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THE SUBROGATED INSURER DOES NOT UNDERGO THE BILL OF LADING ARBITRATION

Exercise of one's own right in effect of the insurance contract, which is in no way confused with the contract of transport

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I have long defended that the clause that intends to impose arbitration, usually abroad, through the Bill of Lading1, is unconscionable and, therefore, illegal.

Voluntariness is a prerequisite for the validity of the arbitration commitment, essential for it to be established. Unlike jurisdiction, which is imposed, arbitration must be desired by the parties.
That is why I state that the clause of such nature, contained in this document, which has a negotiable instrument nature and serves as evidence of the international maritime cargo transport, does not include the hypothesis of art. 485, item VII, of the Code of Civil Procedure2 (which addresses the arbitration agreement as a cause for the dismissal of the case).

The maritime cargo transport contract is essentially a contract of adhesion, without the shipper and the cargo consignee being able to freely express their wills. The carrier imposes the clauses, unilaterally.

This is so true that not even a specific contractual instrument exists, which is represented, at most, by a negotiable instrument that is known, for a long time, as a note of the sea.

[1] Nomenclature of the negotiable instrument that serves as an instrument of the international maritime cargo transport contract - which is a contract of adhesion - unilaterally drawn up by the shipowner.

[2] Art. [485]. The judge will not settle the merits when:
VII- accepts the allegation of the existence of an arbitration agreement or when the arbitration court recognizes its jurisdiction

The owner of the cargo (shipper or consignee) cannot be forced to exercise arbitration if he has not agreed, freely and uncontroversially to its performance.

More than illegal, the imposition is unconstitutional and immoral.

Unconstitutional because there is no tacit waiver of access to jurisdiction, one of the most important fundamental guarantees; immoral because it is an intolerable contractual dirigisme. The shipowner takes advantage of the asymmetry in the factual relationship that informs the legal business.

As far as the moral element of the condition is concerned, a brief explanation is in order.

Regardless of the condition of the owner of the cargo - whether a natural or legal person, and if legal, whether small, large or medium-sized - the shipowner always dominates the legal relationship.

The transport is necessary; the contracting mode is adhesive. The owner of the cargo has no alternative but to adhere to the shipowner's orders, because not doing business with the latter does not guarantee that the others will have more clauses options. In this regard, bills of lading are, as a rule, all the same.

The shipper is subject to the famous "take it or leave it", the consignee only bears this cost. Hence, the need for Justice to correctly dose the meta-legal aspects that influence the legal ones in crisis circumstances.

The condition is aggravated, as I like to say, when the legitimate rights and interests of the subrogated insurer come into dispute.

Typically, the owner of the cargo has a transport insurance. When a loss occurs, and the damage is proven and quantified, the insurer indemnifies the loss and is subrogated in its rights and actions, in accordance with art. 786 of the Civil Code.[3]

Once subrogated, the insurer is entitled to seek the due redress from the party that caused the damage.

[3] Art. [786] - Once the indemnity is paid, the insurer is subrogated, within the limits of the respective value, to the rights and actions of the insured against the perpetrator of the damage.

More than a right, in fact, the search for redress on return is a duty, an act of loyalty of the insurer in relation to the group of insured, and is of great social interest.

We are speaking of social interest because the success of the redress impacts positively on the pricing of the insurance, at the same time that it requires the causer of the damage to respond for his conduct.

Were it not for the subrogation and the redress, the party causing the damage would be unjustly exempted from answering for the damage because of the welfare of the insured, who paid for

the protection, for the coverage.

For this reason, the law provides special protection to the insurer with subrogation, with recourse consequences that result from this.

This protection allows me to state, fully convinced that: even if the text of the bill of lading, sometimes incorporating provisions of the freight agreement, seeks to impose arbitration, and this provision is valid and effective in relation to the owner of the cargo (insured), it will never be, however, for the subrogated insurer, by force of §2 of art. 7864, which determines the ineffectiveness of any act, even valid, harmful to the redress.

The protection of the redress arising from subrogation - precisely because of its historical social dimension – dates back the current Civil Code, so much so that the Federal Supreme Court has summarized it.

