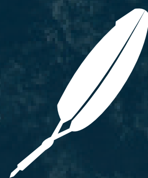
THE UNCONSCIONABLE CLAUSES IN ADEHESION CONTRACTS: CONTROLS AND NULLITIES

The unconstitutional imposition of arbitration in general clauses



Machado, Cremoneze
Lima e Gotas
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Seguros desde 1970

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Short Introduction

Adhesion is the majority of the contracts for services.

A type of hiring that, to tell the truth, is not new. Formally, the concept appears in France, in the twenties of the last century. But some say that the first adhesion contract in history was made between God and the Chosen People. Entrusted to Moses, the tablet with the ten commandments can be seen as the divine contract to whose terms the people adhered.

Admitting this sympathetic point to the natural laws, as I myself admit, the adhesion contract ends up looking like something good, fair and necessary. Necessary because a large number of businesses today are conducted in mass. And at the same time that the adhesion contract concept appears, studies about the masses, their circumstances and perspectives, causes and effects are also beginning. This is what the famous Spanish philosopher **José Ortegay Gasset** says about what he called the phenomenon of the crowded:[1]

> *Extremely simple to state, although not to analyze, I call it the fact of agglomeration, of "crowding". The houses, crowded with tenants. The hotels, crowded with guests. The trains, crowded with passengers. The cafes, crowded with consumers. The squares, crowded with passers-by. The rooms of famous doctors, crowded with sick people. The shows, provided they are not too strange, crowded with spectators. The beaches, crowded with bathers. What used not to be a problem before, begins to be a problem almost continuously: finding a seat.*
>
> *(...)*
>
> *The fact is that, before, none of these establishments or vehicles used to fill up, and now they overflow, and there are too many people eager to enjoy them. Although this is logical, natural, we cannot ignore the fact that before it didn't happen and now it does; therefore, that there has been a change, an innovation; which justifies, at least in a first moment, our surprise.*

It is true that the tone that the great writer lends is more acidic, but it is no less true that the phenomenon exists. And, as it exists, it is connected to what can be considered mass society or consumer society, concepts that are not exactly the same, but that can be confused in many measures. Since the first line was written about the crowded phenomenon, since the title adhesion contract was coined, the situation has intensified, demanding objective answers from the Law.

The adhesion contract is not bad in itself. Rather, it is necessary; or, if not necessary, at least inevitable. It has a lot to do with the massification and standardization of legal relations, which requires contracts designed by general conditions.

Here, speaking of general conditions, the intention is to mention clauses that will serve for a large number of contracts, uniform, not negotiated, but stipulated by the bidder.

Clauses, finally, that do not follow the initial contractual logic, because the principle of the autonomy of the will is fully absent. And, in the absence of the principle, the first statement to be made about the adhesion contract is this: the maxim that the contract makes law between the parties does not apply to it, in an unrestricted manner.

The adhesion contract is really valid and effective, binding proponent and person who adheres to an adhesion contract, but it is not absolute, as contracts informed by the autonomy of the will, by free and individualized negotiation, are, strictly speaking, absolute.

This is the fundamental disadvantage. But there are also significant advantages. These are both economic and practical.

The adhesive mode reduces the time and expense of concluding and regulating contracts. It allows the cost of producing goods or providing business services to be calculated in advance. It facilitates the division of tasks within the bidder's business organization, as well as coordination among its members. Finally, it contributes to the creation of supplementary norms and, at least in part, seeks greater legal security.

Therefore, there are many advantages that the adhesion contract attracts for those who make use of it. This type of contract is common in many business fields such as banking, insurance, transportation, and education.

All advantages, however, lose steam before the imbalance between the parties and the presumed situation of weakness of the person who adheres to an adhesion contract, whether or not the consumer contract. This disadvantage demands constant intervention from the Legislative Branch, by means of protective legal norms, and from the Judicial Branch, either by abstract or concrete control.

In summary, the big problem with the adhesion contract is its propensity to dirigisme, to clause unconscionableness.

1. A rebelião das massas. Tradução de Felipe Denardi - Campinas, SP: Vide Editorial, 2016, p. 78-79

It is not unusual for general terms and conditions to become abusive and, therefore, unlawful. Hence the importance of legal control mechanisms. Unconscionable clauses in adhesion contracts are invalid, ineffective, if not void.

What is the adhesion contract?

The introduction inspires the following question: what, in the end, is an adhesion contract?

Although the concept is not exactly complex, the answer demands some effort.

An adhesion contract is that one formed by clauses, terms and conditions previously determined by only one of the parties and in which there is no room for individual negotiation.

Gleibi Pretty[2], referring to the best of Brazilian doctrine, says:

> *The adhesion contract is the most widely adopted instrument in consumer relations. They are usually prepared by one of the parties (proposer) and are used in day-to-day consumer relations, because they are already in ready templates to ensure the agility and execution of business. According to Caio Mário (1), the adhesion contract should be called an adhesion contract, meaning "...those that do not result from free debate between the parties, but result from the fact that one of them tacitly accepts the clauses and conditions previously established by the other".*
>
> *Still in the meantime, Orlando Gomes (2) addresses the adhesion contract as follows: "In the adhesion contract one of the parties has to accept, en bloc, the clauses established by the other party, adhering to a contractual situation that is defined in all its terms". In the words of Fran Martins (3) the adhesion contract "... soon developed on a large scale and today are widely used in commercial businesses. They mean a restriction to the principle of the autonomy of the will, very known by the French Civil Code, since the will of one of the parties cannot be expressed freely in the structuring of the contract..."*

The approach by **Stephane Gaggioli**[3], who also cites the country's doctrine and explains it didactically, is very interesting:

The adhesion contract is a bilateral or plurilateral juridical business, in which only one of the parties - proponent or stipulating party - previously decides which clauses will be effectively inserted in the contract, so that the other party - person who adheres to an adhesion contract - only agrees or not with what has already been established, being prevented from substantially modifying the contract's conditions.

Maria Helena Diniz defines the adhesion contract:

[...] it is the one in which the statement of will of one of the parties is reduced to mere consent to a proposal of the other, as taught by R. Limongi França. It opposes the idea of parity contract, because there is no freedom of agreement, since it excludes any possibility of debate and compromise between the parties, since one of the contracting parties is limited to accepting the clauses and conditions previously drafted and printed by the other [...], adhering to a contractual situation already defined in all its terms...[4].

Cézar Fiuza points out that "the adhesion contract is not an autonomous category, nor a contractual type, but a different technique of contract formation, which can be applied to countless contractual categories" [5].

In turn, Carlos Roberto Gonçalves teaches that in the adhesion contract "there is a more to the traditional principle of the autonomy of the will. [...] Because of this characteristic, some authors have even denied it a contractual nature, on the grounds that it lacks the will of one of the parties - which shows its institutional character".

However, the mentioned author emphasizes that "the understanding prevails that the acceptance of the clauses, even if pre-established, assures it that character" [6].

This restriction on the autonomy of will supported by one of the parties is the main characteristic that differentiates the adhesion contract from the traditional contract, called by most legal scholars as paritary, i.e., where the parties establish the contractual conditions jointly and equally. However, it is worth mentioning that Cézar Fiuza disagrees that the adhesion contract is not a parity contract (with equal parties):

"The doctrine has traditionally employed the term parity, rather than negotiable. I do not agree, however. Parity is what is formed by even

2. O contrato de adesão no Código Brasileiro do Consumidor: https://www.direitonet.com.br/artigos/exibir/725/O-contrato-de-adesao-no-Codigo-Brasileiro-de-Defesa-do- Consumidor

3. The adhesion contract: https://jus.com.br/artigos/33114/o-contrato-de-adesao

elements to establish equality. The expression "paritary contract" erroneously implies that the adhesion contracts would be unfair, because it gives an exaggerated advantage to one of the parties, to the detriment of the other. (2008, p. 469)

Generally, the formulators of adhesion contracts are large companies, under public or private law, even if they hold a de jure or de facto monopoly (water, gas, electricity, telephone line), involving a consumer relation. Once the contractual instruments are ready, they remain available to an undetermined and unknown number of people. Thus, the adhesion contract is commonly linked to consumer relations, although there are legal businesses that do not have this characteristic (Carlos Roberto Gonçalves, p. 100).

It can be observed that, most of the times, there is a disparity of economic power between the parties, where on one side there is the proponent, who is in the strongest pole of the contractual legal relationship, and on the other side, the person who adheres to an adhesion contract, who is the weakest party [7] due to his economic situation and his inferior technical condition to defend his rights.

According to the above, one can notice that the contractual provisions are exclusively at the disposal of only one of the parties, i.e., the stronger party in the relationship, since the person who adheres to an adhesion contract is prevented from arguing and substantially modifying the content of the contract or its clauses. It is, therefore, a contract that although it is bilateral, is unilaterally formed in its essence, of which content is produced in mass, only allowing the other party the simple act of adhering or not.

In other words: a contract formed by general conditions imposed by the proponent to the person who adheres to an adhesion contract in such a way that the legal business is given by the popular idea of "take it or leave it". Precisely because of this, and because it is inevitable, it is essential to firmly control the general clauses in order to avoid abuse.

The fundamental impossibility of individually negotiating the clauses, linked to the search for balance between the contracting parties, makes it possible to soften the interpretation and application of adhesion contracts.

It is valid and necessary, it produces legal effects, it binds the parties to a great extent, but it does not make a solid, robust, vigorous law between them, because above the famous maxim of the general theory of contracts there is another, greater one, embedded in the concept of Law of the ancient Code of the Emperor Justinian: "the eternal and perpetual will to give to each his own."

In a contract where only one of the parties expresses the will, without negotiation of the individualized content, this idea of justice cannot be considered satisfactorily present. Hence the control, the special protection of the person who adheres to an adhesion contract in relation to unconscionable clauses.

