature of a substantial part of the clauses of the international maritime cargo transport contract.

An effect of the unilateral will of the shipowner, and we strongly affirm, practically uniform among the players of the sector, it is a contract with clauses that deeply hurt the most modern concepts of protection of the unsatisfied creditor and the weak contracting party. In its dirigisme, it harms the contemporary vision of Law of Damages and Civil Liability.

At a time when the Law approaches the old maxim of Emperor Justinian's Codex that defined it as the "eternal and perpetual will to give to each his due", abandoned with time by the unjustified attachment to formalism and a concept of responsibility imputation based on guilt, the supporting body of the risk management liability has gown a lot, a new perspective on strict liability.

We love the phrase used by **Eugenio Llamas Pombo**, present in his books, classes and conferences, which in its wisdom and simplicity, says a lot: *al pan, pan; al vino, vino*! The sentence harmonizes with the principles of proportionality and reasonableness. It allows us to rethink Law all over the world based on what already occurs in some countries, such as Brazil. A rethinking that has the objective of no longer accepting in Maritime Law contractual clauses that limit, in any way, the liability of the carrier who is the protagonist of the damage or that make it difficult for the victim to exercise the right, forcing the use of less favorable jurisdiction or even dangerous arbitration.

Whoever causes damage has the duty to repair it in full. The victim has the right to fight for his interests without obstacles of undue formalism, never accepted by the will. In this an ideal of Justice greater than Contractual Law consists, which must serve as a foundation of validity and almost absolute vector.

[18] ANTUNES, Marcos Alberto Lopes, A APLICAÇÃO DA CLÁUSULA DE COMPROMISSO ARBITRAL NA SUB-ROGAÇÃO LEGAL DA SEGURADORA, Final paper (TFM) for the 45th edition of the University of Salamanca Law Specialization courses: Insurance Law.

When we concluded our work to qualify for the title of specialist in Insurance Law, we wrote about the limitation of liability clause, something that fits perfectly into the study of the imposition of jurisdiction clause, because the eventual recognition of the latter, in the facts of the case, can and certainly will generate great damage to the victim of the damage and, on the other hand, unjustified benefit to the causer. What we have written has a certain amount of emotion, we recognize, perhaps excessive. But we repeat these words because we consider them to be perfectly appropriate to this context as well:

> *Canon Law teaches us: it is not enough for the faithful to sincerely repent of their sin and say "mea culpa" in order to have the sacrament of reconciliation perfected. It is necessary an effective conduct of redress, a 'de facto' contrition. And so, no matter how civil responsibility has changed its profile and the concept of guilt has varied over time, the truth is that it has never ceased to effectively punish the one who caused the damage; either to compensate the victim in some way, or to discourage him and society in general from making similar mistakes.*
>
> *Nailed to the cross, Jesus Christ saw sincere repentance in the thief beside Him; the criminal, stricken by an intense metanoia, had been able to see, in the macerated figure of a man, the ineffable majesty of a God. Still, Christ did not exempt him from punishment - cruel as he wanted, but just according to the Roman legal system. He opened the door to heaven for the criminal, who, in recognition of the divine judge, had just earned an eternal idyll. But his earthly punishment was not rewarded, and even though he was saved, he had to pay for the evil he had caused.*

We reiterate these words, and, with all due particularities, we address them to the clauses of imposition of jurisdiction, or of arbitration, in this case a violent renunciation of jurisdiction. If the victim of the damage (the unsatisfied creditor, the weak contracting party or the subrogated insurer) cannot access his jurisdiction, exercising therein the constitutional guarantee that he deserves, how can we not see in this the scintillating triumph of error, the onslaught against his dignity in favor of the illicit?

The clauses are all illegal, unconstitutional, and even morally dubious, because they do not respect the weak contractor status of the cargo consignee, let alone the mutualism that informs the insurance business, when the claimant is no longer the cargo owner, but the subrogated insurer.

