Freedom Of Contract, Bargaining Power and Forum Selection in Bills of Lading

JUAN ALBERTO SALMERÓN HENRÍQUEZ

2016

Ulrik Uber Institute for Private International Law

Groningen, The Netherlands

This research was funded in part by BBC Chartering GmbH and Briese Schiffahrt GmbH & Co. KG. These companies had no influence in the content of this project. No part of this book should be construed as having been endorsed or approved by these companies.

ISBN Printed Version: 978-90-367-9428-2

ISBN Electronic Version: 978-90-367-9427-5

The author welcomes comments and suggestions on the contents of this book. He can be reached by email at j.a.salmeron@rug.nl

rijksuniversiteit
groningen

Freedom Of Contract, Bargaining Power & Forum Selection in Bills of Lading

PhD Thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. E. Sterken
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

Thursday 22 December 2016 at 11:00 hours

By

Juan Alberto Salmerón Henríquez

born on 30 May 1984
in San Antonio, Chile

Supervisor
Prof. M.H. ten Wolde

Assessment committee
Prof. L.W. Gormley
Prof. T. Solvang
Prof. J.B. Wezeman

"Hear the rime of the Ancient Mariner
See his eye as he stops one of three
Mesmerises one of the wedding guests
Stay here and listen to the nightmares of the Sea."
"The Rime of the Ancient Mariner", **IRON MAIDEN**

"The ship was cheered, the harbour cleared,
Merrily did we drop
Below the kirk, below the hill,
Below the lighthouse top.

The Sun came up upon the left,
Out of the sea came he!
And he shone bright, and on the right
Went down into the sea."
"The Rime of the Ancient Mariner," Samuel Colerige

In Memoriam

María Luisa Frings Korte

1912-2010

Juan Alberto Salmerón Bozo

1948-1998

Acknowledgments

When he analyzed the ways in which war should be conducted, VON CLAUSEWITZ, despite popular misconceptions, did not limit his advice to the complete destruction of the enemy. Indeed, he *"did not universally endorse annihilation as the optimal method of warfare,"* seeing it as only one of several possible strategic approaches to combat.[*] Attempting to destroy the enemy to smithereens, to eliminate every segment of his forces, is an extremely costly endeavor, and so VON CLAUSEWITZ considered that, when possible, alternative tactics should be pursued:

> *"*[T]*he most important method, judging from the frequency of its use, is to wear down the enemy. That expression is more than a label; it describes the process precisely, and is not so metaphorical as it may seem at first. Wearing down the enemy in a conflict means using the duration of the war to bring about a gradual exhaustion of his physical and moral resistance."*[†]

If this book proves anything, it is that VON CLAUSEWITZ was right. Attrition, wearing down the enemy, works. I know this because this is how my research started.

Back in 2010, when I was just an LL.M. student in Groningen, I heard that Professor Ten Wolde was *maybe* interested in starting a research project and supervising a doctoral research. After what can only be described as weeks of relentless phone calls, e-mails, meetings and a behavior that clearly sought to bring about his gradual exhaustion, I became a PhD student. The war of attrition had been won.

Only once all the contracts had been signed did I realize that, for all intents and purposes, I was completely out of my depth. Alone, as the friends I had made during my LL.M. studies had already returned home, and far from my family, I was slowly coming to terms with the fact that perhaps writing a doctoral dissertation in a completely unknown topic was not such a bright idea after all. The challenge ahead seemed to be well beyond my abilities, and the mountains of knowledge that I was somehow supposed to absorb seemed like an unsurmountable obstacle.

The role that Professor ten Wolde played in preventing me from straying *too* far away from the path, so as to conduct and complete this research, cannot be overstated. Every meeting with him somehow filled me with a (probably unwarranted) sense of serenity that allowed me to continue aboard this ship.