About unconscionable clauses

The person who adheres to an adhesion contract must be recognized as having the right not to be conditioned to clauses that are not fair.

The general clause becomes abusive when it violates good faith and causes damage to the person who adheres to an adhesion contract. As the contracting party does not have the faculty to previously expose its will, the protection is provided by the control of content. Through this, the unconscionable clause is declared null. The contract persists, generating effects, but the clause labeled as abusive is extirpated, without incidence in the world of facts.

The Superior Court of Justice says that "one of the fundamental principles of private law is that of objective good faith, of which function is to establish an ethical standard of conduct for the parties in bond relationships. However, good faith is not exhausted in this field of law, echoing throughout the legal system."[4]

Article 422 of the Civil Code states that *"contracting parties are required to comply with, both in the conclusion of the contract and in its performance, the principles of probity and good faith."*

The law does not define what good faith is but ensures it as a value that contracting parties must aim at. Even before the current Civil Code, objective good faith already inhabited the Brazilian legal system through court precedent understanding and in the legal system as a result of the consumerist rules.

As of the Consumer Protection Code, in 1990, good faith was enshrined in the Brazilian private law system as one of the fundamental principles of consumer relations and as a general clause to control unconscionable clauses.[5]

Brazil has thus assumed a dual regime on the principle of objective good faith. Appearing in the

4. https://stj.jusbrasil.com.br/noticias/100399456/principio-da-boa-fe-objetiva-e-consagrado-pelo-stj-em-todas-as-law-areas

5. STJ – fuente citada – página electrónica

Consumer Defense Code and in the Civil Code, it became enforceable in consumer contractual relations and in civil and corporate relations.

This is a guiding principle, and one that can in no way be ignored.

STJ Minister **Paulo de Tarso Sanseverino** explains that "objective good faith constitutes a model of social conduct or an ethical standard of behavior, which concretely imposes on every citizen to act with honesty, loyalty and probity in their relationships."[6]

Let us change "citizen" into "contractor", and the Justice's words become the perfect frame to the contractual framework.

An adhesive clause that causes a significant imbalance in the parties' rights and obligations is not subsumed under the principle of objective good faith, since it is misaligned with the values of honesty, loyalty, and probity.

Moreover, in addition to offending the principle of objective good faith, it affects others. We speak, here, of the fundamental principles of proportionality, reasonability, equity and isonomy.

Let us go further. The unconscionable clause also offends another core principle of contracts: their social function.

With new wording given by Law No. 13874 of 2019, Article 421 of the Civil Code provides as follows:

> Art. 421. Contractual freedom will be exercised within the limits of the social function of the contract.
>
> Sole paragraph. In private contractual relations, the principle of minimal intervention and the exceptionality of contractual revision will prevail.

The law assures freedom of contract, but it balances this freedom with the requirements of the social function. The law prizes the principle of minimum intervention, without neglecting the possibility of revision, even if exceptionally. It should also be noted, however, that it addresses the contract par excellence, i.e., the contract in which the autonomy of will operates bilaterally and the conditions are negotiated individually.

Now, if for this type of contract, which follows the imperative logic of the general theory, there are the limits of the social function and the possibility of revision, what to think of the adhesion contract?

Simple: the social function[7] becomes stronger and the revision is no longer something exceptional, but something ordinary, present and necessary. The adhering party has the right to oppose the unconscionable clause, and the State has the duty to revoke its validity, deeming it void.

Art. 421-A, also introduced by Law No. 13874 of 2019, determines that *"civil and business contracts are presumed to be parity and symmetrical until the presence of concrete elements that justify the removal of this presumption (...)."*

Note that the law speaks of presumption of parity and symmetry, which can only be ruled out in the presence of concrete and justifying elements.

It is understood that the possibility of justifiably departing from the presumption of parity and symmetry only applies to contracts that are informed by the autonomy of the will, never to adhesion contracts.

Thus, the general clause in an adhesion contract that does not respect the parity and between the parties, being harmful to the contracting party, is devoid of good faith and incompatible with the social function of the contract; in other words, it is an essentially unconscionable clause.

Whatever the line of reasoning employed, philosophical or normative, an unfair term has no place in the Law, especially when present in an adhesion contract and in disagreement with what is expected from a general clause.

Unconscionable clauses and comparative law

Almost all Western legal systems repudiate unconscionable clauses in adhesion contracts for the sake of control and protection of persons who adhere to an adhesion contract.

The Spanish jurist **José Antonio Martín Pérez[8],** professor of Civil Law at the Law School of the University of Salamanca, teaches that:

> *Hoy es comúnmente reconocido que el principal problema que plantean los contratos de adhesión es el de su control, dado que suelen abundar en ellos las que conocemos como cláusulas abusivas. Dado que tales cláusulas son impuestas al person who adheres to an adhesion contracte, éste no tiene opción real de rechazarlas o negociar su contenido si quiere obtener el producto o servicio. Por ello, resulta habitual que el contenido de estos contratos sea claramente favorable para el predisponente, realizando una distribución de derechos y*

6. STJ - Idem Ibidem

7. Dice Pablo Stolze Gagliano: "Para nosotros, la función social del contrato es, antes que nada, un principio jurídico de contenido indeterminado, que se comprende en la medida en que reconocemos su esencial efecto de imponer límites a la libertas de contratar, en beneficio del bien común. (GAGLIANO, 2005, p. 55)" [citado por https://ambitojuridico.com.br/cadernos/direito-civil/funcao-social-do-contrato]

obligaciones claramente desfavorable para el consumidor al desplazar hacia él riesgos y obligaciones. Con frecuencia el consumidor o person who adheres to an adhesion contracte ni siquiera conoce las cláusulas, por no leerlas o no disponer de ellas. Pero lo cierto es que una vez que el person who adheres to an adhesion contracte pone su firma, acepta el contrato y queda vinculado por lo "pactado", viéndose atrapado por situaciones poco racionales o claramente injustas. Ahí es donde interviene la ley, para reconocer que estamos ante contratos muy diferentes a los tradicionales, para los cuales no sirve la lógica contractual clásica ni cabe la aplicación rígida del principio pacta sunt servanda, siendo necesarios controles y medidas de protección del person who adheres to an adhesion contracte.

Also abroad, the identification of an unfair term in the midst of the general terms of the adhesion contract is done through the rules of objective good faith and balance between the parties.

Professor Salmantino[9] also teaches:

"La cláusula debe ser contraria a la buena fe. La buena fe debe ser entendida en sentido objetivo como un modelo de conducta contractual leal y honesta, en función del tipo de contrato."

"La cláusula debe causar un perjuicio del consumidor y usuário, un desequilíbrio importante de los derechos y obligaciones de las partes que se deriven del contrato. La doctrina suele considerar que este desequilíbrio es fundamentalmente un desequilíbrio jurídico, sin que la abusividade enguice el contenido económico del contrato."

The statements are made on the basis of the European Union Directives and the Spanish consumer and civil laws, which point out the basic notes of the notion of unfair term and deal with in a very special way with the non-individually negotiated stipulations. The European Union offers directives to the member states, which in turn must incorporate them into their legal systems.

Spain, like Brazil, has a double regulation, consumerism and civil law. With this, there are plenty of legal tools to combat unconscionable clauses in adhesion contracts, whether or not they are consumer contracts.

The Spanish normative framework is very good, and its general scheme is repeated in many Latin American legal systems, with Spanish scholars themselves highlighting the merits and advances of legislation, as in the case of Ecuador and Argentina. The Colombian legal school is also highly praised, especially for the academic production of the Pontificia Universidad Javeriana, with which the Universidad de Salamanca maintains close ties.

For the control of unconscionable clauses, the European Union Directive 93/13 is in force in Spain, which deals with "Cláusulas abusivas en contratos con consumidores"; the TR Ley G. Defensa de consumidores, whose Libro 2, Título 2, regulates the "Condiciones generales y Cláusulas abusivas" [Arts. 80 to 91] and places special emphasis on contractual terms and conditions not individually negotiated.

Directive and law aimed at adhering consumer contracting parties, with a powerful system of checks and balances in their legitimate defense. But what about non-consuming adhering contracting parties: do they not enjoy protection against unconscionable clauses?

Yes, since 1998.

The famous Ley de condiciones generales de la contratación (Law on General Conditions for Contracting) contains rules for controlling and strictly addressing unconscionable clauses in contratos de adhesión and takes advantages of the persons who adhere to an adhesion contract in general, including companies.

This law, in turn, was inspired by the German law on general contractual conditions. It has existed in Germany since the mid-1970s.

Even before the existence of the European Union and the current pro-consumerem view, Germany was already advanced in the protection of contractual persons who adhere to an adhesion contract. The Allgemeines Vertragsbedingungengesetz regulated the general conditions and dealt with unconscionable clauses, albeit in a less intense manner than they are dealt with today and repudiated by practically all legal systems.

The persons who adhere to an adhesion contract had some kind of protection, even if minimal, and this protective, fair, and balanced mentality gained weight, expanding in time and space, and is a reality today.

It is true that in Germany and Spain there is some legal deficit in relation to the protection of the businessperson who adheres to an adhesion contract, since the legislators were more concerned with the figure of the consumer person who adheres to an adhesion contract, but the efforts for the brief suppression are ample and robust. The court precedent is making great strides to correct the situation, without hurting the universal principle of "Judges do not make law".

8. Lectura obligatoria del curso de posgrado en línea en Derecho de la Universidad de Salamanca: *Contratos y Consumo – cuestiones actuales en la protección de los consumidores – Modulo 2 – Cláusulas abusivas y contratación a distancia* – Tema 4.

9. Lectura obligatoria del curso de posgrado en línea en Derecho de la Universidad de Salamanca: *Contratos y Consumo – cuestiones actuales en la protección de los consumidores – Modulo 2 – Cláusulas abusivas y contratación a distancia* – Tema 5.

