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SHORT ESSAY ON THE PRINCIPLE OF MUTUALISM, THE POWER OF SUBROGATION AND ITS IMPORTANCE FOR REDRESS

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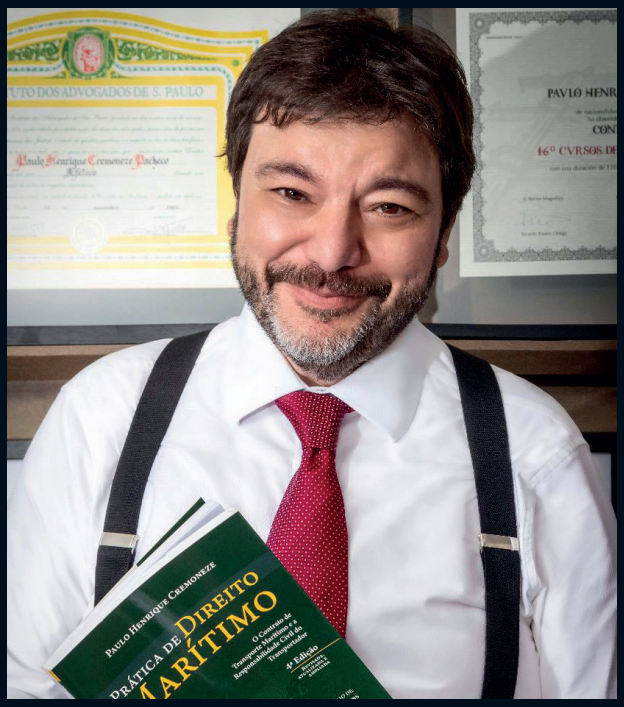

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The purpose of the insurance is to reestablish a disturbed economic equilibrium. This is why it is said that insurance "*is an operation whereby, for a small remuneration, a person, the insured, promises himself or another, in the event of a certain event, which is called a risk, a benefit from a third person, the insurer, who, assuming a set of risks, redresses them according to the laws of statistics and the principle of mutualism*."[1]

The interest herein is the study of the principle of mutualism. And not only its conceptual study, but its importance for the health of the insurance business, the success of the redress in return and the justness of the refusal to pay indemnity when the case requires it.

Insurance has three distinctive features: foresight, uncertainty and mutualism.

Mutualism is so important that, more than a characteristic, it is the guiding principle of the insurance business.

And what is mutualism?

In insurance, it is "*the gathering of people, with common insurable interests, which contributes to the formation of an economic mass, for the purpose of supplying, at a given moment, the eventual needs of some of those people*".[2]

One can think on the principle of mutualism from the famous phrase that Alexandre Dumas coined for the Three Musketeers and D'Artagnan: "*One for all and all for one*". This is the synthesis of mutualism, with a kind of unofficial but striking stamp.

Isabela Cristina Karkache[3] made an interesting comment about it: "*The principle arose in the Middle East, and consists in short of the contribution of all for the individual benefit of each of the contributors. It is the sharing of losses and damages. The insurance contract is based on this principle, to the extent that what one contributor does, harms all contributors (...) Basically, the principle of mutualism protects the insurer from losses - which are always compensated by the contributors themselves. Here the principle of good faith also comes into play, since if the declarations of all the contributors are sincere, the risk is predetermined and in this way is the pay ment of the premium.*"

The great author **Pedro Alvim**[4] teaches that "*The importance of solidarity matured very early in the human spirit, as a factor for overcoming the difficulties that haunted the life of each person or the community itself. It was realized that it was easier to collectively bear the effects of the risks that affected people in isolation. The help provided by many to meet the needs of a few mitigated the harmful consequences and strengthened the group. Mutuality was, therefore, a highly profitable condition for the collectivity subject to the same risks*."

One can see, without much effort, that the idea of collectivity, the perspective of common interests, the concept of collectivity, all this is present in the genesis of insurance.

It is so true that **Pedro Alvim**[5] goes on to say, with excellence, that it was the "*mutuality that served as support to all systems of prevention or redress of damage, arising from risks that interfere with human activity. For many centuries, these systems were simple to organize, as they were limited to providing immediate help to those who were affected by harmful events. The whole group, by force of solidarity, contributed with its participation in kind or in money to repair the conditions of the companion, damaged in its material interests or its health.*"

Magnificent, hum?

