

**THE NEW CODE OF CIVIL PROCEDURE AND TRANSPORT LAW**  
**THE NON-APPLICATION OF THE RULES CONCERNING THE FOREIGN**  
**JURISDICTION CHOSEN BY CONTRACTING PARTIES AND / OR THE**  
**ARBITRATION REGARDING INTERNATIONAL CONTRACTS TO TRANSPORT SEA**  
**AND AIR CARGOS<sup>1</sup>**

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**Abstract:** This paper presents important elements of the Transport Law and Insurance with respect to the Code of Civil Procedure in force since March 18, 2016 and the new procedural dynamics, especially with regard to litigation involving international maritime and air transport contracts of cargos. The main objective is to defend the non-application of rules in subscription contracts that deal with the preference of the foreign jurisdiction chosen by contracting parties and the arbitration agreement. International transport contracts of cargos by maritime and air as usual accession makes the provisions become abusive because they are rendered unnecessarily. There is no real foreign jurisdiction chosen by contracting parties without voluntariness much less arbitration agreement but there is impositions of carriers on cargo consignees, inhibiting the full prevalence of procedural rules in relation to the foreign jurisdiction chosen by contracting parties and arbitration agreement. The situation is even more serious when insurer is legally subrogated to the claim of the insured and cargo consignee is part of the contract of sea or air transport. The abusive characteristic of such contract clause, unilaterally available in printed and pre-ordered contractual instruments becomes even more evident when it seeks the projection of legal effects on those who have not even participated in the business itself. The foreign jurisdiction chosen by contracting parties assumes inhibition of constitutional guarantee of access to justice and also promotes the undue depletion of the sovereignty of national jurisdiction. In the case of arbitration, there is no voluntariness at all. There is a prevalence of "*sine quae non*" application, a substantial insurmountable formal defect, that is, noncompliance with the provisions of the Brazilian arbitration law itself. The contractual instruments of international cargo transport do not follow the expressed rules of Brazilian "*lex specialis*", but its exclusive free will antagonistic to the Brazilian legal system as a whole. The work is not to upset the new procedural rules, but against the possible application of one and / or another in disputes involving the matters of Transport Law related to the adhesion contracts especially when one of the parties are related to Procedural law when insurer is legally subrogated to the original claim of the consignee.

**Keywords:** Adhesive contractual clauses – Adhesion contracts – Unilateral imposition of cargo carriers; Lack of voluntariness of the adhering party; Insurer legally subrogated is not part of the original contractual party – Abusiveness of the clauses of the foreign jurisdiction chosen by

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<sup>1</sup> it is not the object of the present study, but it is also abusive and therefore ineffective, clauses limiting the liability of the carriers, even in the case of the air modal, influenced by the Montreal Convention. Any clause considered abusive does not have effects on unilateral adhesion contracts.

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contracting parties and of arbitration – Non application of new procedural rules on adhesion contracts.

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## **INTRODUCTION**

The new Code of Civil Procedure has been in force since March 18, 2016. Certainly, a new Code carries with it expectations, both positive and negative.

Much paper and plenty of ink will be consumed on the Code and certainly the debates will be intense and successive, as the new procedural rules are applied daily.

After all, a new system is implanted, with figures closer to the “common law” than to “the civil law”, breaking tradition that is originating in Brazilian law.

In any case, our purpose is modest, limited to dealing with the Code and its rules and regulations only in relation to Transport Law and Insurance Law.

In this way, we dare to comment, albeit briefly, on two issues that connects to national jurisdiction: the foreign jurisdiction chosen by contracting parties and arbitration agreement.

The main objective is to show that these rules do not apply to cases (litigation) involving international sea and / or air cargo transport contracts because of the characteristic adhesion contracts.

The carriers of sea and air cargo impose contractual clauses on cargo consignees who are users of transport services.

These same users do not express their wills openly in such a way as the Judiciary always acknowledged that the said clauses are abusive and illegal.

And such unfair and unlawful clauses, unilaterally imposed, cannot be accepted by the new procedural rules dealing with the foreign jurisdiction chosen by contracting parties and the arbitration agreement.

The absence of broad and bilateral voluntariness inhibits the effective impact of new procedural rules on international sea and / air or cargo shipping contracts.

And in this concept, as it will be demonstrated throughout this work, these clauses are no longer applicable to insurers legally subrogated to the claims of the insured and consignees

of charges, who are responsible for the regressive actions of reimbursements against the same carriers, since they are associated to the same criticized abusive contractual instruments.

Let's see:

## **1 ABOUT THE FOREIGN JURISDICTION CHOSEN BY THE CONTRACTING PARTIES**

There is a rule in the new Code of Civil Procedure that may cause some confusion if not correctly interpreted in cases involving legal disputes based on defaults of international sea and/or air cargo transport contracts.

Specifically, article 25 which deals with the foreign jurisdiction chosen by contracting parties read as follows: "Art. 25. It is not the responsibility of the Brazilian judicial authority to process and arbitrate the action when there is an exclusive foreign forum selection clause in an international contract, which is defended by the defendant in the defense. "

This rule cannot be applied to cases involving disputes relating to noncompliance of contractual obligations of sea and / or air transportation of cargo, since in each of the contractual instruments, the foreign jurisdiction was not freely selected by the parties, but imposed, unilaterally by the carriers, without approval of the consignees of the cargo, much less the insurers, possibly subrogated to their claims, could sketch any disagreements in this respect.

Even before this procedural rule, sea and air carriers tried to assert the foreign jurisdiction provided for in the international sea and air cargo contracts, pretending not to be an adhesive, abusive and contrary to the Brazilian legal system, with even unconstitutional nuances.

And at every attempt over the years, the Judiciary responded negatively, recognizing it as distinctly illegal rule, because adhesion contract was abusive, imposed unilaterally by means of a printed clause.