One way or another, every person who adheres to an adhesion contract has some degree of protection against unconscionable clauses in adhesion contracts, which are always reprehensible and considered void.

And this care is extremely important because, besides striving for justice and correcting contractual agreements, it is certain that the abuses endured by the person who adheres to an adhesion contract business owner have repercussions in some way on the group of consumers and harm society as a whole.

Italy has a very good system di tutela contro clausole abusive nei contratti di adesione, not only protecting consumers, but all adhering contracting parties.

There, as in Spain, the abusive condition of a general condition clause is found whenever good faith is set aside and an imbalance abates in the contractual relationship.

Enrico Bevilacqua and Michele Labriol comment: *"Ai sensi dell'art. 33, comma 1, del Codice del consumo, si considerano vessatorie (nel contratto concluso tra professionista e consumatore) le clausole che, malgrado la buona fede, determinano a carico del consumatore un significativo squilibrio dei diritti e degli obblighi del contratto (...)".*[10]

The Italian scholars addresses a specific topic, within the consumerist perspective; the statement - which is in line with what was exposed by the Spanish Martín Pérez -, however, fits well with the case of persons who adhere to an adhesion contract in general.

The German law on general contractual terms and conditions, an inspiration for the European Directives and the consumer or civil laws of other countries, in adhesion contracts has three keys for the treatment of unconscionable clauses: 1) control of inclusion or incorporation;
2) rules of interpretation; 3) control of content.

What matters, at this point, is the control of content. It is through this control that one knows if a general clause is abusive or not and, by noticing its abuse, what must be done to immediately correct the contractual plumb line and prevent unfair harm to the person who adheres to an adhesion contract.

One thing is a fact: in Europe there is what the Spanish call presunción de no negociación, a principle-rule that states: in an adhesion contract every clause is non-negotiable, imposed by the proponent and, therefore, can only bind the person who adheres to an adhesion contract if it is not minimally harmful to him/her, if the primacy of good faith, the observance of the social function, and the balance between the parties is not in doubt.

By the principle of presumption of bargaining, the adhering party will only need to demonstrate the actual clause damage, the serious asymmetry, and the protection system to which it is entitled will fall in tow.

The issuer of the adhesion contract shall demonstrate that the clause found to be unconscionable was individually negotiated and that the person who adheres to an adhesion contract agreed in a special, singular manner to its presence in the contract. An agreement beyond simple adhesion.

And that makes all the difference.

Using Comparative Law and referring directly to a concrete case, I will expose an error of evaluation and assessment of an unfair contractual term. Out of politeness, I will not mention any information about the litigation; I will focus only on the point that is of interest to this study.

It was a recourse action for damages that the subrogated insurer filed against the maritime carrier responsible for damaging cargo covered by the policy, kept in its custody and consigned to the insured.

The carrier claimed in its favor the arbitration clause present in the instrument of the international maritime cargo transport contract. The clause provided for arbitration proceedings abroad.

The insurer, which I defended, exposed that the clause was unconscionable because it was an adhesion contract and there was no express consent of the owner of the cargo and contractor of the transportation service to arbitration abroad. The clause had been unilaterally imposed by the carrier, disrespecting the Brazilian Arbitration Law itself and the fundamental constitutional guarantee of access to jurisdiction.

It was argued that arbitration must always be voluntary, and that in this case it was decided unilaterally by the proposer of the contract, the shipowner; that the clause could not in any way apply against the subrogated insurer, because it was not a party to the contract; and, finally, that subrogation does not transmit arbitration commitments to the insurer.

Despite the clarity and fairness of these arguments, almost always upheld by the Brazilian Justice, the judging panel gave in to this clause, ignoring its manifestly abusive nature, its clear and blatant ineffectiveness.

10. At https://www.notariato.it/sites/default/files/237.pdf

At one point in his reasoning, the judge-rapporteur on the appeal said that it was not credible that an insurer the size of the plaintiff, the then appealed carrier, and a business-sized insured, user of the transport service, did not negotiate that clause to the minutiae.

This is absurd and has produced an injustice that is today being submitted to the Superior Court of Justice, with the hope of reform. The insurer would be forced to obey an arbitration provision present in a contract to which it was not a party, as if the insured, prior to subrogation, could have a right (of recourse) that will only be exercised after subrogation.

The presumption was another, totally contrary: that the clause had not been negotiated. The carrier, the proposer of the contract, should have proved the individual negotiation. And he did not do so.

Thus, the judge of the collective body could not have valued a personal assumption, absolutely subjective, to the detriment of normative and objective presumption, of international spectrum.

The case briefly exposed is interesting to show the danger of disregarding the strength of the presunción de no negociación and its direct effects on the analysis, interpretation, and application of the nullity of an unfair contract term.

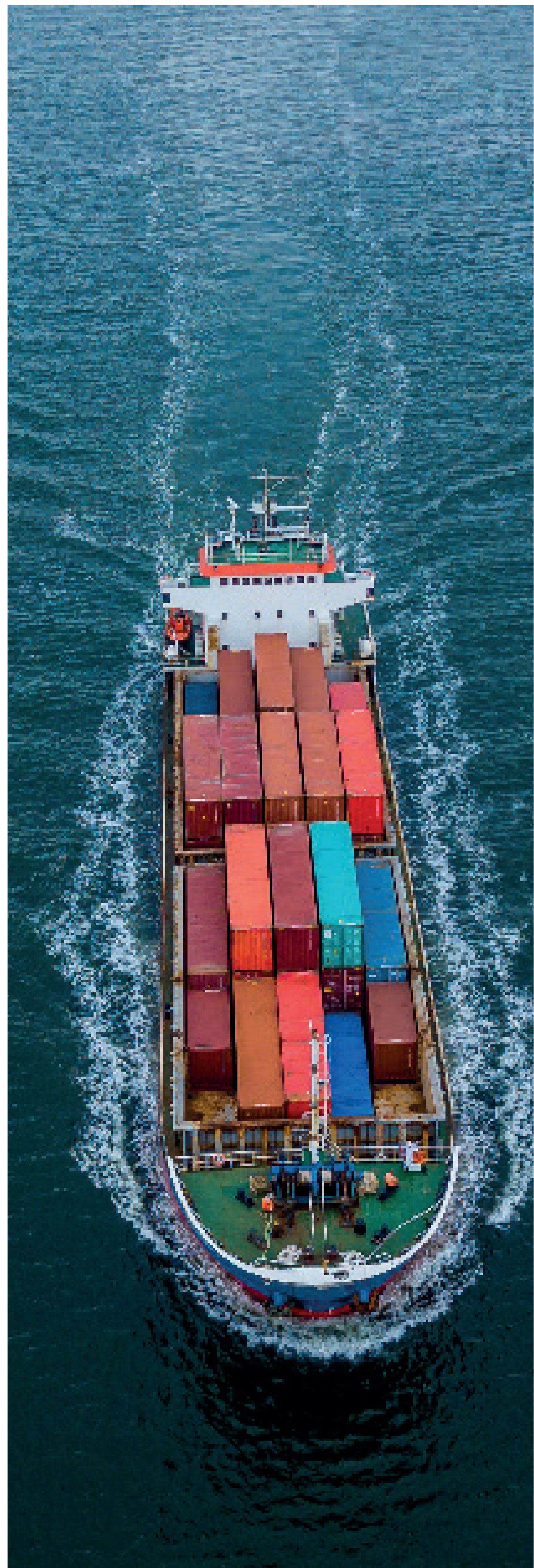
The international comparative approach denotes two things: 1) the international repudiation of unconscionable clauses; 2) how advanced the Brazilian system is in dealing with contractual unfairness, whether in the consumer or civil sphere.

Finally, and before delving into the Brazilian scenario, it is worth remembering that even the American legal-contractual model, averse to the concept of the social function of contracts, is very and directly influenced by liberal ideology and more in tune with pure contractualism, has
strict control instruments of the so-called hard power clauses, protecting persons who adhere to an adhesion contract, and significantly shortening the spaces of serious asymmetries and significant imbalances.

The Brazilian legal view of unconscionable clauses

This is a topic in which Brazil can be considered a model for the world.

Even before the advent of consumer legislation in the 90s of the 20th century, there was control over the content of unconscionable clauses in the country.



It is no exaggeration to say that Brazil has long been opposed to contractual dirigisme, the imbalance of power between the contracting parties, and unconscionable clause in adhesion contracts.

Perhaps, I speculate openly, the organic and endemic social asymmetries, the succession of economic crises, the fragility of the state, and the low density of business promotion in the country have made law enforcers more creative, and thirsty for effective, fair solutions to the many problems in all fields of law, especially contract law.

Crisis drives development, says popular wisdom. This is no different in relation to Law.

Long before there was talk of consumer legislation, the principle of objective good faith, the principle of social function, humanistic capitalism and other concepts that are so common today, even before the Federal Constitution of 1988 (well before, in fact), the Federal Supreme Court summed up that: In a transport contract, the clause not to indemnify is inoperative.[11]

It is worth noting the correct way in which the Supreme Court has viewed the adhesive nature of the contract of carriage and the unconscionable clauses that usually appear in it.

Carriers often insert non-indemnity clauses into contractual fabrics. These, for reasons that require no further comment, were considered inoperative, a word that today can be adequately replaced by null and void.

Let's go further. Since the limitation of liability is practically confused with the lack of compensation, since compensating a negligible amount is equivalent to paying nothing, it is hermeneutically possible to resort to Precedent No. 161 to decree the inoperability, the nullity, of this structurally unconscionable clause.

This is what the Brazilian courts have been doing for decades, almost without interruption. Thanks to the Precedent, and well before the consumer legislation and the current general civil legislation, the clauses of no indemnity disappeared from the contractual daily life, and those of limitation of liability are almost always considered abusive, many times submitted to the commented enunciation.