It is impossible not to refer to the concept of companionship, born in Medieval Law, under the influence of Christianity: "*et cum panis*", those who sit at the same table and share the bread among themselves.

Anachronistic remission, since it can be said that, in some way, the insurance business and the principle of mutualism, much earlier, that actually influenced the formation of companies.

In the face of all these considerations, it is that we affirm: mutualism is a social phenomenon, perhaps the greatest among all those that claim adjectivization. Being a social phenomenon, it makes all the sense in the world to emphasize the social function of the insurance business, for the legitimate protection of the rights and interests of the mutual, the college of insured.

So overlapped is the mutualism in the anatomy of the insured, and such is the social function of the business, that the greatest British statesman of all times, **Sir Wiston Churchill**, said, "*If it were possible, I would write the word insurance on the doorpost of every door, on the forehead of every man, so convinced am I that insurance can, by a modest outlay, deliver families from irreparable catastrophes*."

Churchill's appeal is such that this modest essay could end here. But boldness recommends more.

It is very important to understand that an insurer never defends only itself, its rights and interests. When it takes a stand, it equally defends those of the mutual, those of its direct and indirect policyholders and beneficiaries.

When denying the payment of a redress for a just reason, the Insurer does not harm an insured or any beneficiary. On the contrary: it preserves the rights of all, because an undue, irregular payment causes damage to all the insured.

This is often ignored by people, and negative stereotypes of the insurance market arise from this.

But besides the immediate collectivity, characterized in the principle of mutualism, the intermediate collectivity also has an interest in the insurance business remaining healthy. Its social dimension, its purpose of reestablishing the economic balance interests everyone.

And this happens in a very special way when the lights are shone on subrogation and redress by return. A very powerful right, subrogation in the rights of the insured gives rise to the search for redress and, consequently, a vast and fertile field of circumstances and perspectives.

[1] Hermard, Joseph, Introdução ao Seguro, 2ª ed. – Rio de Janeiro: FUNENSEG, 1999, p. 15
[2] Op. Cit., p. 16
[3] https://jus.com.br/artigos/44814/a-boa-fe-e-o-principio-do-mutualismo-nos-contratos-de-seguro
[4] O contrato de seguro, Rio de Janeiro: Ed. Forense, 1999, p. 2
[5] Idem, ibidem.

Circumstances and perspectives accompany the journey of all of us and in everything, including the Law. How can we not remember the most famous maxim of the great **José Ortega y Gasset**: "*Man is man and his circumstance*"?

The words of the famous Spanish thinker apply very well to subrogation and redress.

The circumstance of subrogation brings many different perspectives on redress, its impact on the insurance business, and its immeasurable importance.

It is through subrogation that the indemnity is exercised, and it is through this that the hygiene of the insurance is guaranteed, protecting the legitimate interests of the insured and of society in general by requiring the party that caused the damage to fully redress what is owed.

The subrogation is "*typical of the insurance of things and financial insurance, i.e., those insurances in which the objective is the payment of an indemnity proportional to the damage or loss of the insured. (...) The holder of an asset must choose between claiming the redress of the damage directly from the causer or opting to receive the redress from its insurer*".[6]

Classically, subrogation is defined as the effect of payment that allows one person to substitute another in rights and obligations pertaining to a given legal relationship, with the limitations imposed by law. It may be conventional, when it results from the will of the parties, and legal, when it originates directly from the law.

In this essay, what is of interest is the subrogation of the insurer. The **Royal Spanish Academy**, through the **General Council of the Judicial Branch**, defines it as follows: "*Situación del asegurador que paga la indemnización al assegurado y se sub-roga em los derechos y acciones que, por razón del sinistro, correspondiran a aquel frente a terceras personas responsables del mismo y hasta el limite de la indemnización pagada. LCS, art. 43*."[7]