Precedent 188/STF has been in effect for decades: The insurer has a recourse action against the causer of the damage for what he effectively paid, up to the limit provided in the insurance contract.

Therefore, any argument that seeks to undermine the dignity of the recourse action of the subrogated insurer against the party causing the damage, due to its considerable unlawfulness, is an attack on Brazilian legal tradition.

I believe, notwithstanding contrary opinions, that the imposition of an arbitration procedure abroad diminishes the rights foreseen in art. 786 and marked in Precedent 188 of the STF, with undeniable damage to the Brazilian insurer.

[4] §²- Any act of the insured that reduces or dismiss, to the detriment of the insurer, the rights to which this article refers, is ineffective.

If part of the allegedly clause content of the Bill of Lading is unconscionable, illegal and unconstitutional to the adherent, owner of the cargo and insured, it is even more so to the subrogated insurer, which is not even part of the legal business of transportation.

The insurer has no prior legal bind with the carrier, so that, valid or invalid, unconscionable or not, the terms of the contract made by the latter cannot be enforced against him.

In addition, the very institute of subrogation does not transmit rights of a procedural or personal nature, but only in relation to the material rights that belonged to the insured. The only limitation that the redress finds is in the prohibition of profit; in other words: the insurer receives no more, no less, than he was forced to pay out.

In any case, it is unreasonable, to say the least, to demand that someone who is not a party to a legal transaction, to which content he did not expressly agree, submits to its provisions. Otherwise, there will be an offense not only against the law, but also against important principles of the Law: reasonability, proportionality, equity, isonomy, in addition to common sense.

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 transport, but on the civil redress against the causer of the damage. In other words: there is almost nothing of Maritime Law in the claim and much of Insurance Law.

The Insurance Law, born out of Civil Law, is much more important and broader than the Maritime Law and, therefore, the protagonist of litigation involving transport 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, reporting by the Honorable Judge J.B. Franco de Godoi5: "(...) the appellant came to court to claim its own right arising from the insurance contract (pages 48/63) and not of a maritime transport contract that has an arbitration clause".

[5] Civil Appeal nº 1011256-26.2019.8.26.0011 of the Judicial District of São Paulo.

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

The highlighted collegiate decision is of solar clarity, magnificent in exposing the difference between a right born from the insurance relationship, which is the essential one, and not from the transport, which is the incidental one.

A correct framing, because if the right of the subrogated insurer arises, by force of law, in force of the insurance contract and does not arise from the contract of transport, for what reason is its compliance to the terms of the latter intended?

The question contains in itself the answer; and it proves how wrong it is to impose on the insurer the arbitration foreseen in an instrument to which it is not a party.

To recognize the arbitration commitment clause (unilaterally written in this negotiable instrument, which acting as an instrument of conveyance, shows an adhesive contracting) is to void the dignity of the 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 given by Judge J.B. Franco de Godoi, which was fully accepted by his peers, the following excerpt should be highlighted, which refers to other decisions, also with excellent grounds:

> *"It is from this understanding that the appellant's right to claim redress for damages arises!*
> *In this regard:*
>
> *"The Code of Civil Procedure acknowledges the possibility and validity of arbitration as long as the legal form is expressly complied with, 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 transport and that 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 him." (Appeal No. 1002847-62.2016.8.26.0562 Judge-Rapporteur MIGUEL PETRONI NETO 16th Private Law Chamber tried on 8/21/2 018)*
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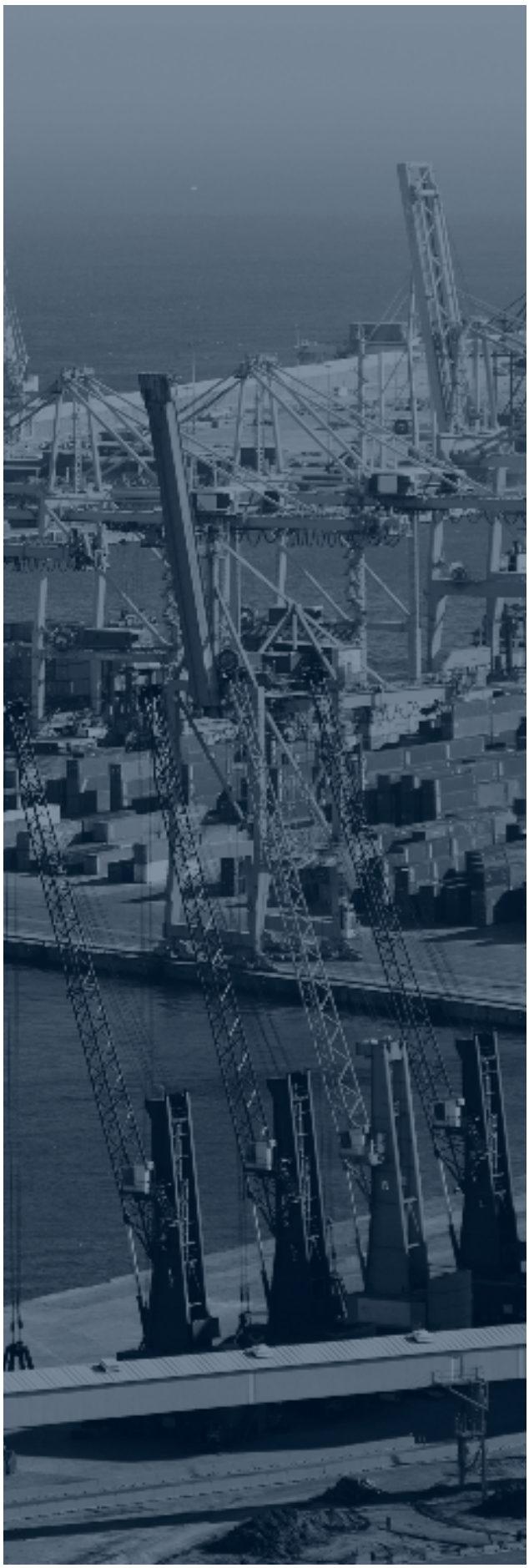
> *"CIVIL LIABILITY. Indemnity. Recourse action arising from insurance contract. Arbitration clause instituted with the insured and not with the insurers. Hypothesis in which the resolution of conflicts by arbitration only binds the contracting parties and not third parties.*



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. 009156716.2003.8.26.0000 4th Chamber. Dismissed 1st TAC – Judge-Rapporteur PAULO ROBERTO DE SANTANA tried on 6.23.2004)

Therefore, the dismissal of the case, which is in terms to be tried, as established in article 1013, § 3, item I, of the Code of Civil Procedure, is rigorous.

The Appellate Decision synthesis, by the way, is already a kind of little catechism [instructions] of Insurance Law and deserves to be reproduced here without further comment:

"CIVIL LIABILITY – Indemnity - Action for recourse action arising from an insurance contract - Arbitration clause executed with the insured and not with the insurer - Event where resolution of disputes by arbitration is binding only on the contracting parties and not on third parties – Dismissal of case inadmissible - Subrogation of the insurer limited to procedural right of the insured, but not to substantive right - Preliminary plea denied - Appeal granted. CONTRACT. Maritime transportation. Action brought by the appellant-insurer against the appellee-carrier. Damages arising from the transportation. Payment of the amount of the claim by the appellant-insurer - Absence of evidence, by the carrier, of any exclusion of its liability - Duty of the carrier to pay the subrogated amount, appointed in the conclusion of the inspection - Action granted - Appeal granted."

I hope that the decision will be a success and that the grounds of the appellate decision can contribute to the value judgments in other cases.

The understanding of the honorable judge-rapporteur is old, so much so that it has been reverberated by other judges. The Business Law Judge and doctrinaire Carlos Henrique Abrão mentions it in one of his excellent decisions:

"It is worth saying that the arbitration agreement and the alleged provisions of foreign legislation is inapplicable because the foreign company is being sued through the representative and partner in Brazil for redress of compensation paid to the insured, being the arbitration clause established with it, binding only the contracting parties, regarding the understanding substantiated in the Civil Appeal No. 0030807-20.2010.8.26.0562, under the reporting of Judge J. B. Franco de Godoi."