Our position, we reaffirm, is strongly based on positive professional experience and our proposal is that other countries, especially the most important ones in the world legal scenario, such as Spain, Italy, Germany, among others, no longer recognize the validity of such clauses nor the incidence of the norms of International Maritime Law Conventions that refer to them, which are incompatible with the views that the internal laws of these States and the European Union itself have on the nullity of unconscionable clauses, the protection of the weak contracting party, the defense of the unsatisfied creditor and the attribution of strict liability to the one who handles the source of risks.

Transport Law (Maritime Law) and its relationship with Insurance Law require new treatment and harmonization with the Law of Obligations, Contract Law and Law of Damages. We see a strong mismatch between one and the other in many legal systems, in such a way that contractual norms of undue protection to shipowners still subsist. The rejection of unconscionable clauses in international maritime cargo transport contracts goes far beyond legal and economic-financial issues, but encompasses fundamental principles and values, all of which are of enormous social concern, and which underlie contemporary Law, which is ever more intimate with the concept of Justice.

To our immeasurable joy, the understanding that we defend here gained strength when reverberated by the renowned jurisconsult **Ives Gandra da Silva Martins**, *one of the greatest Brazilian constitutionalists of all times*, who, in a legal opinion requested by us, prepared for academic and professional use, made the following important statements, now arranged in the form of topics:

1) "*The subrogated insurer is not part of the contract of carriage and is unaware of the choice of jurisdiction clause, which will only be communicated to it, if and when the loss is repaired by it, thus generating his right of recourse. A choice of jurisdiction clause cannot be imposed on it without it consent, under penalty of offending the fundamental individual right of access to jurisdiction" (page 27)*

2) *"The choice of jurisdiction clause is invalid also with respect to the insured (international maritime cargo transportation service taker) for the reasons stated above; The insurer is subrogated to the insured's claim, but not to its legal position in the contract signed with the international maritime transportation service provider, especially with respect to procedural restrictions." (page 27)*

3) *"Yes, the choice of jurisdiction clause in international maritime cargo transport contracts is unconscionable because it is imposed by the party that holds a commercially privileged position in relation to the buyer of the service, who is the weak party in this relationship. There are few shipowners in the world, and they operate in a market in which one cannot speak of freedom of choice for the cargo owner. Furthermore, imposing an alien jurisdiction on the owner of the cargo is a disproportionate burden on the fundamental right of access to jurisdiction, prejudicing the provision of jurisdiction." (page 51)*

4) *"All considerations in this paper regarding the choice of jurisdiction clause are even more acute when the hypothesis is about the arbitration commitment. The doctrine emphasizes "that the philosophy of arbitration is exclusively related to the issue of autonomy of will, and it is correct to say that the Arbitration Law had only the purpose of regulating a form of manifestation of will, ...". To intend to impose arbitration procedure without formal, prior and express acceptance is to violate the fundamental right of access to the Judicial Branch and national sovereignty." (page 52)*

And the famous jurisconsult's conclusion is a kind of qualified summary of our present work and a diadem to be used henceforth in all our forensic pieces in defense of the insurance market:

"It is clear, therefore, that the choice of jurisdiction clause in international contracts of maritime cargo transportation is invalid vis-à-vis the subrogated insurers, since:

1. *It is an adhesion contract, with no freedom in agreeing on the clause;*
2. *The jurisdiction adopted in international bills of lading implies not only inconvenience for those who need to sue the shipowner, but also a true impediment to jurisdiction, affecting this fundamental right and also national sovereignty;*
3. *The insurer is not a party to the contract of transport, it did not consent to the choice of*

[19] TJSP - Appeal n°1005569-68.2019.8.26.0011 - TJSP – tried on 1/29/20 – Justice-Rapportur Carlos Abrão

[20] UNAMUNO, Miguel de, A Agonia do Cristianismo, Editora Danubio, Coleção CulturaEspanhola, Curitiba: 2017, p. 129

jurisdiction clause;

4. *The subrogation of the insurer is limited to the material aspects of the claim and not, to the procedural aspects of the contract executed between the carrier and the taker of the service." (page 36)*

We end this conclusion, pardon for the pleonasm, exactly as we ended the introduction, remembering that we have already addressed this subject in part in a previous opportunity, because it is something that accompanies us professionally, taking advantage of this saying that is already part of us: ***decíamos ayer, diremos mañana.***

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