Whoever ventures to study the historical development that, within the Law in Brazil, you will find, without much effort, myriads of court decisions and court precedent comments, all very richly reasoned or argued.

Taking a historical leap, we have the year 1990 when, directly inspired by the Federal Constitution, the Consumer Protection and Defense Code came into force. A powerful legal diploma, still avant-garde in many aspects, influencing the exegesis of legal situations that are not even under its umbrella.

Unconscionable clauses in adhesion contracts - which had long been dealt with by Brazilian court precedent - were especially contemplated by the new legal system, marked with the stamps of specialty and constitutionalism.

Art. 51, says the STJ, *"defines unconscionable clauses in contracts as those that release suppliers from liability in case of defect or vice in the goods or service. It also provides that the clause is void if there is disregard for laws or basic principles of law."*[12]

One can see that the Brazilian consumer legislation, even before the European one, considered the need to respect the laws and the basic principles of Law, the fundamental values, to what was later molded by the jurisprudence of the Civil Code on objective good faith and social function. Finally, the triumph of concepts such as proportionality, symmetry of the rights and duties of the contracting parties.

In December 2019, the Second Section of the Superior Court of Justice approved a new precedent on unconscionable clauses in adhesion contracts, specifically banking contracts. It is contained in Precedent 638/STJ: *"a contractual clause that restricts the liability of a financial institution for damages arising from theft, robbery or loss of an asset pledged as collateral under a civil pledge contract is unconscionable".*

It is interesting to note that the Precedent not only addressed an unconscionable clause, but also strengthened the understanding of the Brazilian legal system against clauses limiting liability. And what is valid for the contract with a financial institution is valid for any adhesion contract, such as the transport contract.

Thus, more than ever, respecting the long-standing legal tradition, it is correct to state that every liability limitation clause is abusive and, consequently, void.

The concept of an unconscionable clause in an adhesion contract has overflowed the fields of consumer contracts and has reached, like an intense and revitalizing rain, the entire contractual system, in such a way that civil or business contracts also benefit from the brakes and controls.

Any person who adheres to an adhesion contract, not only the consumer, can and should be protected, even if in the world of facts is not weakness,

11. Enunciado de Precedente n.º 161
12. STJ – página electrónica - https://lfg.jusbrasil.com.br/noticias/1036145/stj-tem-nova-sumula-sobre-abusividadedas clausulas-nos-contratos-bancarios

but someone endowed with economic and even institutional strength. As a person who adheres to an adhesion contract that demands the normative protection of control, of invalidity, ineffectiveness, inoperability and nullity of unconscionable clauses.

If there had been any doubt about this, the aforementioned articles 421 and 422 of the Civil Code have buried it once and for all.

In view of the social function of contracts and the objective good faith that reigns between contracting parties, two guiding principles, if not fundamental, clauses that cause unbalance in rights and obligations between contracting parties are unacceptable, intolerable.

Furthermore: in the case of a general, non-negotiable clause, without autonomy of will, imposed by one of the parties, as usually happens in adhesion contracts, the harmful asymmetry to the person who adheres to an adhesion contract is an objective cause for nullity.

It is something more than the principle of the most favorable interpretation to the contracting party in case of doubt or obscurity of the content of a clause, whether the consumer contract or not. In effect, what is aimed at is not the best interpretation, but the complete unburdening.

The principled interpretation of the clauses, moreover, is supported by art. 47 of the CDC[13,] as well as by art. 423 of CC14. Both determine that, if there are ambiguous or contradictory clauses in the adhesion contract, the most favorable interpretation to the person who adheres to an adhesion contract will be adopted.

In the case of nullity, it is undoubtedly a much wider step. The idea is the same: to fairly favor the adhering party, but in a different sense. We no longer speak only of the interpretation and application of the clause that is favorable, but of its absolute removal due to the unconscionableness found. One eliminates what is wrong, undue, unfair, harmful, so that the damage does not materialize, and the abuse does not take shape in the contractual environment.

At a time when the Law is moving towards the objective responsibility of injurers in general and towards protecting unsatisfied creditors, the existence of unfair contractual terms is no longer tolerated, especially in contracts, such as adhesion contracts, in which prior negotiation is not possible and in which only one of the parties imposes its will.

The adhesion does not mean the assumption of unconscionable clause content, quite the contrary. The adhesion is an inevitable fact of the business world and that at no time characterizes the full exercise of the autonomy of the will.

It is precisely for this and for all the fundamental principles already exposed that content control is always necessary, with the intensity with which the sentinel awaits the dawn, in constant vigilance so that the contractual balance will never be harmed.

The unconstitutional imposition of arbitration

Brazilian law recognizes arbitration as a means of dispute resolution, where applicable. Law 9307 of September 23, 2016, regulated the use of arbitration, giving there the contours of its incidence.

It took almost a decade for the Supreme Court to declare the constitutionality of the law, untying it for full use.[15]

The news published in the prestigious electronic legal portal ConJur (Consultor Jurídico)16 points the grounds, and evidence that the Arbitration Law is not about a duty to act, but a right, a faculty, not a burden. Moreover, the news also highlights: the Federal Supreme Court has made it clear that voluntariness is an inescapable condition for its exercise:

> *"By seven votes to four, the Federal Supreme Court justices decided on Wednesday (12/12) that the mechanisms of the Arbitration Law (9307/96) are constitutional. The decision represents the end of an argument that has mobilized the STF over the last four years.*
>
> *The understanding was established in the judgment of an appeal in the process of approval of a Foreign Trial (SE 5206).*
>
> *The law allows the parties to choose an arbitrator to settle disputes over property rights, and the arbitration award resulting from the agreement does not need to be approved by a judicial authority.*
>
> *The appeal is the leading case on the matter. It is a lawsuit filed in 1995. The company, of foreign origin, intended to approve an arbitration award given in Spain, so that it would have effects in Brazil. At first, the request was denied. However, in 1996, Law 9307 was enacted, dispensing with the need to approve the award in the justice of the country of origin. During the trial of the appeal, Justice Moreira Alves raised the issue of the constitutionality of the new law.*
>
> *Although all the justices voted to grant the appeal, in the sense of homologating the*

13. Art. 47, CDC: Contract clauses will be construed in the manner most favorable to the consumer.
14. Art. 423, CC: When there are ambiguous or contradictory clauses in the adhesion contract, the interpretation most favorable to the person who adheres to an adhesion contract shall be adopted.
15. See decision of the appeal trial in the process of approval of Foreign Judgment (SE 5206) in 2001.

Spanish arbitration award in Brazil, there was disagreement regarding the unconstitutionality incident.

Sepúlveda Pertence, the rapporteur on the appeal, as well as Sydney Sanches, Néri da Silveira and Moreira Alves understood that the arbitration law, in some of its provisions, hinders access to the Judiciary, a fundamental right provided by article five, item XXXV, of the Brazilian Constitution.

The winning side, on the other hand, considers the law a great advance and sees no offense to the Magna Carta. Justice Carlos Velloso, in his vote, pointed out that these are property rights and, therefore, available. According to him, the parties have the faculty to renounce their right to appeal to Justice. "Item XXXV represents a right to action, not a duty.

The president of the court, Justice Marco Aurélio, after the end of the trial, commented on the decision saying he hoped that the institute of arbitration would be given confidence, and as occurred in other countries, that this practice "would also catch on in Brazil". According to him, the arbitrators, who must be accredited to do so, are presumed to act in good faith.

The Arbitration Law has been in effect since the date of its publication.

News republished by mistake in the previous composition Revista Consultor Jurídico, December 14, 2001, 7:04 pm".

The Civil Procedure Code of 2015, strongly influenced by the economic view of Law, according to the reading of the famous Chicago School, facilitated - it should be said, encouraged - the use of arbitration. In this regard **Sergio Oliveira de Souza**[17] comments:

"The new Code of Civil Procedure in its art. 3, establishes Arbitration as a Jurisdiction, allowing Arbitration in the form of law, in Article 42 states that "Civil causes will be processed and decided by the court within the limits of its jurisdiction, except for the parties the right to institute arbitration, as provided by law," thus the new CPC confirms Arbitration as a recognized Jurisdictional Institute, ensuring the right of the parties to opt for Arbitration Jurisdiction, at this moment it is included in the principle of the non-assailability of jurisdiction, this way, it puts an end to the theory of Arbitral Award being Unconstitutional and the lack of recognition as jurisdiction, because, once there were many discussions regarding the legitimacy, validity, legality and application of the Arbitral Award in concrete case, no doubt, these changes will bring many benefits for the parties who opt for the Arbitration Convention."

There is no doubt about the possibility of the use of arbitration and its convenience, encouraged by the State, although it is still something in which the courts do not fully trust. There is much less doubt about the constitutionality of the law, provided that the formal and substantial requirements for its admissibility are observed.

Besides the subject matter (only available property rights can be the target of arbitration proceedings), voluntariness is imperative. To talk about arbitration, it is essential to verify the free and unfettered will of the parties, without whose autonomy there is no choice, but imposition.

Arbitration can in no way impair the right of access to jurisdiction, which is a fundamental constitutional guarantee (art. 5, XXXV).[18], because there is no tacit waiver to the full exercise of such a right.

As reported by ConJur, "Justice Carlos Velloso, in his vote, emphasized that these are property rights and, therefore, available. According to him, the parties have the capacity to waive his right to appeal to the courts. "Subsection XXXV represents a right to action, not a duty."

As it is a capacity, not a duty, voluntariness is a prerequisite of validity. In the absence of a clear desire to participate in arbitration, the interested party may perfectly well oppose its realization, invoking, at the same time, the illegality and unconstitutionality, not to say immorality, of any imposition. Therefore, the question is: Can an adhesion contract contain an arbitration clause?