From the first time that we met and discussed the possibility of conducting this research project, and all the way until these words are being written, he has been a continuous

[*] MALKASIAN, C., *A History of Modern Wars of Attrition*, 2002, Praeger, p. 19.
[†] CLAUSEWITZ, C. v., *On War*, 2007, Oxford University Press, p. 36.

source of support. I am extremely thankful for the tremendous opportunity that he gave me by taking me in as a PhD student, and for having supported me throughout these years. I consider myself very fortunate to be able to call Professor ten Wolde, Mathijs, a very dear friend.

The funding for my research was provided by both BBC Chartering and Briese Schiffahrts. This was made possible by Ed Anderson, Chief Legal Officer of BBC Chartering, who placed his trust in me and gave me this opportunity. He was always very supportive, and I cannot thank him enough for everything that he did. It is truly a privilege to have worked under someone as professionally and academically accomplished as he is in the maritime field.

It was thanks to the vision of Svend Andersen, CEO of BBC Chartering, and Roelf Briese, CEO of Briese Schiffahrts, that these companies agreed to fund my project. The time that I spent working with them, learning the intricate details of the maritime industry, and, as a novice, familiarizing myself with the daily practice of maritime law, proved to be invaluable in my professional and academic development. Similarly, the fellow attorneys that I met during this time, Florian Meer, Andrei Kharchanka, Fabian Schweigel, Thomas Bock, and many others, were all instrumental in my ability to perfect my knowledge of the trade.

I would also like to thank the assessment committee for this dissertation, Professor Solvang from the Scandinavian Institute of Maritime Law at the University of Oslo, and Professors Gormley and Wezeman from the University of Groningen. Their effort and input has been greatly appreciated, and I am fortunate to have had such excellent academics review, evaluate and comment on my work.

I owe a great deal of gratitude to my mother, without whose support this journey would have been impossible. The accomplishment represented by this book is a testament to her enormous efforts and sacrifices. I can only hope that when, and if, I have kids of my own, I will be able to transmit to them the love, care and trust that she has conveyed to me throughout my life. It is thanks to her that I learned about the unforgiving minute, and I sincerely hope that this book represents at least part of that distance run with which we are to fill its sixty fleeting seconds.

During the many sleepless times that were required in the making of this dissertation (particularly as the final deadline drew closer), there were many times when I found myself questioning the series of poor decisions that had led me to this situation. Whenever I found myself doubting my skills, however, it was Ana, my partner, who was there to give me support. I have no doubt that if it was not for her constant pushes, and the unending (and, in my view, unjustifiable and disproportionate) trust in me, this book would have taken much, much longer or, perhaps, not even have been finished at all. This book, without a doubt, would not exist without her. Хвала, Ана.

Despite having a rather small family, I have had the fortune of having several “adoptive” family members. María Teresa Jeria, Lutgarda Cabello and Sonia Berríos played an

enormous part in my life, and I am glad to report that their efforts were not in vain. Patricia Cotera and Luz Gómez were very supportive of my desire to continue my studies abroad, and were thus instrumental in cementing my decision to do so. Also, I am very thankful to Predrag, Marcela and Anuška Bosnić, who, together with Milka Tot, have in one way or another, welcomed me into their family. Хвала.

If the saying is true, and it takes a village to raise a child, something similar can be said of a book. The whole department of Private International Law at the University of Groningen proved to be great accomplices in my never-ending quest to perfect the art of procrastination. I am very lucky to have had such terrific colleagues, and my hours-long conversations with Kirsten and Ilian, for example, will remain as one of the best parts of my research (even if, in reality, they had very little to do with it). I must also extend my gratitude to the personnel of the University of Groningen, where people like Kirsten Wolkotte, Karien Galli and Majolijn Both were all instrumental in achieving my academic objectives.

Finally, I have an enormous debt of gratitude to my friends, Sonja Magličic, Claire Towey, Víctor de María, Jeremie Rousseau, Claudie Padiou, Jon Burkan, Andrew Downey, Conor Courtney and Bradley Barnes. Their friendship and support made it possible for me to, when necessary, forget about this project and focus on the things that really matter in life.