There is a lot of confusion hovering in the air because of a certain decision of the special body of the Superior Court of Justice, which has nothing to do with cargo transport and the right of recourse.[6]

[6] I am talking about decision SEC 14.930-EX, which addressed exclusively with the formal aspects of the approval of foreign arbitral decision. Arbitration that was held in the USA and in which the insurer participated, implying tacit acceptance to that method. A case involving the voluntariness of the insured and supply contract. Different context from the adhesion in the contracting of transportation. The reporter of the decision, Justice OG FERNANDES himself stated that this is not a precedent, exactly because account of the important issues surrounding art. 786 of the Civil Code. And the very nature of subrogation.

The truth that stands out is that the subrogated insurer is not required to the arbitration procedure provided (imposed) in the B/L, or in the charter that it sometimes tries to incorporate.

This is the understanding of the renowned jurist Ives Gandra da Silva Martins[7], according to his recently issued legal opinion regarding the choice of court clause (which applies to the arbitration commitment), well in line with what I have always defended:

1) "The subrogated insurer does not integrate the contract of transport, it is unaware of the choice of court clause, which will only be reported to it, if and when the loss is redressed by it, thus generating its right of recourse. A choice of court clause cannot be imposed on it without its consent, under penalty of offending the fundamental individual right of access to jurisdiction." (page 27)

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

3) "Yes, the choice of court clause in international maritime cargo transport contracts is

unconscionable because it is imposed by the party that holds a commercially privileged position in relation to the buyer of the service, 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 forum on the owner of the cargo is a disproportionate burden on the fundamental right of access to jurisdiction, which harms the provision of jurisdiction." (page [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 highlights "that the philosophy of arbitration is exclusively related to the issue of autonomy of will, and it is correct to say that the Arbitration Act had only the purpose of regulating a form of statement made of the will, ...". To intend to impose arbitration proceedings without formal, prior and express acceptance is to violate the fundamental right of access to the Judicial branch and national sovereignty." (page [52])

[7] Opinion that I requested in order to confirm or not the fairness of the arguments against the imposition of arbitration in the international bill of lading.

And the conclusion of the famous legal adviser is crystal clear:

"It is clear, therefore, the invalidity of the choice of court clause in international contracts for maritime cargo transport in relation to 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 transport, has not agreed to the choice of court clause;

4. The subrogation of the insurer is limited to the material aspects of the negotiable instrument and not, to the procedural aspects of the contract signed 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 honorable Arruda Alvim, who has positioned themselves in this way in two magnificent opinions, which, out of politeness and respect, I will not reproduce in this essay because they were issued in specific cases, hired by the plaintiffs. I am not reproducing them, but I am faithfully testifying to their existence.

The best doctrine and the dominant court precedents, including that of the STJ, point out the impossibility of binding the subrogated insurer to the arbitration procedure that the insured may have opted for, or may have been forced to by the shipowner.

Beyond the strong arguments about the unconscionable nature of the clause - which does not comply with the Brazilian arbitration law -, there is something undisputable: the subrogated insurer does not seek redress for the breach of the obligation to transport, but for the damage that generated insurance redress. It does not seek redress from the ocean carrier itself, but from the tortfeasor. From anyone who finds himself in these circumstances.

For the subrogated insurer, there is no difference between the natural person who causes an automobile accident, causing loss to the insured, and the shipowner who damages or misplaces cargo. Both are causers of damage and loss. The dynamics of compensation for one is the same as for the other. Similar circumstances and perspectives, differing only in the chronicles of the facts and in a few elements of civil liability.

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

It sounds incredible, but one cannot help but remember the famous English author G.K. Chesterton "The day will come when we'll have to prove to the world that the grass is green." Today, faced with so many attempts to mislead the Judicial Branch, I think that the day to prove that the grass is green has arrived.

And because it has, I will end 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 aim to undermine one of the most important institutes of Insurance Law: the subrogation.

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