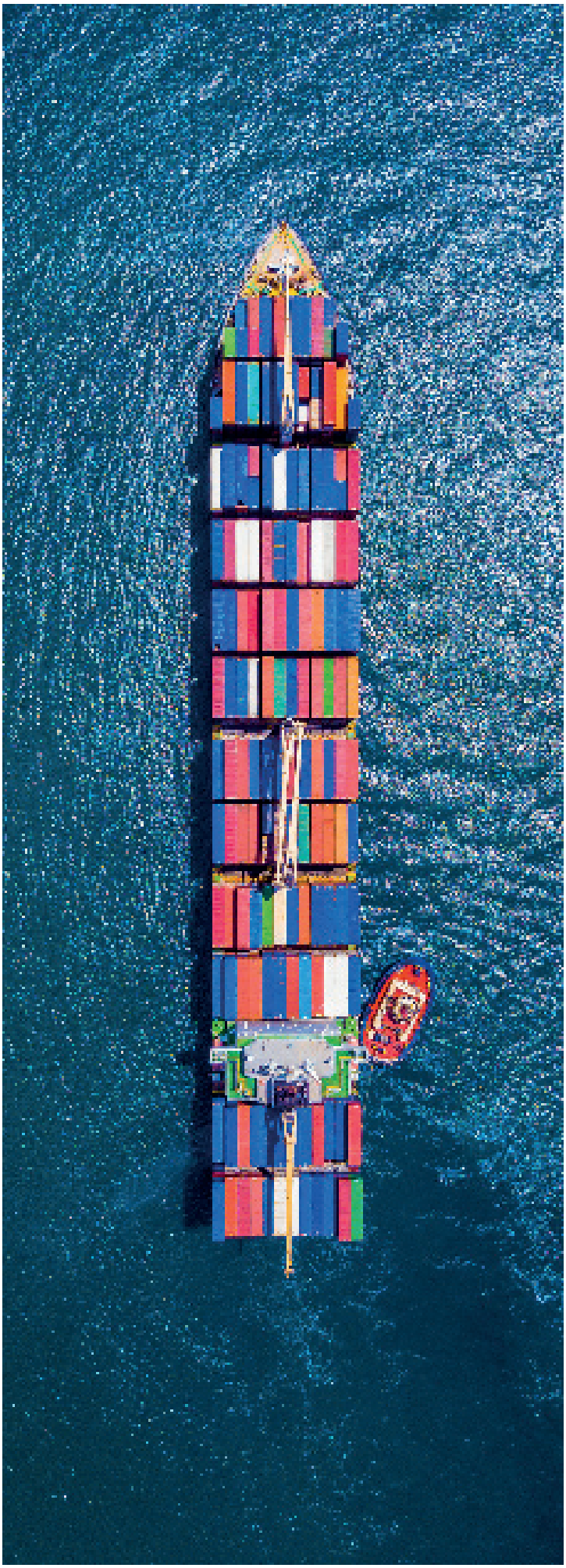
A definition, which is academic, vocabular and at the same time legal since it is present in the country's Insurance Law. Such is its value that, more than a legal figure, it embodies a principle.

This is exactly what it says **Maurício S. Gravina**[8]: "*Se trata de um principio de proporcionalidade y reequilíbrio de la posición de las partes frente ao contrato, a los daños causados y a su reparación. (...) Como consequencia del contrato de seguro y del pago del sinistro, el assegurador cuenta com determinados derechos y aciones contra el terceiro causadorde los daños*.".

And **Gravina**[9], citing the Italian scholar **Cesare Vivante**, also tells us: "*L´assicutatore é surrogato in tutti i diritti che competeno allássicurato verso i terzi per causa del danno*".

And it is through this principle, through this figure, that compensation is present, and with it, the materialization of many good things. The first of them is the perfect recognition of the transmission of rights and actions.

Through the subrogation, the insured transfers to the insurer all his rights and actions against the causer of the damage that originated the insurance indemnity.



[6] Direito do Seguro, 8ª. ed. – Rio de Janeiro: Funenseg, 2006, p. 58
[7] Diccionario del Español Jurídico (Santiago Muñoz Machado), Real Academia Española, 2016, Espasa Libros:Barcelona, p. 1545
[8] Princípio jurídicos del contrato de seguro. – 1ª ed. – Buenos Aires-Madrid-México: Ciudad Argentina-HispaniaLibros, 2015, p. 147.
[9] Idem Ibidem

In Brazil, this transfer does not only derive from the insurance contract, where there is a similar provision. First of all, it is the law that determines it. We are speaking exactly of art. 786 of the Civil Code [*Once the indemnity is paid, the insurer is subrogated, within the limits of the respective value, to the rights and actions that belong to the insured against the perpetrator of the damage*].