Here are some emblematic judgments that deserve special attention, as the two now reproduced and pinned from the jurisprudential repertoire of the Superior Court of Justice:

***“APPEAL TO THE SUPERIOR COURT OF JUSTICE ( SPECIAL APPEAL) - SEA TRANSPORT CONTRACT – RIGHT OF RECOURSE OR REIMBURSEMENT- SUBROGATION - FORUM SELECTION CLAUSE - PROCEDURAL MATTER - UNENFORCEABILITY TO SUBROGATION - ABSENCE OF INSURGENCE IN RELATION TO ALL THE FOUNDATIONS OF VENERABLE JUDGEMNET UNDER APPEAL – APPLICATION BY ANALOGY OF PRECEDENT NUMBER 283 OF FEDERAL SUPREME COURT - APPEAL NOT KNOWN.”***

*I - The subrogation institute transfers the credit only with its material characteristics. The forum selection clause established in the contract between insured and carrier has no effect with respect to the subrogated agent.*

*II – Decision of appellate court recorded on more than one ground or reason, without any objection. Application by analogy of Precedent n. 283 / STF (The federal supreme court.)*

*III – Appeal to the superior court of justice (special appeal) is not known (STJ – Resp ( Court report of case law of superior court of Justice): 1038607 SP 2008 / 0052074-1, Reporter: MASSAMI UYEDA Minister, Judgment Date: 05/20/2008, T3 - THIRD PANEL, Publication Date: 05/08/2008) "*

1. The decision of appellate court under appeal explicitly stated that it would not face the merits of subrogation. Therefore, it is evident that there is no pre-questioning of the subject enclosed in article 988 of the Civil Code which prevents the follow up of the special point regarding its merit

2. The decision of appellate court under appeal provides that "a waiver of rights clause with such serious consequences as the foreign court clause cannot be accepted tacitly without any evidence however minimal. And that the consent was specific and resulted from conscious negotiation "(pp. 43). This basis of the decision of appellate court, sufficient for its maintenance, was not challenged, either on the basis of paragraph a) or c) of the permissive constitution. The paradigms refer only to the validity of the forum selection clause in adhesion contract, without addressing however the specific situation verified in the hypothesis of these cases, a clause for the foreign jurisdiction chosen by contracting parties, an offense against public order and the Brazilian jurisdiction. Therefore, the necessary factual identity among those tried.

3. Denied interlocutory appeal.

(AgRg (Agravo regimental)) interlocutory appeal to the same appellate court that entered the interlocutory order; internal interlocutory appeal.) in the INTERLOCUTORY APPEAL No. 459.668 - RJ - 2002 / 0076056-3)<sup>3</sup>

The two decisions above represent vast remaining assets of decisions in the similar way, as state of appellate court throughout the country practically repeat the position.

Considering the new Brazilian procedural system and the strength of judicial precedent, the repeated decisions of refusing the foreign jurisdiction chosen by contracting parties in an adhesion contract are very significant and cannot be ignored in the practical analysis and effective application of article 25 in relation to international transport contracts sea and / or air cargo.

Not only this: in the case of an insured person legally subrogated to the claim of the insured party and the consignee of the cargo in any particular case, the possible application of the clause was revealed and is being revealed even more erroneous, as the case-law has also generally acknowledged:

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<sup>3</sup> Synopsis of the decision (head note): Internal interlocutory appeal; Special appeal is not admitted; Contract; Sea transportation; Jurisdiction; Foreign forum selection clause.

**"0031172-14.2007.8.19.0000 (2007.002.17947) – INTERLOCUTORY APPEAL ANA MARIA OLIVEIRA - Judgment: 08/28/2007 - OITAVA CAMARA CIVEL**

Interlocutory appeal against the decision that rejected an exception of lack of jurisdiction presented by the appellant in the right of recourse of compensation that moves the appellant before the 4<sup>th</sup> Business Court the Capital of State. **An appellant who intends to know the jurisdiction of Singapore or in case he does not know jurisdiction district or Santos. Insurer seeking the reimbursement of the value of insurance coverage paid as a result of breach of international sea transport contract, subrogating to the insured's right. Subrogation that does not include the forum selection clause of agreed in a contract of which it did not participate. Precedents of the TJRJ ( State appellate court of Rio de Janeiro).** It is must that Jurisdiction observes the general rule of the forum of the domicile of the defendant, having the Aggravating affiliate in the District of Rio de Janeiro. Lack of prevention of the Judgment led the interruptive protest of the prescription. It is Denial of interlocutory appeal.

**0006273-83.2006.8.19.0000 (2006.002.14243) – INTERLOCUTORY APPEAL**

**DES. CARLOS SANTOS DE OLIVEIRA - Judgment: 08/11/2006 - THIRTEENTH CAMERA CIVEL**

**The Interlocutory appeal; Exempting the lack of jurisdiction based on selection contract forum; Claim of decline of jurisdiction for the judicial district of Marseilles, France; Main action relating to subrogation of the insurer in the amounts paid to the insured; Forum selection Clause insists on the sea transport contract of which the insurer did not participate; Selection of jurisdiction that does not bind the insurer; Precedent of the superior court of justice; Denial of the appeal to maintain the decision that rejected the exemption of lack of jurisdiction.**

If the insured consignee of the cargo did not agree with the foreign jurisdiction chosen by the contracting parties, much less his insurer did. Thus, there is a monumental abuse and a constitutional offense to constitutional right which is a fundamental guarantee of access to justice of the consignee.

In the book of our modest authorship, “*Prática de Direito Marítimo*” “Practice of Maritime Law”, today in its third edition (Customs), we discuss a lot about the subject, taking advantage of the professional experience to build the argument.

Given the purpose of this work, we can reproduce the section that deals with the abusive and illegal nature of the clause jurisdiction chosen by contracting parties of the international sea cargo transport contract, since the archetypes of the respective contracts are absolutely identical.