Table Contents

A Note on References and Citations

"If we steal thoughts from the moderns, it will be cried down as plagiarism; if from the ancients, it will be cried up as erudition."

Revered Charles Caleb Colton.[3]

"I am reminded of the man who was asked what plagiarism was. He said: 'It is plagiarism when you take something out of a book and use it as your own. If you take it out of several books, then it is research.'"

Ralph Foss.[4]

"Experienced lawyers know that, whatever appears in the texts of brief and articles, the footnotes are where the battlelines are very often drawn and the participants sometimes even quartered."

Allan Mendelsohn.[5]

As the few who read this work will notice, the amount of footnotes and references used throughout this book is, to say the least, considerable. In order to facilitate the already tedious and difficult reading process, we have made some stylistic decisions, aimed at simplifying the text.

We have taken the liberty of eliminating all the internal citations, references and footnotes when a passage is being quoted verbatim. We have, accordingly, chosen not to add comments such as "internal footnotes omitted" in our citations.

When it comes to citing legislation that was not originally drafted in English, we have attempted to use, whenever possible, official translations into the English language. With the exception of EU regulations, however, English translations, even when done by the respective official governmental body, do not have force of law, and yield in favor of the original language. Because of this, we have added in the footnotes the original text of the

[3] COLTON, C. C., *Lacon: Or, Many Things in Few Words: Addressed to Those who Think*, 1820, 5th, Longman, Hurst, Rees, Orme, and Brown, p. 229.
[4] Ralph Foss, 'Cooperation Between Special Libraries and Publishers' *Special Libraries*, p. 281.
[5] MENDELSOHN, A. I., 'Why the U.S. Did Not Ratify the Visby Amendments', 1992, 23 *Journal of Maritime Law and Commerce*, no. 1, p. 30.

respective norms, so that readers, if they wish to do so, are able to compare and verify their meaning.

With the goal of facilitating the understanding of the text, we have changed the font styles depending on the situation. Verbatim quotes can be easily identified by the use of quotations and italics (*"example 1"*). Figures of speech are written in quotes ("example 2"). Emphasis is done by italicizing the word or phrase (*example 3*). In those cases in which a verbatim quote is emphasized, either by us or by the original author, this will be shown through use of bolding (*"example **4**"*).

Readers will note that although this book has been written in American-English, many citations come from sources written in British English. In those cases, the original spelling has been retained. Since the English authors being cited are so numerous, we have not added "sic" after every different spelling (e.g. *"favour"* instead of the American "*favor*"), so as to not add even more padding to this already voluminous work.

It should be noted that the final substantive edits to this book were made on October 2016. Although special care has been taken to ensure that all the cited legislation and case law is up to date, reforms or decisions issued in close proximity to this date are bound to have been missed.

Introduction

"At some point, the people who pay the bills will have had enough of the excuses for the gibberish, jargon, obfuscation, and prolixity in legal language. They will demand lawyers who can write in their mother tongue.

That day will come. We cannot fool people forever."

Matthew R. Salzwedel.[6]

"Law is the servant of Freedom. Freedom without limits is just a word."

Terry Pratchett.[7]

1.1 Philosophical Underpinnings of the Project

Our economic system is based on two basic ideas. First, people should be able to conclude binding agreements with each other; second, those people should be free to choose the terms of these agreements. These ideas permeate the totality of our liberal conception of society, as expressions of our liberty and our individual rights. As a free people, we are the best arbiters of our needs, and are therefore best suited to decide the conditions under which we want to deal with one another. The State has, therefore, no role to play in our individual interactions.

At least, that is the theory.