It can, provided it is negotiated individually. The arbitration commitment cannot be a general clause like the others but has to be negotiated case by case. This is not only a systemic interpretation of the topic, although absolutely correct, but also what the Brazilian Arbitration Law itself states. The presentation by Vinícius Ubertti Pellizzaro[19] is very opportune and didactic:

Read what is foreseen in article 4, paragraph 2, of the Arbitration Law (9.307/96) - LArb, about its application in adhesion contracts:

"§ 2 In adhesion contracts, the arbitration clause will only be effective if the person who adheres to an adhesion contract takes the initiative to institute arbitration or expressly agrees with its institution, provided that in

16. https://www.conjur.com.br/2001-dez-14/stf_declara_lei_arbitragem_constitucional

17. https://sergiooliveiradesouza.jusbrasil.com.br/artigos/116475616/confira-como-ficara-a-arbitragem-no-novo-cpc

18. Art. 5 All are equal before the law, without distinction of any nature, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, safety, and property, in the following terms: XXXV - the law shall not exclude from the appreciation of the Judiciary any injury or threat to a right;

writing in an attached or bold document, with the signature or seal especially for this clause."

Just for the record, it should be noted that the arbitration clause is a species, where the arbitration commitment is also a species, of the genus "Arbitration Agreement". The distinction concerns the moment when the arbitration agreement is stipulated; if it is contractually foreseen, before a judicial or extrajudicial litigation (before the dispute arises) it is an arbitration clause; if it is later, when the parties have already started a judicial or extrajudicial litigation, it is an arbitration commitment. In the legislation, the distinction is supported by articles 4 and 9 of the special rule.

Under the terms of the aforementioned paragraph 2 of article 4 of LArb, which recently underwent a major change with the adoption of Law No. 13,129 of 2015, the adhesion contract has a specific provision, given the presumption of inequality between the offeror and the person who adheres to an adhesion contract, especially due to the vulnerability of the latter.

The legal provision in question requires that for an arbitration clause to be valid in an adhesion contract, it is indispensably necessary to comply with the assumptions foreseen in the rule - the subscription of a document attached to the contract (specific) or, if in the body of the instrument, the specific signature (or initials) on the clause, which should be in bold letters. Nothing prevents that even without complying with the requirements mentioned above, the contracting party may choose to institute arbitration after the dispute between the contracting parties has arisen, which would validate the clause in question.

The clarity and transparency of the clauses that mitigate (or substantially alter) the person who adheres to an adhesion contract's right is a matter that has long been debated in our courts, and is most often linked to consumer law, where adhesion contracts are routinely subscribed, vulnerability being presumed by the Consumer Rights Code (law No. 8078, 1990).

In summary: in civil and corporate adhesion contracts, the arbitration clause or the arbitration commitment may exist, provided it is negotiated individually with the person who adheres to an adhesion contract, somehow separated from the general set of clauses.

In other words, this type of clause is possible, but the prior, formal, substantial, express acquiescence of the person who adheres to an adhesion contract is fundamental, and this acquiescence is not that generic one that is given when adhering to the contractual package, but a truly differentiated one.

Without this, the clause becomes void, expressly unconscionable, according to the lex itself. In the case of an adhesion consumer contract, the rigor, for obvious reasons, is even greater. Again, I take as my own the words of **Pellizzaro**[20]:

Under the CDC is the express provision prohibiting the arbitration agreement as a mandatory rule stipulated by one of the parties. See article 51, VII:

"Art. 51: Contractual clauses related to the supply of products and services are null and void, among others:

[...]

VII - determine the compulsory use of arbitration;"

In fact, the above provision, if read without a hermeneutic perspective, seems unnecessary, since the arbitration clause for adhesion contracts presumes that both contracting parties agree, and the unilateral stipulation of arbitration is not allowed by the normatization in force - article 4, paragraph 2, of LArb.

However, as commonly happens in insurance contracts, article 51 brings greater protection to consumers who sign an adhesion contract, who have not read, do not understand, do not know what it is about, but nevertheless signed it due to the identification of their vulnerability.

In this regard, the "compulsoriness" is presumed by the inequality between the contracting parties, and it is not enough for the person who adheres to an adhesion contract to sign the instrument for him to recognize that he has read it, understood it, and knew what the provision was about.

The doctrinal and court precedent problem arises when questioning whether the premises set forth in article 4, paragraph 2, of LArb, would be sufficient to remove the compulsory use of arbitration, or whether even if those requirements were met, the consumer would still be in a situation of inequality and vulnerability.

In consumer, civil, and business contracts, the

19. https://pellizzarovinicius.jusbrasil.com.br/artigos/339342795/a-clausula-compromissoria-convencao-de- arbitragem-no-contrato-de-adesao-de-consumo-e-o-paradigmatico-julgamento-do-superior-tribunal-de-justica
20. Idem, ibid.

adhesive form of contracting requires highlighting the arbitration clause and express acquiescence, agreement to a greater degree, express, transparent, than that which is employed in mere adhesion.

This is because, it is never too much to repeat, there is no tacit waiving of jurisdiction, there is no tolerance for the undermining of a fundamental constitutional right and guarantee.

It is true that the Civil Procedure Code of 2015 facilitated the use of arbitration and contract clause of exclusive foreign choice of court in international contracts[21,] but it is no less true that both have to be voluntarily decided upon by all contracting parties.

Without prior and express negotiation, there is no validity and effectiveness, if not nullity, in clauses that determine arbitration or foreign exclusive court.

The legislator did not choose the word choice for nothing. Arbitration is mutually and unimpededly elected, the foreign court is jointly chosen, but one and/or the other is never imposed. The imposition offends the Brazilian legal system, disrespects fundamental rights and guarantees, causes intolerable damages and compromises the moral health of contractual relations.

In adhesion contracts, all this is even more true and noticeable, and hence more rigorous control is required, the weight of nullity to the clauses that impose on the person who adheres to an adhesion contract procedures and courts for the solution of disputes that are not expressly desired by him, whether he be a natural person, a consumer, or a legal entity, even a large company, user of a product or service.

The particular case of the international cargo transport contract

There is a very interesting situation that interests Transport Law, Maritime Law, Insurance Law, Contract Law, and Civil Procedural Law.

It is about disputes involving cargo owners or their subrogated insurers and ocean cargo carriers. The international maritime cargo transport contract is also discussed.

In truth, there should be no controversy, given the undeniable unconscionableness of the clause imposing arbitration and/or foreign jurisdiction, but from a mistaken interpretation of the new procedural system in force, the confusion has led to some judicial litigation.

It is worth addressing this confusion, which is apparent, in an especially thoughtful way.

I am using to a great extent arguments that I have already used in previous essays and articles, in order to emphasize that a clause imposing a foreign court and/or arbitration in a cargo transportation adhesion contract is void without individual negotiation by the person who adheres to an adhesion contract.

The new Civil Code has introduced significant changes in the Brazilian procedural system, requiring a new look from the protagonists of the Law.

Some of these changes have a direct impact on Maritime Law.

It can be said that the impacts are, in principle, positive.

However, they call for special care to ensure that this optimistic view is not tainted by misinterpretation.

If good hermeneutics is consolidated and does not abandon the daily exercise of Law, the changes will only generate good things; however, eventual negligence will be potentially harmful and damaging not only to the actors of Maritime Law, but also to the country's economy and the concept of Justice.

One of the subjects that will most require good hermeneutics and a constant dive into the legal tradition already consolidated by jurisprudence is the one that addresses the clause of choice of exclusive foreign jurisdiction in international contracts.

A normative novelty, it is true, but one that is closely connected to the already consolidated tradition of Brazilian Law with regard to the repudiation of unfair contractual terms present in adhesion contracts.

In effect, although the new rule recognizes the validity and effectiveness of a foreign exclusive choice of court clause in an international contract, it does not waive the strict regularity of this clause, both formally and substantively, so that the procedural rule will not be appropriate if the contractual clause does not reflect a perfect legal deal.

The choice of court clause in the international contract will only be effectively recognized and applied if its content perfectly corresponds to the assumptions of validity of the legal transaction, as well as being imbued with the unavoidable voluntariness.

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

21 Art. 25 - The Brazilian judicial authority has no jurisdiction to process and judge the action when there is a clause of choice of an exclusive foreign jurisdiction in an international contract, argued by the defendant in the defense. (It can be seen that the law starts from the assumption of choice, of voluntariness

Within this context, therefore, we have, for example, that no clause of choice of exclusive foreign court in the international contract unilaterally imposed in an adhesion contract will be subject to the new procedural rule.

Now, considering that every international contract of maritime cargo transportation is an adhesion contract, formatted exclusively by the carrier, without any kind of consent from the cargo's consignee, much less from its insurer, there is no way to speak of recognizing the clause of choice of exclusive foreign jurisdiction present therein, even because long ago the jurisprudence labeled this type of contractual provision expressly unconscionable and illegal.

Another thing that cannot be ignored is 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.

It can be seen that the topic is, paradoxically, simple and complex, a stage for practical and concrete doubts, which call for more detailed studies.

Article 25, head provision of the new Civil Procedure Code, in force since March 18, 2016, when dealing with the limits of national jurisdiction, states that: “The Brazilian judicial authority shall not process and judge the action when there is a foreign exclusive court choice clause in an international contract, argued by the defendant in the pleading.

Before beginning the study of the choice of court clause and the possible removal or not of the national jurisdiction in favor of the foreign one, it is necessary to understand the subject matter of its incidence, that is, the international contract.

The international contract is the one that, in some way, promotes the circulation of wealth among nations, even if through purely private actors, involving the regular flow, continuous or not, of goods, capital, or services, all according to article 2 of Decree Law No. 857/1969.