## **2 WE OPEN QUOTATION MARKS**

## 2.1 CLAUSE OF JURISDICTION CHOSEN BY THE CONTRACTING PARTIES: ABUSE OF LAW

In the same way, it is invalid and ineffective, null and void, every adhesive clause disposing as jurisdiction chosen by the contracting parties that is said to be at the free will of the sea carrier.

In general, carriers (irrespective of their country of origin) establish London and New York as competent forums imposing an excessive burden on the transporter or final consignee of cargo transport.

In fact, let us imagine the case of a Brazilian importer, the final recipient of the cargo transport service, who is forced to litigate in London, at an extremely high cost and with an unknown legal system most likely equipped to protect with some exaggeration.

It is because cargo transport is a vital activity for a country's economy. The more developed nations have always considered the industry as strategic for their global claims, setting up their legal assets with (often exaggerated and unbalanced) rules of protection on the sea carriers.

That is why we cannot lend strictly to the clause of jurisdiction chosen by the contracting parties to stamp and protect the "*pacta sunt servanda*". Quite the contrary, this Clause, as we have said, it is null and void and other criteria established by the Brazilian legal system for the determination of the competent jurisdiction.

Indeed the place of performance of a transport obligation is the legal criterion normally used in cases of importation. In the case of export, in order to protect the Brazilian citizen, the legal criterion is the place where the transport obligation was executed. Another valid criterion is the place of the facts or the verification of the facts. All these criteria, dictated by law, overlap with the draconian forum of choice.

If the plaintiff is a legally subrogated insurer, the situation is even more feasible in terms of rejection of any validity clause of the forum selection clause as the insurer was not the party to the transport contract.

However, if the clause is not capable of harming the connoisseur of the transport contract, more reason cannot measure up to the insurer legally subrogated.

Therefore, we remain convinced that, in principle, except in very exceptional cases, the Brazilian jurisdiction will always be competent to assess the legal dispute over Maritime Law, thus neglecting the clauses printed in the Maritime Bill.

We are not saying that the jurisdiction chosen by the contracting parties cannot appear in a legal transaction, but that at least in relation to the maritime transport contract it cannot really enforce and produce legal effects by its adhesive nature.

The jurisdiction chosen by contracting parties, in a broad sense, was maintained in Brazilian procedural law by art. 111 of the Code of Civil Procedure, establishing the possibility of the parties to change conventionally the jurisdiction in value and territory, with the corresponding jurisdiction chosen by the contracting parties where personal actions and in some cases the real ones must be proposed (Article 95 Of CPC Code of civil procedure). Thus, excluding the actions related to real estate and the inventory of assets located in Brazil, whose international jurisdiction is attached to the Brazilian judicial territories. A foreign jurisdiction chosen by contracting parties is feasible to the national jurisdiction by the interested parties.

But the strength of the expression "convention" must be emphasized. In an adhesion contract, the idea of a convention does not exist, especially in the plaintiff of the action, in the specific case of the subrogated insurer has not even figured in the body of the contractual instrument. For that reason, the jurisprudential positioning has been in the sense that this "convention" is, in most cases, abusive; taking into account that it has advantages only for one of the contracting parties, the transporter.

Therefore, in the adhesion contracts, the clause of jurisdiction chosen by contracting parties has declared ex officio its nullity.

Below, we reproduce a statement of the Precedent of the First Civil Appeal Court of the State of São Paulo:

**Precedent No 14 of the 1st TACivSP: (the conduct adjustment term in São Paulo**

**“Transportation contract”**: Subrogated insurer - The forum selection clause in the contract of transport or the bill of lading is ineffective in relation to the subrogated insurer.”

In the same way, judged below:

RT 623/90

*"The forum selection clause contained in the contract of transport or the bill of lading is ineffective in relation to the insurer subrogated to the credit of the sender, since the insurer is not in the contractual position of the insured sender, holding only the sender's credit."*

(UJ 356.311 - TP - J. 7.5.87 - rel. Judge Araújo Cintra)

The doctrine is also contrary to the forum selection clauses that are abusive, especially to the detriment of the one that did not even figure in the contractual terms, as is the case of the insured legally subrogated. José Frederico Marques states: "A question that has been much discussed in our courts is the extension of the jurisdiction chosen by the contracting parties to

the insurer, in transportation contracts. The best doctrine which seems to us is that the agreement between the carrier and the consignor of the merchandise does not bind third parties, although the insurer is subrogated to the rights of the original creditor, thus occupying the position of subrogation to civil proceedings. "

Another trial of the former First Civil Appeal Court deserves our special attention:

RT 623/90

*"The jurisdiction prerogative and the domicile of the defendant are competing; therefore they are competitors of latter and the selection. It is said that when simultaneously several forums are competing, jurisdiction Competitor can have the choice of one plaintiff, to the detriment of the others (...)"*

*"The case offers the choice of the forum, regardless of whether the defendant changes his domicile or there is other change of fact, because this is the moment of the perpetuatio jurisdictionis, which in our Law is not simultaneous with the prevention, whereby the jurisdiction of the court is established, crystallizing it (articles 86 and 219 of the CPC). (Code of civil procedure)"*

*"The general domicile forum; and competitors with the others, for failing to bring case loss to the defendant, which may be better defended, and it should be emphasized that there are express rules - which are considered a general character - regarding the jurisdiction chosen by the contracting parties (Articles 95, Part of the CPC (Code of civil procedure) and 846, sole paragraph, and 950, sole paragraph, of the CC)."*

## 2.2 THE BRAZILIAN JUDICIAL AUTHORITY

For these reasons and many others that we do not consider valid and effective the forum selection clauses in maritime transport and adhesion contracts par excellence.

Moreover, the Brazilian legal system is intelligently constructed to give honor to the national judicial authority and it also provides evidence to handle most cases of Maritime Law.