Outside of the fringes of politics and economics, few suggest that freedom of contract should be left unregulated, as there is a certain awareness of the problems that arise within the contractual process. As we will see, evidence shows that a significant part of our contracts is made up of clauses we do not know, would not understand if we knew them, and which, even if we knew and understood them, we would be unable to change. Of course, this is not surprising, since life itself would be impossible to deal with if we had to carefully analyze the legal details of every one of our deals. The problem, therefore, is not that we do not know or understand everything we contract. Instead, the issue is how

[6] SALZWEDEL, M. R., 'The Lawyer's Struggle to Write', 2015, 16 *Scribes Journal of Legal Writing,* p. 90.
[7] PRATCHETT, T., *Feet of Clay*, 2007, HarperCollins e-books, p. 347.

much power the other party possesses when the terms of those contracts are drafted, and how our legal system tackles the possible unfair results that can come from such an imbalanced relation.

At the same time, we cannot overlook the fact that freedom of contract is a manifestation of our civil liberties. Our ability to interact with others, to buy, sell, rent, hire, etc., are all demonstrations of our qualities as individuals, independent from the will of the State, and free from unnecessary obstructions. Here it is key, however, to note that obstructions are not, in and of themselves, negative. In fact, they are necessary in order to ensure a working society. A system in which individual freedom is unfettered, where our rights are not limited, is not a free society, it is anarchy. It is a system in which the strong trample over the weak; where might, quite simply, becomes right.

This conception of liberty and society is not new. Already in 1819 Thomas JEFFERSON noted how liberty recognizes certain limits, even if these are not necessarily those created by the State.

> *"Of liberty I would say that, in the whole plenitude of its extent, it is unobstructed action according to our will. But rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others. I do not add 'within the limits of the law' because law is often but the tyrant's will, and always so when it violates the rights of the individual."*[8]

It is from this Jeffersonian understanding of freedom, as a fundamental right that recognizes the rights of others as its limit, that we build our analysis.

1.2 Freedom and the Market

The West owes its progress and prosperity to the free market. In the struggle of the cold war, the clash between two competing ideologies, one placing freedom at the forefront, the other the enslavement to the State, it was economic freedom that allowed the West to win.

> *"To the free market, we owe all material prosperity, all leisure time, our health and longevity, our huge and growing population, nearly everything we call life itself. Capitalism and capitalism alone has rescued the human race from degrading poverty, rampant sickness, and early death."*[9]

[8] JEFFERSON, T. & APPLEBY, J. et al., *Jefferson: Political Writings*, 1999, Cambridge University Press, p. 224.
[9] ROCKWELL JR., L. H., *Speaking of Liberty*, 2003, Ludwig von Mises Institute, Auburn, Alabama, p. 29.

A fundamental part of our capitalist economy is our freedom of contract, our ability to create binding agreements with one another in whatever terms we might decide. This is what allows the market to grow, as different players are able to contract with each other, based on the rules of supply and demand, and develop the economy.

While, certainly, it is thanks to the free market that our societies have been able to flourish and prosper, we cannot be blind to the limits that are inherent to the market. Left to its own devices, the market will soon transform into a Darwinian hellscape where, to paraphrase ORWELL, society would involve nothing but *"a boot stomping on a human face – forever."*[10] Experience shows us beyond any doubt that the operations of unfettered markets *"tend to weaken or destroy the resources of life and freedom for the majority, to benefit most the small minority of society whose wealth provides them with far more* [...] *than they need."*[11] Because of this, the establishment of regulatory systems that prevent abuses, that create and police the rules of the market, is essential.

Key among these rules are the ones devoted to the establishment of limits to our freedom of contract, recognizing the different power dynamics that exist within the market. Although in an ideal conception of capitalism we might like to believe that all parties to a contract arrive on equal terms, and are therefore able to negotiate the terms of their agreements in a fair and open manner, the reality is quite different. It is because of this that, despite our inherent liberty, and even though we recognize that freedom of contract is essential to our prosperity, we curtail that ability in order to protect not only society, but also the market itself.