Since the contract is international, it is perfectly legal, a priori, to choose the exclusive foreign jurisdiction, provided that the sovereignty of the national jurisdiction (cases with legal reserve) and the Brazilian legal system as a whole are respected. The article has no correspondence in the 1973 Code of Civil Procedure and constitutes an innovation in the Brazilian procedural legal system.

At first, it is worthy of praise.

But it is necessary to be very careful with the application of this article, because it is not applicable to each and every contract.

In adhesion contracts and, especially, in those of maritime cargo transportation, it is not possible to speak of the validity and effectiveness of the exclusive foreign choice of court clause, much less the arbitration clause, if the formal and substantial admissibility requirements, basically summarized in the individualized negotiation, are not fulfilled, as they are.

The autonomy of the will is indispensable for the perfecting of the legal transaction and, it is never too much to repeat, an unavoidable condition for the validity and effectiveness of the clause under study, under penalty of unconscionableness and serious damage.

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 article 25, head provision, to be subsumed to a given legal transaction, its absolute legality must be verified. Strictly speaking, this is what is said about the arbitration clause (or arbitration commitment), according not only to the procedural law, but also to the Brazilian Arbitration Law itself, as exposed before.

Thus, a foreign exclusive choice of court 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.

The international maritime cargo transport contract is a typical adhesion contract, in which one of the parties imposes its will, by means of printed clauses, while the other is required to accept such impositions, under penalty of not carrying out the desired transportation.

Therefore, it does not fit into the new procedural legal pattern.

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

In the bill of lading, the instrument of the international maritime cargo transport contract, the

choice of court 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 the concept of hardship clause.

This is exactly why the court precedent has never recognized the claims made in forensic litigation by the maritime carriers in the sense that the referred clauses are recognized and applicable to the concrete cases. Quite the contrary: Brazilian courts have always seen these clauses as abusive and incompatible with Brazilian law, especially with regard to the sovereignty of the national jurisdiction. In fact, they have always positioned themselves for the invalidity and ineffectiveness of this type of clause.

It is, by the way, a true tradition of Brazilian jurisprudence and of long standing that in adhesion contracts, the choice of court clause (or arbitration clause) has been declared null due to its serious unconscionable condition

Below is an important Precedent of the former First Civil Court of the State of São Paulo:

Precedent no. 14 of the former 1st TACivSP, now TJSP: “Transport contract. Subrogated insurer - The choice of court clause contained in the transport contract or bill of lading is ineffective in relation to the subrogated insurer.”

And, in the same regard, the emblematic trials, present in RT 623/90 and RT 623/90, respectively:

“The choice of court 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 shipper’s credit.” (UJ 356.311 - TP - j. 7.5.87 - judge Araújo Cintra)

“The special courts and the courts of the defendant’s domicile are concurrent, therefore, the latter and the jurisdiction of choice are concurrent. And it is said that jurisdiction is concurrent when simultaneously several courts are competent, and there may be the choice of a plaintiff, to the detriment of the others (...)”.

“When the action is filed, the jurisdiction is considered chosen, regardless of whether the defendant changes his domicile or another factual alteration occurs, because this is the moment of perpetuatio jurisdicitionis, which in our Law is not simultaneous to that of prevention, by which the jurisdiction of the court is fixed, crystallizing it (art. 86 and 219 of the CPC).”

"The court of the general domicile; and concurrent with the others, since it does not cause harm to the action filed therein to the defendant, who will be better able to defend himself, and it should be noted that there are express rules - which are considered of general character - regarding the venue of choice (arts. 95, Second part, of the CPC and 846, sole paragraph, and 950, sole paragraph, of the CC)".

As it has been said before, the above judgments were rendered under the old Code of Procedure Civil, but fit like a glove to the present Code, because, in truth, nothing has changed with the new procedural order, since article 25, head provision, will only produce the legal effects intended by the legislator if the clause of choice of exclusive foreign jurisdiction in the international contract respects all the legal elements already exposed, notably the voluntariness.

As a matter of fact, the highlighted judgments are representative of the court precedent guidance, practically settled, in the sense of not being recognized the contractual clause of choice of an exclusive foreign court in an international adhesion contract (such as the international contract of maritime cargo transportation)

Civil procedural law has changed, but the international maritime cargo transport contract has not; therefore, everything that was valid before is still valid today and will continue to be valid from now on, without any significant change.

In summary, it is possible to state that a foreign exclusive choice of court clause will only be valid and effective if 1) the principle of autonomy of the will is respected; 2) it is not inserted in an adhesion contract; 3) it respects all the essential assumptions of the perfect legal business;
4) it lacks any illicitness, even if only according to the moral order; 5) it is not abusive.

In view of the items listed and highlighted, it is certain that the international maritime cargo transport contract - as a typical adhesion contract - cannot consider valid and effective its clause of choice of an exclusive foreign court, because it is vitiated by the vice of voluntariness and labeled - according to a wide jurisprudential understanding - as an unconscionable clause, null and void by operation of law.

It is very important to insist that the theme has always received special treatment by the Brazilian Judiciary, even before the incidence of article 25 of the new Code of Civil Procedure, in face of the insistence of the shipping market in claiming the validity of a clause imposed unilaterally, abusively, in an adhesion contract, with the jurisprudential response for its invalidity and ineffectiveness, if not the recognition of nullity.

The position of the Superior Court of Justice, in the judgment of the Special Interlocutory Appeal filed in Interlocutory Appeal no. 459.668-RJ (2002/0076056-3), judged on December 16, 2002, is worthy of note, as reported by **Justice Carlos Alberto Menezes Direito**:

"SYNOPSE: Interlocutory appeal. Special appeal not admitted. Contract. Maritime transport. Jurisdiction. Foreign choice of court clause.

1. *The appealed appellate decision expressly stated that it would not face the merits of the subrogation issue. Therefore, the lack of pre-questioning of the issue contained in article 988 of the Civil Code, in its merits, is evident, which prevents the special appeal from being followed on this point.*
2. *The appealed Judgment stated that "a waiver of rights clause with such serious consequences as the foreign choice of court clause cannot be considered to have been tacitly accepted, without any evidence, however slight, that the party's consent was specific and resulted from conscious negotiation" (page 43). This ground of the Appellate decision, sufficient to be held, was not challenged, either on the basis of subitem a) or on the basis of subitem c) of the constitutional permissive. The paradigms address only the validity of the choice clause of the court in an adhesion contract, without, however, dealing with the specific situation verified in the case of these proceedings, a foreign choice of court clause, a violation of public order and of Brazilian jurisdiction, and, therefore, the necessary factual identity between the decisions does not exist.*

3. Interlocutory appeal denied.

AgRg in the INTERLOCUTORY APPEAL No. 459.668 - RJ (2002/0076056-3)"

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 cargo consignees, the insured.

The dynamics are more or less as follows: the cargo consignee (sometimes the shipper and exporter) takes out international transport insurance 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 is subrogated to the original claim of the insured against the ocean carrier who did not faithfully perform 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 it is he who initiates the judicial dispute by formal provocation of the State- judge.

The clause of choice of exclusive foreign jurisdiction in the body of the ocean bill of lading is considered unconscionable, therefore, null, in relation to the insured, shipper and/or consignee of the cargo; and being so, it is equally null in relation to the insurer. If it is for the more, it is also for the less.

In other words: the insurer, legally subrogated to the insured's claim, cannot be required to obey the provision of a legal transaction to which he was not a party in the strict sense, much less agreed to.

The illegality, unconscionableness, flagrant in relation to the person who adheres to an adhesion contract of the contract, is even more pernicious and undue to the insurer.

And it goes without saying that subrogation is a two-way street. Subrogation legally and legitimately transmits rights in its material aspect, but not all duties, especially those stamped with the signs of vices, legal defects and unlawfulness.

Now, in a given forensic litigation, when the plaintiff is the insurer legally subrogated in the insured's claim (shipper or consignee of the cargo), the eventual application of the clause would prove to be even more wrong, hence the precise and fair jurisprudence response, uniform and very consistent.

Whether for the party actually adhering to the ocean bill of lading (international cargo transport contract) or, even more so, for the insurer subrogated to the claim of the same adhering party, insured in international cargo transportation insurance, one cannot speak of subsumption of the clause of choice of the exclusive foreign court, because it is in flagrant disagreement with the legal order in effect, once unilaterally inserted into a contract of adhesion and marked with the incurable stamp of unconscionableness, i.e., illegality. Therefore, it is impossible to submit this clause to the command of the head of art. 25 of the Code of Civil Procedure, as well as those of the specific rules that deal with arbitration, whose vice is even greater.[22]

It is important to say that the insurer's right of recourse does not derive from the contract of carriage, but from subrogation, which is why it is even more meaningless to impose the contractual burden on him, regardless of whether or not his unconscionableness is recognized.

It is curious that, in addition to all that has been stated in this paper, art. 25 itself contains mechanisms to calibrate against possible injustices, denying validity to abuses.

We speak, therefore, of the rule in § 2, which reads as follows: "Art. 63, §§ 1 to 4."

Paragraph 3 expressly states: "Before service of the summons, the choice of court clause, if unconscionable, may be declared ineffective ex officio by the judge, who shall order that the case be sent to the court of the defendant's domicile.

Now, the same rule that authorizes the recognition of a foreign exclusive choice of court clause in an international contract has a reference to another rule, which presents an antidote against the clause that proves to be abusive, incompatible with the legal system.

Once the abusive nature is recognized, the judge may, even unprovoked, declare its nullity and send the case records to the court of the domicile of the defendant, remembering that, in relation to the domicile of the foreign maritime cargo carrier, the domicile is the place where he is represented by a maritime agent, a commercial representative in Brazil.

The importance of this rule is immense, since it emphasizes, with the weight of legality, the impossibility of this clause surviving as long as it is abusive, illegal, devoid of vital elements such as full voluntariness.