With regard to National law, the Brazilian judicial authority shall be competent concerning the defendant who is domiciled in Brazil regardless of his nationality (article 88, item I of the CPC), understanding the person's domicile foreign legal entity, his/her agency, Branch or branch in the country (sole paragraph of article 88 of the CPC). (Code of civil procedure)

Therefore, regardless of which legal entity is responsible for reimbursing the damages arising from the claim, the Brazilian judicial authority will be competent to assess the matter in the Brazilian Court, since the litigating parties is domiciled in Brazil, lending to the word domicile wide range.



The foreign sea carrier that has in the country a maritime agent will be considered as domiciled in Brazil, attracting the national jurisdiction. This situation is reflected in the terms of the sole paragraph of article 88 of the Code of Civil Procedure, which establishes that in order to determine domicile jurisdiction, the person is considered to be domiciled in Brazil, the foreign legal person who has here agency (*actor sequitur forum rei*), say, commercial representation.

On another screen, it is pointed out as an element of connection, in order to establish the jurisdiction of the Brazilian Justice in assessing the litigation, the obligation has to be fulfilled in Brazil (*actor sequitur forum executionis*), common situation in transport linked to the export.

For H elio Tornaghi the following must be considered for the purpose of establishing the place where the obligation is to be fulfilled:

"The place where the obligation is contracted is irrelevant; what is important is that it has to be fulfilled. The rule observed here is different from that adopted laws which take into account either the place where the obligation is contracted or the place where it must be fulfilled (Article 20 of the Italian Civil Code, for internal jurisdiction).

For the Brazilian justice to be competent in this case, it is necessary that Brazil be the "*locus destinatae solutionis*", that is, the place where the obligation must be fulfilled. The liberality of the debtor who paid in part in Brazil when he/she was not obligated to pay, does not authorize the creditor to ask the Brazilian court to enforce the rest of the debt.

On the other hand, it is not enough that only some contractual obligation should be fulfilled in Brazil; it is necessary that the same obligation which is requested must be fulfilled."

As appropriate, we highlight and reproduce the jurisprudential understanding regarding:

**"JURISDICTION - International - Civil liability - Sea transport - Cargo transported from Sweden to Brazil (Port of Santos) - Merchandise conditioned on a ship other than the specified one, with another destination - Existence of a transport contract between the reverse and the cargo consignee Transported - Article 88, II, of the Code of Civil Procedure - Jurisdiction of the Brazilian Justice - Preliminary distance."**

"The Brazilian justice is Competent, because here the obligation should be fulfilled: delivery of the merchandise transported in the port of Santos, regardless of whether the contractor has contracted - the Competent Brazilian justice and not the insured plaintiff - as another company, transports between two ports abroad. What is valid for determining the jurisdiction of the Brazilian judicial authority is the contract of transportation between the defendant and the consignee of the cargo, thus the issuance of transportation bill, the obligation to make the delivery of the container and the merchandise inserted therein in the aforementioned port located in Brazil. The art. 88, II, of the CPC(Code of civil procedure), is competent Brazilian authority, because here the obligation should be fulfilled."

(Appeal No. 717.367-5 - Santos - 11th Chamber 04/27/98 - v.u. - Judge Antonio Marson.)

**"INTERNATIONAL TRANSPORT OF GOODS - Compensation for loss of cargo - Jurisdiction- Disembarkation to be made in Brazil - Judgment affecting the Brazilian Justice - Prevalence of the provisions of art. 88, II of the CPC (Code of civil procedure) on the jurisdiction chosen by the contracting parties - Existence in addition the previous acceptance of the Brazilian jurisdiction - Application of the principle of submission - Statement of votes."**

*"Official Synopsis of decision (head note): Sea transport; EC 7/77(Constitutional amendment); Recession case. Residual jurisdiction of the defunct TFR(Federal Regional Court); foreign jurisdiction chosen by the contracting parties; Prevalence of Brazilian jurisdiction; Application of art 88, II of the CPC (Code of civil procedure) and the principle of submission."*

1. In the case of transport contract related to the issue of sea transport the extinct TFR (Federal Regional Court) after the EC 7, (Constitutional amendment) dated 13.4.77, continued to be competent for the judgment of a rescission action aiming at the deconstruction of its judgments.

2. The forum of contract chosen by the parties does not prevail when the obligation assumed by the transport company, the landing of the merchandise is done in Brazil. Application of art. 88, II of the CPC, as well as of the principle of submission due to the previous acceptance of the Brazilian jurisdiction.

3. Restrictive action deemed unfounded, due to the lack of legal grounds.

(AR 133 - RS - 2nd S. - J. 30.8.89 - rel. Min. Claudio Santos - DJU 2.10.89)

Still, according to Article 100, item IV, letter "d" of the Code of Civil Procedure, the right of reimbursement filed against the maritime carrier must be distributed in the place where the obligation must be fulfilled that is, in the port of destination of the goods.

In favor of the prevalence of national jurisdiction, we have Pontes de Miranda:

*"Whichever may be the place of benefit, except for *lex specialis cogente*, the persons concerned may change it by agreeing that it be given elsewhere (e.g. that the indemnification for an unlawful act be delivered by the debtor at home) or changing the place which was conventionally determined, or whose determination resulted from a rule of law. For the action arising from fact occurred, or from an act practiced in Brazil, art. 88, III, is cogent."*

Comments on the Code of Civil Procedure, Rio de Janeiro: Forensic, 1973 - TOMO II( Rules of service of the general court of Justice), p. 190/191.

With regard to jurisprudence, in the event of a claim in Brazil, the following must be verified:

*"It is a traditional principle of Brazilian law, inscribed in art. 9 of the Law of Introduction to the Civil Code", that the obligations must be qualified and governed by the law of the country in which they are constituted. In view of the rule of *lex loci delicti*, which is a matter of public policy, if the unlawful act was practiced in Brazil and was effective in the jurisdiction of Brazil, then it is of the Brazilian courts."*

(United States Supreme Court of the Federative Republic of Brazil, in the interlocutory appeal in plenary session on 9.10.80, as amended in art. 3.119-0, Min. Antônio Neder; RTJ 97/69)

In matters of private international law, individual relations must be observed in order to observe the law applicable in disputes between the parties. However, certain limitations are imposed on the parties, especially on issues related to international jurisdiction competence, as it will be verified.