1.3 Limiting Commercial Parties

When the State establishes limits to the freedom of contract, it often does so in regards to certain categories of contractual parties. These are the "weak" participants of the market, the consumers, the workers, etc., and who are deemed to require special protections in order to avoid being victims of the powerful.

The problem about categorizing certain market participants as "strong" and "weak," is that such categories often lack flexibility. Mainly, this is the result of strict criteria that do not accommodate to the real nuances that exist in the marketplace. Such is the case of commercial parties, who are often left without any significant legal protections as a result of being "commercial," with the law treating them as if all commercial parties, by their very nature, were always of a similar size and with similar power.

---

[10] ORWELL, G., *Nineteen Eighty-Four*, 1983, Penguin Books, New York, NY, p. 220.
[11] MCMURTRY, J., 'The Contradictions of Free Market Doctrine: Is There a Solution?', 16 *Journal of Business Ethics*, no. 7, p. 651.

An interesting case study of the market dynamics between commercial parties appears in the case of the carriage of goods by sea. At first glance, one is tempted to believe that all the players in this market, the ones behind the containers, the ships, and the crews, all possess significant market power. And while this might be true if they are placed side by side with individual consumers, when the players in the maritime market are next to each other, the differences are enormous.

The carriage of goods by sea is a market that, for over a century, has been characterized by the recognition of bargaining power disparities. Shipowners and carriers are seen by the regulators as possessing the vast majority of the market power, while the cargo owners and receivers are seen as the ones deserving special protection. The need for these protections is a lesson learned long ago, when contractual abuse and unfairness turned the maritime market into anarchy.

1.4 The Topic of this Book

This book is divided in two, very distinct, parts. The first is devoted to the analysis of the binding character of contracts, with special attention being paid to forum selection. The second, places its attention on the carriage of goods by sea and, especially, in the use of forum selection clauses in carriage contracts.

While our attention to forum selection, particularly when it is present in maritime carriage, might appear whimsical, there are strong reasons for it. While issues of contractual fairness have been the subject of many superb academic works, it appeared to us that such an analysis was not often performed in regards to commercial contracts. On the contrary, commercial contracts have often been left behind not only in legislative attempts at solving contractual unfairness, but also in the literature. This was even more pronounced in the case of maritime contracts, where the analysis of rights and obligations often seemed to ignore the issues of bargaining power and contractual fairness. This was even more pronounced in the case of choice of court agreements in maritime contracts.

We felt that an analysis of these topics made through the prism of the struggle between bargaining power disparities and freedom of contract would be an interesting and useful addition to the available academic literature. It represents a rather different approach to this topic, and we are confident that it might open new lines of discussion to further our understanding and, hopefully, solve some of the issues that affect the trade.

1.5 Research Questions and Methods

In our work we have tried to answer two questions:

1. Should commercial parties, such as cargo interests in maritime contracts, benefit from a legal protectionism established in their favor?
2. Should this legal protectionism extend to forum selection clauses?

In order to answer these questions, we have adopted an eclectic research method. Although in several sections our use of a doctrinal methodology is obvious, as we review both black letter law and jurisprudence, we felt that limiting our methods to only doctrinal aspects would hurt our ability to find answers. Because of this, we have, at times, adopted an interdisciplinary approach, taking sociological and philosophical issues into consideration. Our research has, therefore, occasionally been not so much "in" law, but rather "about" the law.

The push for maritime regulation in the late 19th Century, for example, cannot be understood unless it is placed in the social and historical context of the time. Similarly, the rise of labor and consumer law cannot be comprehended unless the sociological context of the industrial revolution and the rise of the individual consumer, respectively, are given proper attention. These are social issues that, although have increased the length of our work, appear to us to be a fundamental part of this research.

Since an essential part of our research deals with the question of the legitimacy of State intervention in the economy, particularly when it comes to bargaining power disparities, we are aware of the problems that arise when tackling such monumental question. This is, after all, a question that is inherently related to the philosophical conceptions of society that a person or a State might have, covering the whole gamut of options existing from the Marxist far left to the Libertarian right wing. While it would be impossible to analyze every philosophical and economic position in regards to our questions, we have reviewed them accordingly when a given topic requires it.