But, in the specific case of Maritime Law, or rather, of the international contract of maritime cargo transportation, the plaintiff is the party immediately interested in the recognition of the unconscionable clause, since it is adhesively disposed of by the carrier, the defendant in any and all litigation based on the non-fulfillment of the obligation of result contained in the same contract. Nevertheless, the observation, with the inversion of poles, fits like a ring on a finger and deserves to be highlighted in view of the weight of the following statement: "Once this unconscionableness is verified, the inefficiency of the clause may be declared ex officio by the judge (...)".

With the highlighted rule, there is the certainty, also by law, that the unconscionableness, very common in adhesion contracts and even more so in the body of any and all international maritime car-

22. NOTE: given the importance of the subject, there will be a separate topic later on.

go transport contracts, has no place in the Brazilian legal system and does not allow the application of article 25 of the new Code of Civil Procedure.

To conclude, it is possible to state in a very healthy and positive way, despite a certain ambiguity of the literary statement, that despite the appearance of change, absolutely nothing has changed, and one can invoke the memory of the famous novel by **Tomasi di Lampedusa**, “Il Gattopardo” and Trancredi’s anthological phrase: “(...) if we want everything to continue as it is, everything must change (...)”.

Article 25 innovated, changed, brought good things to Brazilian Law as a whole, but nothing has changed, nor will it change, in the disputes involving Maritime Law, essentially informed by international contractual relations, because jurisprudence, with unusual excellence, has filled in legal gaps and has always promoted Justice, the best Law, and the common and general good.

Keeping things as they are: this is the true meaning of legal security and the application of Justice.

Therefore, clauses that impose arbitration or a foreign court in international maritime cargo transport contracts are, strictly speaking, null and void, abusive, if there has been no individual negotiation of their content before. Null because abusive, null because unconstitutional, null because offensive to the moral order.

In view of the particular situation of the subrogated insurer as the protagonist of most of the litigation, it is useful to treat him differently.

The subrogated insurer is not subject to the terms of the Bill of Lading

Let it be stated at the outset: the subrogated insurer is not subject to arbitration imposed through the bill of lading.

And why?

Because the exercise of one’s own right born of the law and the insurance contract is in no way to be confused with the contract of transport, to which one is not even a party.

I have long argued that, in the Bill of Lading (B/L), the clause that imposes arbitration, usually abroad, is unconscionable, therefore, illegal. Everyone knows that voluntariness is a prerequisite for the validity of the arbitration commitment. More than an assumption of validity, voluntariness is, as has been said many times, indispensable for the existence of arbitration. Unlike jurisdiction - which is imposed - arbitration has to be desired by the parties.

That is why I affirm that the clause present in this originally credit note, which is evidence of the international maritime cargo transport contract, does not fall under art. 485, VII, of the Code of Civil Procedure (which deals with the arbitration agreement as a cause for the extinction of the process).

Regardless of the condition of the cargo owner (whether natural or legal person, and if legal, small, large or medium size), there will always be the dominance of the shipowner in the legal relationship. The transport is necessary, the contracting mode is adhesive, and the cargo owner has no alternative but to adhere to what the shipowners impose on him, because all of them present basically the same clauses, with minimal differences.

Hence the need for Justice to correctly dose the meta-legal aspects that influence the legal aspects when in crisis situations.

The situation is aggravated, I am very fond of saying, when in dispute are the legitimate interests of the subrogated insurer.

Usually, the owner of the cargo has a transport insurance. In the event of a loss, the damage is proven and quantified, the insurer indemnifies the loss and is subrogated in its rights and actions, in the form of art. 786 of the Civil Code. Once subrogated, the insurer has the right to seek reimbursement from the party causing the damage.

More than a right, in fact, the search for reimbursement on return is a duty, an act of loyalty of the insurer to the group of insured, reason why it has an undeniable social interest.

We speak of social interest because the success of the indemnification impacts positively on the pricing of the insurance, at the same time that it forces the causer of the damage to answer for his conduct.

Were it not for subrogation and indemnity, the party causing the damage would be unfairly exonerated from liability for the damage because of the foresight of the insured, who paid for the protection, for the coverage.

For this reason, reimbursement by way of subrogation is specially protected by law.

This protection authorizes me to state that, even if the arbitration clause in the bill of lading, in the promissory note of the sea, was effective in

relation to the owner of the cargo (the insured), it would never be effective for the subrogated insurer, by force of art. 786, §2 of the Civil Code, which determines the ineffectiveness of any act, even a valid one, that is harmful to the compensation.

It is worth checking the central decision of the Superior Court of Justice, reported by Justice **Massami Uyeda**, which is still, in all courts of the country, the most cited trial of the Court on this very subject:

> *"SPECIAL APPEAL - MARITIME TRANSPORT CONTRACT - ACTION FOR RECOURSE - SUBROGATION - CHOICE OF COURT CLAUSE - PROCEDURAL MATTER – INADMISSIBILITY TO THE SUBROGEE - LACK OF INSURGENCY IN RELATION TO ALL THE GROUNDS OF THE APPELLATE DECISION - INCIDENCE, BY ANALOGY, OF PRECEDENT No. 283 OF PRECEDENT/STF - APPEAL NOT COGNIZED. I -* ***The institution of subrogation transfers the credit only with its characteristics of material law. The choice of court clause established in the contract between insured and carrier does not produce effects with respect to the subrogated insurance agent.*** *II - Judgment based on more than one ground, not all of which have been subject matter of objection. Application, by analogy, of Precedent n. 283/ STF. III - Special Appeal not cognizable". (REsp 1038607/SP – Justice-Rapporteur MASSAMI UYEDA - THIRD PANEL, j. 5/20/2008, DJe 8/05/2008).*

The protection of compensation arising from subrogation - precisely because of its unusual social dimension - predates the current Civil Code and it has been summarized by the Federal Supreme Court.

For decades in the Brazilian legal system, Precedent 188/STF has been in force, which states: "The insurer has recourse action against the causer of the damage, for what it effectively paid, up to the limit provided in the insurance contract."

Therefore, any argument that aims at undermining the dignity of the recourse action of the subrogated insurer against the causer of the damage.

Despite the possible opinions to the contrary, it seems clear to me that the imposition of an arbitration procedure abroad diminishes the rights provided in article 786 and recalled in Precedent 188 of the STF, causing injury to the Brazilian insurer.

If part of the Bill of Lading's clause content is abusive, illegal and unconstitutional to the person who adheres to an adhesion contract, cargo owner and insured, it is even more so to the subrogated insurer, who is not even a party to the legal business of transportation.

It is repeated as necessary: the insurer is not a party to the business of transport, has no prior legal link with the carrier, so that, valid or invalid, abusive or not, the terms of the contract cannot be enforced against him.

It is unreasonable, to say the least, to demand submission to its provisions from someone who is not a party to a legal transaction. This type of submission, if applied, will offend not only the law, but also important principles of law: reasonability, proportionality, equity, isonomy, in addition to common sense, so much so that there are, to rule out such provisions, several important judgments in the Court of Justice of São Paulo, such as this one, reported by the Justice Ligia Bisogni:

> *"JURISDICTION Clause of choice of foreign court not enforceable in action founded on subrogation of insurance company Jurisdiction concurrent between the domicile of the headquarters of the defendant legal entity (CPC, art. 53, inc. III, "a"), or of the place of the fact (CPC, art. 53, inc. IV, "a") Possibility of choice by the plaintiff Precedents Preliminary dismissed." (TJ-SP, Apel. 1033752- 13.2018.8.26.0002, 14th Private Law Chamber, tried on 06.26.19)*

In exercising the right of recourse against the shipowner, the right of the subrogated insurer is not based on the breach of the contract of carriage, but on the civil redress of the causer of the damage. In other words, there is nothing of Maritime Law in the claim, but of Civil Law and Insurance Law.

Insurance Law, born out of Civil Law, is much more important and broader than Maritime Law and, therefore, the protagonist of disputes involving transportation damage.

In this regard, a very recent decision of the 23rd. Chamber of Private Law of the Court of Justice of the State of São Paulo, reported by Justice J.B. Franco de Godoi: "(...) the appellant came to court to claim its own right arising from the insurance contract (pages 48/63) and not from the maritime transport contract that has an arbitration clause".

The rapporteur also stated: "The subrogation of the insurer is not of the same right material that emerges from the contract of transport by sea, but rather from the insurance contract."

The highlighted panel decision is of sunny clarity, magnificent in well exposing the difference between a right born from the law and the insurance business, and not in the contract of transport.

I consider the decision especially important because it did not merely declare the unfairness of the arbitration clause imposed by the carrier but stated that the insurer has nothing to do with the business of transportation; his rights are of another order, the legal greatness and qualification.

A correct framing that focuses on the following question: if the right of the subrogated insurer arises because of the insurance contract - and mainly because of the law - and not because of the contract of carriage, why is it intended that the former obey the terms of the latter?

The question contains in itself the answer and shows how wrong it is to impose on the insurer the arbitration foreseen in an instrument in which it does not figure.

To recognize the arbitration commitment clause (unilaterally imposed in a credit instrument that evidences a contract of adhesion) is to undermine the dignity of subrogation, to harm the mutual, to impose a heavy burden on the one who did not consent to its existence, and to hurt the fundamental constitutional guarantee of access to jurisdiction that every victim of damage (even if reflexively) has.

Still on the excellent vote of Justice J.B. Franco de Godoi, which was fully accepted by his peers, it is worth highlighting the following part, which refers to other decisions, also with excellent grounds:

"It is from this understanding that the appellant's

right to claim compensation for damages arises!