Usually international contracts grant jurisdiction to foreign courts, which in itself implies unilateral imposition of an advantage on one side over the other.

However, the indication of the forum is not mandatory, mainly because of two factors: the previous submission to the jurisdiction other than the agreement and the ineffectiveness of said clause against third parties subrogated in law and obligations.

**The principle of submission** constitutes voluntary acceptance by the parties to the jurisdiction of a court which is not normally affected, a forum other than that established to settle disputes between contractors.

According to an important lesson of Amílcar Castro, the Judiciary has the power to prosecute and adjudicate any cause, regardless of nationality, domicile or location. To this plaintiff, for the solution of international conflicts, we must observe the following: "By this doctrine, in the silence of the law, the exercise of jurisdiction is based on two principles: Effectiveness and submission. (...) "(...) the principle of submission means that in a limited number of cases a person may voluntarily submit to the jurisdiction of a court that he was not the subject, since it begins by accepting it and afterwards we cannot get rid of it."

Not only do we not agree with the forum selection clauses, but we understand that hardly a concrete case, involving a nation will cease to be appreciated by the Brazilian Jurisdiction.

### **3 WE CLOSE QUOTES**

When addressing the illegality of the jurisdiction chosen by the contracting parties in the international sea transport contract of cargo, we also took at the advantages of the preference of the Brazilian judicial authority, defending national jurisdiction.

Evidently, the approach reproduced above referred to the old Code of Civil Procedure, but the legal arguments remain strictly the same, to the extent that no change has occurred in this regard.

For all this, the rule of Article 25 should not be applied in cases involving adhesion contracts (maritime or air), since there is no real foreign jurisdiction chosen by the contracting

parties but illegal and unconstitutional imposition on adhesion contract of which the plaintiff was not a party and did not freely express one's wishes.

It should be noted that we do not really question the constitutionality, nor the validity and effectiveness of the rule referred to in itself, but it's possible and misleading application in disputes involving, nevertheless, international, adhesive, air and maritime transport contracts of cargo, since the foreign jurisdiction chosen by contracting parties was not agreed upon in any of them, but imposed unilaterally.

And this, as demonstrated to exhaustion, is even more appropriate when dealing, for example, with a legally insured plaintiff of cargo, subrogated to the claim of the consignee, since the latter, more than this, and did not in any way express his free will on the subject.

The adhesion contracts have to be analyzed with great strictness and care, always restrictively. Therefore, they cannot serve as safe-conduits for abuses, especially those that deprive constitutional guarantees such as broad access to justice.

That is why we repeat convincingly, that we cannot give to the forum selection clause in the international maritime and / or air transport contracts of the cargos, the stamp duty and the protection of *pacta sunt servanda*. On the contrary, this clause, as we have said, is ineffective, and other criteria established by the Brazilian legal system have to be determined by the competent court.

Hence, at least in the matter under examination, there should a careful interpretation and application of Article 25, not allowing undue damage to the adherent parties or, even more serious, to their insurers, not even parties in the original contractual relations.

Indeed the place of performance of a transport obligation is the legal criterion normally used in cases of importation. In the case of export, in order to protect the Brazilian citizen, the legal criterion is the place where the transport obligation was established. Another valid criterion is the place of the facts or the verification of the facts. All these criteria, dictated by the law, overlap with the draconian forum of election and all were, in one way or another, reflected by the new Code of Civil Procedure, which did award the jurisdiction chosen by the contracting parties, since it is absolutely voluntary in a Contractual relationship, never in a relationship marked by the adhesion seal.

If the plaintiff is a legally subrogated insurer, it is worth insisting, that the situation is even more comfortable in terms of rejection of any valid argumentation of the forum selection clause as the insurer was not a part of the transport contract.

However, if the clause is not capable to harm the connoisseur of the transport contract, all the more it cannot measure up to the insurer legally subrogated.

For this reason, we are confident that in principle, except in very exceptional cases, the Brazilian jurisdiction will always be competent to consider the judicial dispute on Transport Law (and Maritime Law in particular), thus neglecting Clauses printed in the sea-bill or in the air-bill.

We are not saying that the jurisdiction chosen by the contracting parties cannot appear in a legal transaction, but at least in relation to the maritime transport contract, by its adhesive characteristic cannot really enforce and produce legal effects.

The jurisdiction chosen by the contracting parties in a broad way was maintained in current Brazilian procedural law along the same lines dictated by the former Article 111 of the Civil Procedure Code of 1973, establishing the possibility for the parties to change **conventionally** the jurisdiction of value and territory, with the corresponding jurisdiction chosen by the contracting parties where the personal actions and in some cases, the actual ones must be offered (article 95 of the CPC). It is worth affirming that this idea was maintained in article 63 of the current Code, especially in § 1 but whether in the previous procedural system or at the present time, the presence of the element of voluntariness is indispensable, under penalty of becoming a Will, marked by the adhesive form of contracting, in an absolute manifestation.

Thus, excluding the actions related to real estate and the inventory of assets located in Brazil, whose international jurisdiction is attached to the Brazilian judicial agencies. It is feasible today as before, the weird jurisdiction chosen by the contracting parties to the national jurisdiction by the interested parties. I must stress the strength of the expression "convention". In the adhesion contract the idea of a convention does not exist, especially if the plaintiff of the action, in the specific case of the subrogated insurer, has not even figured in the body of the contractual instrument.

For that reason, the jurisprudential positioning has been in a way that this "convention" is in most cases, abusive; taking into account that it has advantages only for one of the contracting parties, the transporter. We have no reason to believe that this will change with the new "Codex".