It is very important to emphasize that the Brazilian Civil Code is exhaustive in providing that only rights and actions are transmitted by subrogation. Understood in the best way, it means that the insurer does not absorb any burden, personal obligation or procedural pact originally imposed on the insured or accepted by it.

Naturally, there are those who disagree. But it does not seem to be the most correct interpretation of the law.

It is not, therefore, an exaggerated attachment to the literal formalism of the rule, but a systemic intelligence of the legal system, considering even the ontology of the institute. Now, if burdens were also transferable, what is the point of subrogation and the exercise of rights and actions?

The insurer can and should benefit from the rights and actions; and since the very institute of subrogation was created to benefit the payer, the payer cannot in any way be harmed by interpretations that impose on it burdens of any kind.

This is something present in the definition of the institute, as it is well explained in the quotation from the Real Academia Española, reproduced a little earlier (*Situación del asegurador que paga la indemnización al asegurado y se sub-roga em los derechos y acciones*). Whatever the definition, academic or legal, the present idea will always be that of transmission only of rights and actions, never burden, of any condition restricting rights, even if eventually valid and effective to the insured, the transferor.

With this, it is not our intention to reward casuistry or to defend an adherent reading of the Law, but rather to honor the principle of mutualism and the social function of the insurance contract.

When seeking redress, the insurer, it should be stressed, is not only defending its rights and interests. It also defends, or even more so, those of the group of insured, those of the mutual. The success of the redress protects the mutual and has a direct impact on the pricing of the insurance, benefiting, even if reflexively, all of society.

Although somewhat logical and ontological, the legislator also took care to regulate the impossibility of transferring burdens, doing so in §2 of the same art. 786: *Any act of the insured that reduces or dismisses, to the detriment of the insurer, the rights referred to in this article, is ineffective*.

Unfortunately, this provision, as radiant as three solar systems, is sometimes ignored, and the whole mutual agreement is harmed by the insured's act, which by damaging the insurers' right of recourse, undermines the dignity of subrogation and inhibits the materialization of justice.

Other legal systems around the world address the subject in the same way, as seen in Spain: LCS, art. 43, CC; Portugal: DL 72/2008, arts. 136 and 181; Italy, art. 438, CC; Argentina: LS, art. 80; Chile: art. 534, CC; Mexico: LS. Art. 111, 143 and 163[10].

There is, therefore, almost universal protection of subrogation and indemnification. Protection in the sense that they are never harmed, either by the insured himself, the transmitter of rights and actions, or, much less, by third parties.

All this also because the subrogation will allow the redress against the causer of the damage, which besides benefiting the collectivity of the insured, will provide society with benefits. And this is not only about cheaper insurance, but also about a sense of justice. The person who caused the damage cannot go unpunished because someone else, the insured or the policyholder, thoughtfully took out an insurance policy and paid the due premium.

It is known that the primary function of civil liability is to redress the damage, and a kind of subsidiary function is to give a just punishment to the one who caused it. The one who causes the damage has to answer for it. Just because the victim has insurance protection does not mean that this duty[11] will be change. And in this secondary function subsists the social interest, the double moral legitimacy of the redress anchored in the subrogation.

Therefore, one speaks of a right of recourse for the group of insured and a duty on the part of the subrogated insurer.

This insurer has not only a right of recourse, but a duty to provide it, marked by the social seal and the stamp of dignity, by respect for the college of policyholders, the shareholders, and the general members of society.

Seeking redress is, therefore, a right and a duty. The insurer has the right, on behalf of many, to mutual, but also the duty to seek redress, a reason why, regardless of the powerful rule of §2 of art. 786 of the Civil Code, the Federal Supreme Court had already settled the subject by Precedent 188: "*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*".

The insurer's right of recourse is based on the law and on the validity of the insurance contract, not on anything else, even if the factual support of the cause that generated the damage is of special interest and authorizes the application of liability.