1.6 Researched Legal Systems

Although we have taken great care to cover the topics being researched in the most thorough possible way, certain decisions had to be made in order to avoid its extension becoming unmanageable. As such, and due to the fact that our analysis is, in the end, focused on maritime law, the bulk of our work is focused in the laws of the United States and England, as well as the applicable international conventions regulating maritime trade. The reasons for this decision are simple to understand. Due to its past as the greatest maritime empire, the laws of England continue to be an essential part of maritime trade, while English courts and arbitrators are seen as the most prepared in this area. If England owns the past of ours seas, however, the United States and its laws might

own their future. As one of the largest trading nations, and with an increasing number of bills of lading selecting American courts and arbitrators as their chosen forum, paying due attention to American law seemed appropriate.

Despite this narrow limit, legislation from third countries is also used for comparative purposes. In those cases, we have mostly referred to the laws of Germany, the Netherlands, France, Spain and Chile. We believe that these countries offer a good sample of the Civil Law tradition and, as such, can give us great insight from a comparative perspective.

1.7 Structure of this Book

Something that we noted during our research is that a book will often tackle a certain topic without actually covering all of its bases. In order to avoid seeing our analysis becoming the proverbial giant with feet of clay, we have opted to build our topic from the ground up, addressing all the elements that come into play.

In Chapters 1 and 2, we review the *pacta sunt servanda* principle, as well as the strength and extent of the freedom of contract principle. In Chapter 3, we focus our attention on bargaining power and how it can lead to contractual imbalances. Chapters 4 and 5 analyze how contractual imbalances have been addressed in both the Civil Law and the Common Law systems, as well as how adequate these methods have been. In Chapters 6, 7 and 8, we review forum selection clauses, their implementation and acceptance under American and English Law and, of course, their use as a possible manifestation of bargaining power disparities.

In Chapters 9 and 10 we review the contracts that make up maritime law, as well as the regulations that apply to them. As part of this regulatory analysis, we review some of the historical reasons that led to the enactment of these regulations, particularly the bargaining power disparities that were (and continue to be) pervasive in the trade. Chapter 11 then focuses our attention to freedom of contract and, in light of the applicable regulations, whether or not it actually exists in this field. Finally, Chapter 12 analyses forum selection in contracts of carriage, how different international regulatory systems have addressed it and, of course, whether these can be seen as unfair clauses.

Chapter 1
The Inviolability of Contracts

"Universal notions of justice and humanity teach even the worst barbarians among human beings, that, if an agreement has been made, the law demands its observance."

Lord Russell.[12]

"It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements."

Lord Baron Skynner.[13]

1.1 Introduction

The idea that agreements must be kept and that contracts are made to be fulfilled is not just a fundamental value of legal practice, but a pivotal element on which all transactions are based. Certainly, all commerce would come to a halt if there was no presumption of contractual compliance. Just like sciences are based on the infallibility of the laws of physics, commerce is based on the idea that the parties can trust each other, that their agreements will be fulfilled, and that the courts will intervene in case of noncompliance.[14]

Despite how natural and obvious they might appear, however, the fundamental elements that make up our understanding of contractual relations are far from static. Let us take, for instance, the concepts of *pacta sunt servanda* and of *freedom of contract,* the former referring to the inviolability of the contracts (the parties must do as they agreed), and the latter to the ability of the parties to negotiate and agree upon whatever terms they decide. The history of both concepts, together with how they were shaped as legal principles,

[12] Cited in WEHBERG, H., 'Pacta Sunt Servanda', 1959, 53 *The American Journal of International Law*, no. 4, p. 783.
[13] Cited in HUGHES PARRY, D., *The Sanctity of Contracts in English Law*, 1959, Stevens & Sons Limited, London, p. 11.
[14] SHARP, M. P., 'Pacta Sunt Servanda', 1941, 41 *Columbia Law Review*, no. 5, p. 784 ("[there is a] *necessity in a commercial civilization that sensible expectations induced by a promisor be not too often defeated. Business calculations assume inevitably the dependability of undertakings about future conduct*").