Therefore, in the adhesion contracts, the forum selection clause has declared *ex officio* its nullity or, at least, its inefficacy, its invalidity.

Below, we reproduce a statement of the Precedent of the former First Civil Court of Appeal of the State of São Paulo, absorbed by the Court of Justice with the purpose of showing how traditional this intelligent and just Brazilian jurisprudential position is:

***Precedent n° 14 of the 1st TACivSP: (the conduct adjustment term in São Paulo***

***"Transportation contract: Subrogate insurer - The forum choice clause in the transport contract or the bill of lading is ineffective in relation to the subrogated insurer. "***

In the same sense, judged below:

*RT 623/90*

***"The forum selection clause contained in the transport contract or the bill of lading is ineffective in relation to the insurer subrogated to the credit of the sender, since the insurer is not in the contractual position of the insured sender, holding only the sender's credit."***

*(UJ 356.311 - TP - J. 7.5.87 - rel. Judge Araújo Cintra)*

The doctrine has also long been opposing the forum selection clauses that are abusive, especially to the detriment of the one who did not even figure in the contract as is the case of the insured legally subrogated. José Frederico Marques, in his famous procedural work, states: "A question that has been much discussed in our courts is the extension of the jurisdiction chosen by the contracting parties to the insurer, in transportation contracts. The best doctrine it seems to us is that the agreement between the carrier and the consignor of the merchandise does not bind third parties. Although the insurer is subrogated to the rights of the original creditor, thus occupying the position, such effect of subrogation to civil proceedings. "

Another decision deserves our special attention, even though extinct, is of former Civil state court of appeal of limited jurisdiction, reiterating that the selection of former judges is intended to emphasize the strong jurisprudential position and the certainty that nothing will change regarding the new Code of Civil Procedure, Article 25.

Here's the decision:

*RT 623/90*

*"The jurisdiction prerogative and the domicile of the defendant are competing; therefore they are competitors of latter and the selection. It is said that when simultaneously several forums are competing, jurisdiction Competitor can have the choice of one plaintiff, to the detriment of the others (...)"*

*"The case offers the choice of the forum, regardless of whether the defendant changes his domicile or there is other change of fact, because this is the moment of the *perpetuatio jurisdictionis*, which in our Law is not simultaneous with the prevention, whereby the jurisdiction of the court is established, crystallizing it (articles 86 and 219 of the CPC)."*

*"The general domicile forum; and competitors with the others, for failing to bring case loss to the defendant may be better defended, and it should be*

emphasized that there are express rules - which are considered a general character - regarding the jurisdiction chosen by the contracting parties. (Articles 95, Part of the CPC ( code of civil procedure) and 846, sole paragraph, and 950, sole paragraph, of the CC).”

The foreign jurisdiction chosen by the contracting parties is indeed a normative reality and the new procedural rule deserves all possible prestige, no doubt as long as it is truly selected between the parties, chosen as the fruit of the free expression of wills, not as something imposed in adhesion contract abusively, without any consent of the adherent part, much less of its insurer.

In the second case, the procedural rule will serve the crooked and will be the object of serious injustice and even of reflex violation against the sovereignty of the national jurisdiction.

### 3.1 ABOUT THE ARBITRATION CONTRACT

For the same and well-founded reasons, it is not necessary to speak in the concrete case of an eventual preference for the arbitration procedure, according to article 3, paragraph 1.

Added to the above-mentioned reasons is another, absolutely fundamental one: the alleged arbitration contract is not strictly international maritime and / or cargo transport contracts, carried out under Brazilian arbitration law.

In fact, in addition to being another tax contained in an adhesion contract, that provision is in direct violation of the special law on the subject.

It is worth remembering that the same Code of Civil Procedure recognizes the possibility and validity of arbitration, since it has been specifically observed in the legal form, as provided in §1 of Article 3: "Arbitration is permitted, according to the law."

What is inferred from the final part of the aforesaid statement is simple and does not contain much of an explanation of it, if not the obvious one: if the law is not strictly observed, there is no need to speak of arbitration!

And in disputes relating to the Transport Law, the arbitration agreement is not a true convention, but another unacceptable imposition of carriers in general.

In the case of an adhesion contract, the arbitration agreement must be disposed of in a separate term, specific, annexed, signed by the parties and / or disposed in the actual body of the contract, but with signed letters and with the signature of the adhering party on The respective text.

None of this is usually observed in such contracts, in such a way that we feel very comfortable invoking consolidated case law in this respect:

**“CIVIL RESPONSIBILITY; Transported cargo; Damage Regression arising from an insurance contract; Arbitration clause established between the service provider and the owner of the cargo; Non application of contract towards the Insurer, who neither signed nor agreed to the said contract; Theft of cargo; A fact that it does not characterize major event force, because it is perfectly predictable and avoidable under normal transport conditions.**

*Appeal provided to give up the dismissal of the proceeding and, based on the provisions of article 515, paragraph 3, of the CPC (code of civil procedure), declare the action to be well founded. “The legal nature of the arbitration clause is an obligation to do, with a very personal character, and therefore cannot be transferred to a third party.” 2. The theft of goods transported cannot be considered as a disconnected fact to the transport contract and predictable and ultimately avoidable, In the light of the carrier's precautionary measures, does not constitute a fortuitous event or major force capable of excluding the liability of the carrier.*

(TJ-SP - APL: 990093738210 SP, Reporter: Gilberto dos Santos, Judgment Date: March 11, 2010, 11th Chamber of Private Law, Publication Date: 03/22/2010).