In this way, if the insurer pays an indemnity to the owner of a cargo damaged during transportation, it will exercise the right of recourse against the carrier not because there was no performance of the contractual obligation of transportation, but because it paid the insurance compensation and, therefore, is entitled to full reimbursement of the amount indemnified. It is clear that the insurer can use the legal rules that govern the carrier's civil liability (whatever the mode of transport), but is not subject to the contract's clauses.

And it is not submitted because the contract of transport is an adhesion contract, usually full of unconscionable clauses, and mainly because it is of no concern to it and, therefore, it can harm the fullness of the right of recourse, which is absolute.

[10] Legal sources taken from the quoted work of Maurício S. Gravina (p. 147)

[11] There is the mistake to want to discuss, in a claim for redress on the return of the subrogated insurer against the causer of the damage, issues relating to the insurance contract. The clauses are irrelevant to the well-being of this litigation. Even if the insurer has, by mistake or any other condition, unduly made the payment of compensation, the duty of full redress of the damager remains, a condition that in no way depends on the legal transaction itself, but on the rules of civil liability.

At will, the insurer, even in the case of the example chosen, may even disregard the special rules that addresses civil liability of a given mode of carrier, to use the general rules of civil liability: articles 186, 927 and 944 of the Civil Code.[12]

And what is true for transport insurance is true for any insurance (with the possibility of subrogation) and for the duty of redress by the person causing the damage.

The legal basis of the civil liability of the party causing the damage is less important than that of the right and duty of redress, the aforementioned article 786 of the Civil Code, with special emphasis on §2, strengthened by the aforementioned Precedent 188 of the Federal Supreme Court.

All this is due to the primacy of mutualism and subrogation, fundamental principles of the insurance business.

Principles are special standards that override the others in the construction, interpretation and application. For those who are not guided by legal positivism, for those who are not seduced by formalism for formalism's sake, legal principles are fundamental standards inspired by Natural Law. And exactly because of this, by their major source, they can never be defeated by other standards when confronted, notably those of a contractual nature.

Therefore, no pre-existing condition to the exercise of the redress by the subrogated insurer, even if valid and effective to the insured or any other, can minimally cause damage. The insurer is only subject to the limits of the indemnity paid and the interests of the mutual, social par excellence. Nothing less, nothing more.

Its right to redress, a moral duty, is absolute, principled, because it is based on another principle, that of subrogation, which in turn, refers to the major principle of mutualism.

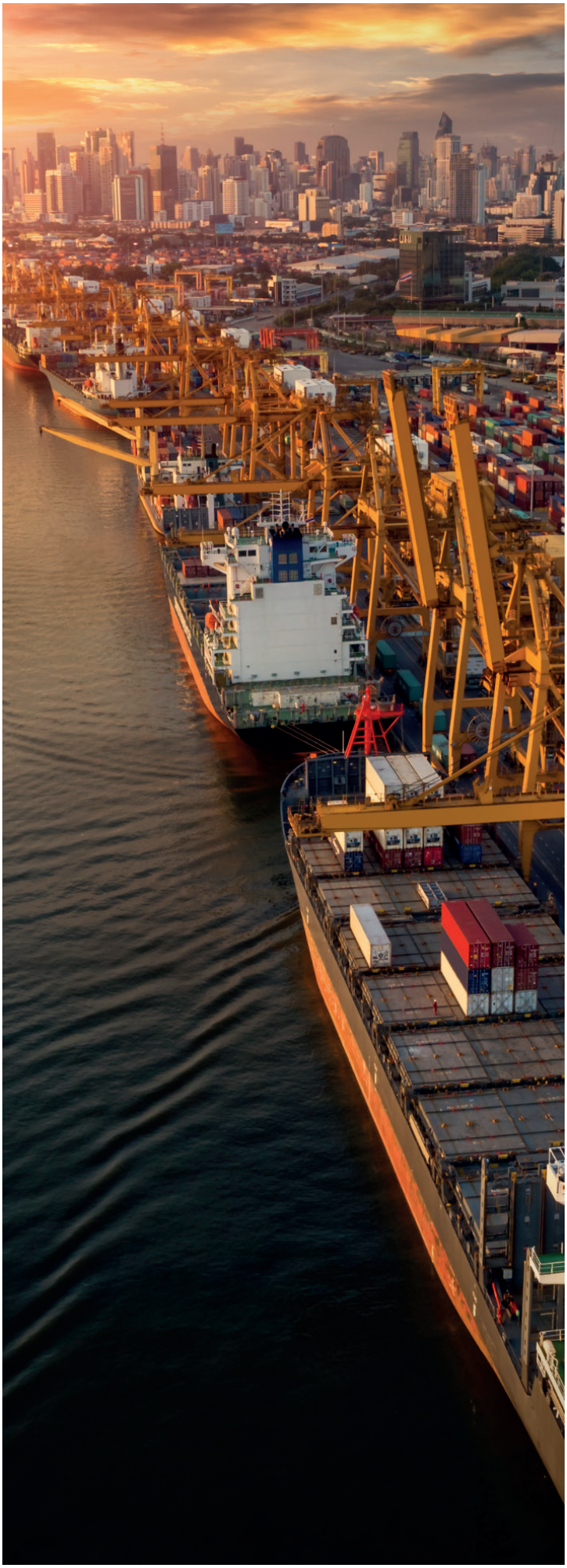
Any interpretation of contexts focused more on the inflictor than on the insurer offends the dynamics of the solution of apparent conflicts of rules, disrespects the general principles of Law and, in this case, the specific ones of the insurance business. It mortally wounds the indemnity, erodes the subrogation and damages the legitimate interests of the group of insureds, directly, and those of society in general, indirectly.