In this regard:
"The Code of Civil Procedure recognizes the possibility and validity of arbitration as long as the legal form is expressly observed, as provided in paragraph 1 of article 3: "Arbitration is allowed as provided by law". In this case, the insurer did not adhere to the referred clause, so the Brazilian legislation was not strictly followed in the requirement of the party's acceptance to submit to arbitration. In this case, the indication of arbitration was made in the contract of carriage and even if the insurer is litigating based on the right of recourse, subrogated in the rights and actions of the insured, this contractual clause does not reach it." (Appeal No. 1002847-62.2016.8.26.0562 Justice-Rapporteur MIGUEL PETRONI NETO 16th Private Law Chamber tried on 8/21/2 018)

"CIVIL LIABILITY. Indemnification. Recourse action arising from insurance contract. Arbitration clause instituted with the insured and not with the insurers. Hypothesis in which the resolution of conflicts through arbitration only binds the contracting parties and not third parties. Application of foreign legislation, for this very reason, which could only be recognized in a proper lawsuit between those who were part of the original contract for services. Inadmissible dismissal of the process. Impossibility of denying the incidence of the national law. Subrogation of the insurer that is limited to the right to procedural action that the insured would have, but not of the material right. Appeal dismissed." (Inst. Ag. no. 0091567 16.2003.8.26.0000 4th Chamber. Extended 1st TAC – Judge-Rapporteur PAULO ROBERTO DE SANTANA tried on 6.23.2004)

Thus, the dismissal of the case, which is in terms to be judged, as established in art. 1.013, § 3º, I, of the Code of Civil Procedure, is rigorous.

The Judgment synthesis, by the way, is already a kind of little catechism on Insurance Law and deserves, here, to be reproduced, without further comments:

"CIVIL LIABILITY - Compensation - Recourse action arising from insurance contract - Arbitration clause instituted with the insured and not with the insurer - Hypothesis in which the resolution of conflicts by arbitration is only binding on the contracting parties and not third parties - Extinction of the process inadmissible - Subrogation of the insurer that is limited to the procedural right that the insured would have, but not to the material right - Preliminary dismissed Appeal granted. Maritime transportation Action filed by the plaintiff-insurer against the defendant-carrier Damages resulting from the transportation Payment of the amount of the claim by the plaintiff-insurer - Absence of evidence, by the carrier, of any exclusion of its liability - Duty of the carrier to pay the subrogated amount, indicated in the conclusion of the survey - Action granted - Appeal granted".

I hope that the decision will be a success and that the grounds for the ruling will help in judging other cases.

The understanding of the illustrious reporter is old, so much so that it has been reverberated by other judges. The eminent Associate Justice and Corporate Law doctrinaire Carlos Henrique Abrão cites it in one of his excellent decisions:

"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 report of Justice J. B. Franco de Godoi."

There is a lot of confusion in the air due to a certain decision of the collegiate body of the Superior Court of Justice that has nothing to do with cargo transportation and subrogation in general.

The salient truth is that the subrogated insurer is not bound by the arbitration procedure provided (imposed) in the B/L, sometimes purportedly incorporated into it by the charter-party, which concerns the charter prior to the carriage.

This is, for example, the understanding of the renowned jurist Ives Gandra da Silva Martins, according to his recently issued legal opinion, which is in line with what I have always defended:

1) "The subrogated insurer does not integrate the contract of carriage, is unaware of the choice of court clause, which will only be communicated to him, if and when the loss is repaired by him, thus generating his right of recourse. A choice of court clause cannot be imposed on him without his consent, under penalty of offending the fundamental individual right of access to jurisdiction" (page 27)
2) "The choice of court clause is invalid also with respect to the insured (international maritime cargo transportation service taker) for the reasons stated above; The insurer sub claims on the insured's claim, but not on its legal position in the contract entered into with the international maritime transportation service provider, especially with respect to procedural restrictions." (fl. 27)
3) "Yes, the choice of court clause in international maritime cargo transport contracts is abusive 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 court on the owner of the cargo is a disproportionate burden on the fundamental right of access to jurisdiction, prejudicing the provision of jurisdiction." (fl.51)
4) "All considerations in this paper regarding the choice of court 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 Judiciary and national sovereignty." (page 52)

And the famous jurisconsult's conclusion is crystal clear:

"It is clear, therefore, that the choice of court clause is invalid in international contracts of maritime cargo transportation against the subrogated insurers, since:

1. It is an adhesion contract, with no freedom in agreeing on the clause;
2. The court 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 carriage, it did not consent to the choice of court 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 entered into between the carrier and the taker of the service." (page 36)

The famous constitutionalist is not alone in this powerful understanding. It is shared by the largest group of proceduralists in Brazil, the prestigious Arruda Alvim, who has positioned themselves in two magnificent opinions, which, out of courtesy and respect, I will not reproduce in this essay because they were issued in specific cases, hired by the plaintiffs; a position whose existence I faithfully testify.

The best doctrine and the dominant jurisprudence point out the impossibility of binding the subrogated insurer to the arbitration procedure imposed through the Bill of Lading.

Beyond the strong arguments about the abusive nature of the clause - which disobeys the Brazilian arbitration law itself - there is something undeniable: the subrogated insurer does not seek reimbursement for the breach of the obligation to trans-

port, but for the damage that generated insurance compensation. He does not seek reimbursement from the ocean carrier itself, but from the tortfeasor, anyone. Period.

For the subrogated insurer, there is no difference between the natural person who causes a car accident, causing loss to the insured, and the shipowner who damages or misplaces cargo. Both are causers of damage and loss. The dynamics of the search for compensation for one is rigorously the same as the other.

Absolutely similar circumstances and perspective, differing only in the chronicles of the facts and in a few elements of liability.

The important thing is to respect the long-established Roman Law metric of giving one exactly what is his, and not offending the undisputed preference of national jurisdiction.

It is impossible not to remember the famous English author, G.K. Chesterton: “The day will come when we’ll have to prove to the world that grass is green”. Today, in view of the repeated attempts to mislead the Judicial Branch, I believe that this day has arrived.

And because it has arrived, I will end my commentary by recalling one of the first lessons I learned when, many years ago, I studied the Law of Obligations: the contract is law between the parties and, strictly speaking, does not produce effects erga omnis.

It seems incredible, but today it is necessary to emphasize that those who are not party to a contract cannot be required to comply with its provisions, especially when these are manifestly unconscionable, illegal, and intend to empty one of the most important institutes of Insurance Law, subrogation - which never incorporates them.

Conclusion

Although the text and argument have been extensive, the conclusion is brief and summary. This is so because, once the legal and juridical foundations of the argument are exposed, there is no way to conclude differently from what has already been stated above and in different moments.

The adhesion contract is opposed to all forms of control necessary for the removal of its general clauses from those labeled as abusive. An unconscionable clause is one that violates legal logic, violates objective good faith, ignores that the contract has a social function and that the unbalance between the parties is unbearable.

Every contract, adhesion or not, consumer contract or not, has to prioritize the asymmetry between the parties, the balance between their rights and obligations. Every contract has it; the adhesion contract, even more so.

In the adhesion contract, the calibration mechanisms - because they start from the assumption of no individual negotiation (principle of the presumption of non-negotiation) - have to protect the adhering party, who is weak by legal determination, unconditionally from its factual condition.

Consumer or not, natural or legal person, the person who adheres to an adhesion contract has to be especially protected, in order not to suffer injury by the undue imposition of an unconscionable clause. General clauses are admitted by the Law and even necessary, important for the viability of legal business in mass and risk societies, but they can never become unconscionable.

The distance between the general clause and the unfair one, as daily experience and the legal literature, is smaller than that between sanity and insanity. For this reason, at the slightest evidence of unconscionableness, the clause must be declared void.

That is the overview of the subject.

In particular, it is interesting what happens in transport contracts, especially international maritime cargo contracts. In them, there are clauses imposing arbitration and foreign exclusive jurisdiction.

These clauses have always been considered invalid, ineffective, inoperative and void. They and others, such as the one that intends to limit the liability of the carrier that caused the damage, author of illicit civil-contractual acts.

Due to a mistaken interpretation of some norms of the new Civil Procedure Code, a few, but already worrisome, decisions have arisen in the Brazilian legal scenario, unduly recognizing its validity and effectiveness.

Unduly because the procedural law has changed, but the contract of carriage has not. It continues to be an adhesion contract and the clauses that provide for arbitration and/or foreign jurisdiction are imposed, not elected. Even without referring to the consumer protection system, the unconscionableness is blatant and implies a constitutional offense, given the guarantee of access to jurisdiction.

The fact that the contracting party is usually a legal entity - in the international maritime cargo transport contract - in no way changes the abusive condition of these clauses. The arbitration and/or the foreign court are not chosen, not agreed upon, not freely accepted and wanted by the adhering parties, but unilaterally imposed by the shipowners (carriers).

The absence of individualized negotiation is the great defect to be declared. This situation only worsens when the litigating party is no longer the person who adheres to an adhesion contract itself, but, by force of the transportation insurance contract and subrogation, the insurer.

The right of recourse of the insurer does not derive from the breach of the contract of carriage, but from the law and the insurance contract, from the express determination of art. 786 of the Civil Code and, in face of the loss, from the payment of compensation to the victim of the damage. The insurer claims against any party causing the damage, not exactly against the obligor of the transportation obligation.

And if the insurer has nothing to do with the transport contract, it is certain to say that he is not subject to any of its clauses, especially an abusive, illegal, unconstitutional one, that intends to prevent him from accessing the Jurisdiction itself, a fundamental constitutional guarantee.

The imbalance is so blatant that to grant validity to this type of clause is to discredit Law as a whole. The specific norms that control the unfairness of clauses in adhesion contracts are discredited, and even more so the general theory of Law, the fundamental principles and all the values recognized over the last two millennia of Western civilization, with powerful echoes in Eastern culture.

If it were possible to summarize the whole of this study in a single sentence, it would be unconscionable clauses in adhesion contracts is but a **matter of justice and defense of the moral order.**

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