**0031172-14.2007.8.19.0000 (2007.002.17947) – INTERLOCUTORY APPEAL.**

**DES. ANA MARIA OLIVEIRA - Judgment: 08/28/2007 - OITAVA CAMARA CIVEL**

*Interlocutory appeal against a decision that rejected an exception of lack of jurisdiction presented by the appellant in the right of recourse of compensation that moves the appellant before the 4<sup>th</sup> Business Court the Capital of State. An appellant who intends to know the jurisdiction of Singapore or in case he does not know jurisdiction district or Santos. Insurer seeking the reimbursement of the value of insurance coverage paid as a result of breach of international sea transport contract, subrogating to the insured's right. Subrogation does not include the forum selection clause agreed in a contract of which it did not participate. Precedents of the TJRJ (State appellate court of Rio de Janeiro). Jurisdiction must observe the general rule of the forum of the domicile of the defendant, having the Aggravating affiliate in the District of Rio de Janeiro. Lack of prevention of the Judgment led the interruptive protest of the prescription. Denial of interlocutory appeal.*

**0006273-83.2006.8.19.0000 (2006.002.14243) – INTERLOCUTORY APPEAL**

**DES. CARLOS SANTOS DE OLIVEIRA - Judgment: 08/11/2006 - THIRTEENTH CAMERA CIVEL**

*INTERLOCUTORY APPEAL. EXCEPTION OF JURISTICICTION BASED ON THE FORUM OF THE CONTRACT OF SELECTION. CLAIM OF DECLINED JURISDICTION OF THE MARSELHA REGION, FRANCE. MAIN ACTION RELIES ON SUBROGATION OF THE INSURER, THE AMOUNTS YOU PAID TO THE INSURED. FORUM SELECTION CLAUSE INSISTS IN THE MARITIME CONTRACT, WHICH THE INSURER HAS NOT PARTICIPATED. JURISDICTION CHOSEN BY THE CONTRACTING PARTIES DOES NOT LINK THE INSURER. PRECEDENTS OF THE SUPERIOR COURT OF JUSTICE. DENIAL OF THE APPEAL TO MAINTAIN THE DECISION REJECTING THE EXCEPTION OF JURISDICTION. ”*



If the adhesion contract does not faithfully comply with the provisions of the arbitration law, there will be no question of the validity and effectiveness of the respective contract, and the respective clause will be null and void.

Even before the new Code of Civil Procedure, the matter already drew our attention, due to the daily professional practice.

This is because there was and is a tendency to broaden the legal and practical effects of the arbitration clause, reaching those who are not a legitimate and interested party.

We understand that this tendency is mistaken and will not have the strength to proceed, because the jurisprudential positioning is clear and practically uniform that the arbitration clause does not project effects to those who did not voluntarily take part of it.

It cannot be forgotten that voluntariness is the quintessential quality of arbitration, without which it cannot become a legitimate means of settling disputes, but arbitrary and unconstitutional imposition

In the field of Transport Law, and in particular Maritime Law, especially in the part that it juxtaposes to the Law of Insurance, the subject is of special relevance and deserves serious consideration.

The best way to avoid an inoculated error of gross injustice is to fight it at its source, at the source of its genesis.

We are talking in particular about cargo insurance, maritime cargo transport itself and subrogation, and everything that is part of the maritime transport modality fits as already said, with equal symmetry to the air modal.

The insurer subrogated to the rights and actions of an insured party, consignee of cargo, who is the victim of a transport contract agency frustrated by the ship owner, maritime carrier (and / or the air carrier), cannot be obliged to adhere to the arbitration procedure imposed unilaterally on the agency of maritime bill, the instrument that configures the cargo transport contract.

There are plenty of reasons for not admitting the undue amplitude of the arbitration clause and they will be exposed with a certain amount of detail by the authors from now on.

Not even the new procedural rule could impose this, at least when compared with maritime and air cargo transport contracts.

It should be emphasized that in the specific case of the arbitration clause in the international maritime transport contract (in the air transport contract, this is not common), there

are two fundamental reasons for its non-application, one being general and the other the insurer's case subrogated.

At this juncture: the first and general: the arbitration clause contains the obverse of the maritime bill and is drafted in dissonance with the Brazilian Arbitration Law, that is why it is null and void. Even the consignee of the cargo, party to the contract, cannot be obliged to obey it because it is manifestly abusive and unlawful. The second case, with regard to the subrogated insurer, lies in the already mentioned attribute of voluntariness, since the insurer is not part of the transport contract agency, and therefore he cannot impose even though it was in agreement with the law of arbitration. Contrary to that there are limits to subrogation and these are well scrutinized by the legal system as a whole.

The insurer, who is legally subrogated, does not, therefore, have to comply with contractual rules assumed or unilaterally imposed on its insured party and consignee of the cargo.

As it may appear much to the eyes, and less accustomed to the universe of insurance, a one-way street, the legally defensible truth is that subrogation operates broadly for rights and actions, but absolutely restricted in regard to possible duties and burden.

If the insurer did not take part in the transport contract, it is not fair and appropriate that insurer be obliged to accept the clauses of the transport contract, and if the manifestation of insurer will was not at any time asked in its execution of the contract. This is especially evident in the case of arbitration, as long as the figure of voluntariness is not present.

In maritime bill in general, and especially in some air bill of transport, the arbitration clause goes hand in hand and along the same road of contractual interventionism, from absolute disrespect of the element to voluntariness.

In this respect, we have yet to disclaim the clause that imposes arbitration.

Not because we have no appreciation for arbitration, quite the opposite.

This is a salutary form of conflict resolution and needs to be encouraged and practiced in Brazil.

But, the way in which arbitration is imposed on the scenario of sea contractual agency.

It almost always follows the clause of the imposition on foreign jurisdiction, and the interested party does not contest any manifestation of will.

In addition, the clause that establishes it is irregular in the eyes of the Brazilian legal system.

In fact, the Brazilian arbitration law provides that the clause providing for arbitration in the adhesion contract must be written in bold letters, detached from the general text and specifically signed on the content of the allegedly interested party.

Another way is to predict the arbitration in the text separated and attached to the transportation contract.