Besides being substantially and legally wrong, the interpretation benefits the victim of the damage, legally replaced by the subrogated insurer and the mutual, at the same time that it benefits the causer of the damage, deforming the essence of Law and obliterating the sense of Justice.

To inhibit or reduce the redress is nothing more than to soften the fire of subrogation and, with this, reward the author of the illicit act, harming the group of insureds, corrupting the ideals of justice, especially those fundamental ones, well translated in the maxim of the ancient Code of the Emperor Justinian - to give to each what is his.

Hence the unusual importance of protecting these principles, mutualism and subrogation, by strengthening the indemnity.

Whatever the factual status of the damage, what-



[12] Art. 186. Whoever, by voluntary action or omission, negligence or imprudence, violates a right and causes damage to another person, even if exclusively moral, commits an illicit act.
Art. 927. Whoever, through an illicit act (arts. 186 and 187), causes damage to another is required to redress it.
Sole paragraph. There will be an obligation to redress the damage, regardless of guilt, in the cases specified by law, or when the activity normally developed by the author of the damage implies, by its nature, risk to the rights of others.
Art. 944. Compensation is measured by the extent of the damage.

ever the quality of the author of the damage, whatever the legal source of application of responsibility, the protection of the principles of mutuality and subrogation, as well as that of full compensation, is primordial, absolute (as few things in Law are usually) and unwaivable.

Therefore, national or international contractual, conventional and legal rules that minimally interfere with these guiding principles and negatively affect the compensation are, at least at the moment and context of the conflict, unlawful.

There is no need to talk about limitation of liability, involuntary declination of the fundamental constitutional guarantee of access to jurisdiction, statute of limitations due to the absence or untimeliness of the letter of protest, alleged defect in active legitimacy, unreasonable formalism for the proof of payment of insurance compensation, eventual *ex gratia* payment, analysis of insurance policy clauses, unilateral determination of damages and losses, and another robust collection of causes that are foreign to the perfect path of seeking compensation against the one who, in the world of facts, is responsible for the damage that motivated the insurance compensation.

The comprehension of the principle and absolute nature of the redress on return is essential, so that the offender does not find himself eventually unpunished, unduly exonerated from the duty of full civil redress (reimbursement), benefited by conditions that are foreign to the truth and offensive to insurance.

This modest essay does not advocate a rethinking of Insurance Law and Civil Law, but only thinking according to the principle of identity, that is, according to what each one of these principles really is: mutualism, subrogation and redress, giving them the due and preferential treatment, in order to avoid deformation of it and, consequently, of Justice itself.

On the 19th day of January 2021 A.D.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