shows that their meanings are much more complex than it might appear at first, and that they have actually changed greatly throughout the years.[15]

In order to truly understand how the law shapes itself towards contractual enforcement, and how certain rights and obligations can be demanded while others cannot, it is essential to review the history of these concepts. In this chapter we provide a cursory review of how contractual sanctity, the *pacta sunt servanda* principle, came to be, and how it manifests itself in different legal systems.

1.2 Pacta Sunt Servanda as a Religious Imperative

Although it might seem counter-intuitive, contracts, binding agreements, are a recent development in human history, having paid a rather small part in the earlier parts of its development. Within primitive societies, for example, it was *"the solidarity of relatively self-sufficient family groups and the fear of departing from accustomed ways* [that would] *limit individual initiative as well as the scope and importance of what can be achieved by deliberate agreements or bargains"*.[16] COLLINET is categorical on this issue, stating in no uncertain terms that:

> *"In the beginning of every civilization there was no contract. The agreement of two or more persons never gave rise to an obligation of dare, lacere or non lacere-such being the definition of contract. Primitive peoples employ particular proceedings, quite unlike the agreement of wills, to carry out the transactions that we call 'contracts' (sale, for instance). Comparative historical jurisprudence has made these two facts obvious."*[17]

It was only once more advanced societies started to develop, together with their internal and external economies, that the idea of enforceable agreements began to take hold. This adoption of contracts as *binding* agreements was *"largely an incident of commercial and*

---

[15] For an analysis of freedom of contracts, as well as its evolution, *See* Chapter 2.

[16] COHEN, M. R., 'The Basis of Contract', 1933, 46 *Harvard Law Review*, no. 4, p. 555. Although legal repercussions exist, at their core, these same values continue to serve as the backbone of the sanctity of contracts; as KAHN-FREUND noted, *"the fear of social ostracism by one's friends and neighbours is a far more powerful guarantee that promises will be kept than the fear of the judge or of the sheriff's officer"* (KAHN-FREUND, O., 'Pacta Sunt Servanda - A Principle and Its Limits: Some Thoughts Prompted by Comparative Labour Law', 1973-1974, 48 *Tulane Law Review*, no. 4, p. 895).

[17] COLLINET, P., 'The Evolution of Contract as Illustrating the General Evolution of Roman Law', 1932, 48 *The Law Quarterly Review*, no. 4, p. 488. What is more, as HUGHES PARRY, citing the work of HOLLAND, has noted, there were stages in history where *legal* enforcement of contract was not only non-existent, but in which even the mere idea was frowned upon. This *"on the ground that they* [the contracts] *should be entered into only with those whose honour can be trusted"* (HUGHES PARRY, D., 1959, supra note 13, p. 5).

industrial enterprises that involve a greater anticipation of the future" that was previously thought to be necessary, and which required an increasing reliance on promises.[18]

In its earliest forms, contract "law" was closely related to theological concerns, almost being a part of religion in and of itself. According to the ancient traditions of China, Egypt and Babylon, for example, the gods themselves intervened in the formation of a contract, acting, in a way, as its guarantors. As a result, if a party breached her obligations, she was expected to face the wrath of her deities.[19] Similarly, in Mesopotamia, where several business transactions were regulated in the Code of Hammurabi (c. 1750 BC), divine authority was claimed to justify the regulations.[20] Analogous provisions, albeit not necessarily equivalent, exist also in Assyrian (circa 1400 BC) and Hittite Law (circa XVI-XV centuries BC) where religious concerns also played a role in the regulation of agreements.[21] This quasi-religious power given to contracts, and which has even been referred to as a "*cult of contracts*", was responsible for the development of religious formulas or solemnities required at the time of contracting.[22]