None of this is observed by the sea carrier (and, not infrequently, by the air carrier).

It merely imposes arbitration on the same clause that determines the jurisdiction chosen by the contracting parties, which makes it distinctly illegal, invalid and ineffective. It must also be considered that the transport contract is a provision in favor of a third party, so that the consignee of the cargo, although part of the transport obligation, did not participate in the conclusion of the contract, let alone his insurer, which makes the arbitration clause even more ineffective.

There are, as mentioned, two main impediment elements, one formal and the other substantial.

In view of the reasons and grounds set forth herein the jurisprudence understanding seems correct, of not submitting in a compulsory manner the cases of compensation to the sieve of arbitration.

This is obviously unlawful since the arbitration provided for in the bill of lading, as seen in detail in the considerations of both plaintiff, is a unilateral clause, contained in the adhesion contract, without the acquiescence of the consignee of the cargo insured, let alone the insurer, and written in violation of the substantial formalities required by the Brazilian Arbitration Law.

More than illegal, the eventual application of the arbitration clause stops the subrogated insurer seeking compensation in return against the maritime carrier that defaulted a transportation obligation therefore it was is and will be a great and serious mistake, even raising unconstitutionality, for violation of the fundamental guarantee of access to the Jurisdiction.

Although arbitration may be a smart, healthy, affectionate procedure to the available rights and of an entrepreneurial nature, such as those dealing with maritime cargo transport, it will never take on the grandeur that only the State's jurisdictional function has and can never be applied without the sign of voluntariness. Forcing someone, for example, who has not voluntarily joined the arbitration procedure is something dangerous and that raises doubts about the smoothness of the institute itself.

As discussed, the adhesion to resolution of the dispute via arbitration must be voluntary and with explicit manifestation of will of the parties. It is necessary to emphasize that no criticism is made to the arbitration system itself, on the contrary, it is an efficient measure and of great value in the condition of assisting the judiciary, but we believe that its acceptance will always be a prerogative of the parties concerned, and under no circumstances it may be compulsory or determined, either by the judiciary or even by means of a clause in the adhesion contract with a unilateral statement on the matter. It is a measure that aims to provide full and absolute legal security for all players in the maritime cargo transport, with clear and objective conditions for everyone to act with the fewest possible conflicts.

It should also be pointed out that the possibility of a "arbitration offer" clause leaves the possibility for all parties involved, whether the carrier, the owner of the cargo and the insurer to decide which route is the most expeditious, economically feasible, and more interesting for parties to adhere when litigation involving sea transport occurs.

We end this conclusion in the same way that we end the introduction that is, emphasizing that the arbitration clause in the Maritime Law is null and void because it is manifestly abusive and illegal. And since it is null and void for the consignee of the cargo, the insured and the victim of the contractual default of the carrier, the more reason is for the insurer subrogated, since it cannot take part in an obligation that besides being illegal and abusive, has never been called to express their consent, a true truculence in any opposite direction is a true juridical truculence and improperly amplifies the legal effects of subrogation. It is the right of the insurer, the right that has a social function and general economic impact, not a burden.

## **CONCLUSION**

Now, in the light of the above mentioned, we affirm without any reservations or fears that both the jurisdiction chosen by the contracting parties and the arbitration contract are not applicable to the particular case because, in summary:

- 1) Offered unilaterally, by means of printed clauses, in the agency of an adhesive contractual instrument;
- 2) Stripped of the free will of the adhering party;
- 3) In the case of the arbitration clause there is flagrant disagreement with the arbitration law itself;

4) The plaintiff, insurer legally subrogated, was not even part of the contract, and cannot be forced to bear the heavy burdens imposed on it.

The defective contractual instruments that embody the international maritime and air cargo transport are much to be awarded with the application of procedural rules that are not appropriate to the specific case.

The same "Codex", on the other hand, contains a fundamental norm that fits hand in hand with the concrete case: "Art. 4. The parties shall have the right to obtain within a reasonable time the complete solution of merit, including the satisfactory activity. "

This article deals with the "primacy of the decision of merit".

The parties have the subjective public right, now elevated to the status of fundamental norm, procedural-constitutional guarantee, the decision of merit.

And by merit, one understands, mainly, the life's good of litigation, its nucleus.

When engaging in the jurisdiction chosen by contracting parties and / or arbitration in cases in which these same figures are, it is not noticeably undue and unlawful, it is against the fundamental norm of the primacy of the decision of merit and in prejudiced the jurisdiction and, reflectively, the very sovereignty of Brazilian Justice.

Nevertheless, in both cases what has to be kept in sight is the voluntariness.

However, if the foreign jurisdiction of chosen by contracting parties and / or the arbitration procedure are not fully voluntary, it is not necessary to mention their penalty of legal offense.

In the specific case of the insurer legally subrogated to the situation, as exhaustively stated, it is even more justifiable, and any contractual norm or agreement signed between the insured and a carrier without its prior formal and express consent is inapplicable.

This is all the more so in the case of an adhesion contract, characterized by printed and, in some cases, distinctly abusive clauses. Respect for the foreign jurisdiction chosen by the contracting parties and for the arbitration procedure is something correct and desirable, something to be contemplated and defended by the law in exercise, but this respect necessarily goes through the way of voluntariness. Without voluntariness, without the broad, unrestricted and legally perfect agreement, respect loses its mantle and begins to put on another negative, tailored with the lines of abuse and contractual imbalance. Only voluntariness authorizes the concept of "*pact sunt servanda*".

The adhesion contract, for moral and legal reasons, even ontological reasons, has always been interpreted and applied restrictively by the Brazilian legal system, constituting this form

of intelligence a true mechanism of calibration and a good jurisprudential tradition. We have no reason to believe that the situation will change with the new Code of Civil Procedure, because its genesis connects to the end of formalism by formalism, the literal view of the legal rule, rewarding law as an instrument of justice and the common good.

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