The reasons that justify the inclusion of a mandate of divine origin urging people to respect their commitments are, to borrow a biblical term, legion. Social stability requires that people are able to trust in one another, at least in regards to their commercial transactions. If the members of a community cannot be relatively certain that their peers will respect their agreements, then the internal workings of the community will soon crumble. Thus, and in a similar way to what happened in regards to rules on alimentation and general behavior, religious creeds developed their own regulations on contracts and agreements, in an attempt to direct the public in what they saw as a self-preserving way.[23]

---

[18] COHEN, M. R., 1933, supra note 16, p. 555. On contract law and predictability, *See* PHILLIPS, J., 'Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine', 2010, 45 *Wake Forest Law Review*, no. 3, p. 839 (*"In short, contract law enables contracting parties to proceed and plan with a degree of confidence"*).

[19] WEHBERG, H., 1959, supra note 12, p. 775. GORMLEY offers as an example, though in the realm of public international law, the treaty between Ramses II and Hatushili III, in which *"their respective deities were held to guarantee the sacred obligation of the treaty"* (GORMLEY, W. P., 'Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith', 1969-1970, 14 *Saint Louis University Law Journal,* p. 373). COHEN goes even further on this point, adding that agreements (what we might call "proto-contracts") between nations were used to preserve the peace, with these "*promises to the gods* [...being] *enforced by the community as a whole because it feared the undiscriminating effects of divine wrath"* (COHEN, M. R., 1933, supra note 16, p. 555).

[20] SALEH, N., 'Origins of the Sanctity of Contracts in Islamic Law', 1998, 13 *Arab Law Quarterly*, no. 3, pp. 252–253.

[21] ibid., pp. 252–253.

[22] WEHBERG, H., 1959, supra note 12, p. 775.

[23] ibid., p. 775 ("*contracts were considered as being under Divine protection. But their psychological basis then was, above all, the necessity of a legal regulation* [...]"). On the issue of religious mandates on food and their origins, *See* SIMOONS, F. J., 'Traditional Use and Avoidance of Foods of Animal Origin: A Culture Historical View', 1978, 28 *BioScience*, no. 3.

Just as the Mesopotamian laws before it, although going beyond in scope, Judaic tradition regulated a plethora of contracts, such as deposits (Exodus 22/7-13), loans (e.g. Exodus 22/25-27) and sales (e.g. Leviticus 25/14-23). Considered as divine revelation, Mosaic law went beyond merely setting rules in regards to specific transactions, establishing instead a general duty for the parties to fulfill their agreements, going as far as directing them to the competent courts in case a dispute arose, under penalty of death.[24]

Talmudic law was, in general, favorable to contracts, encouraging an increasing doctrine of self-reliance. The Old Testament is clear on this, with the Book of Ezekiel establishing that:

> *"The soul that sinneth, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son: the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him."*[25]

Although easy to overlook, the importance of this passage cannot be overstated. What the Book of Ezekiel establishes is that it is the party who breaches his obligations who must pay the price. The significance of these doctrines of self-reliance and self-responsibility in the Old Testament is that they allowed the foundations of contract law to develop. Once "sin" is understood as an inherently voluntary act, and for which only the "sinner" bears responsibility, liability for those sins comes as a natural result. Among these sins, of course, the failure to fulfill an agreement. As established in the Book of Numbers:

> *"If a man vows a vow unto the Lord, or swears an oath to bind his soul with a bond; he shall not break his word, he shall do according to all that proceedeth out of his mouth."*[26]

Biblical Christianity continued with the foundations established in the Old Testament, placing a great emphasis in the importance of keeping one's word.[27] The Book of Matthew, for example, exhorts Christian believers to fulfill their obligations:

> *"But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil."*[28]

Remarkably enough, the New Testament establishes an interesting exception to the idea of the sanctity of contracts, by apparently limiting their efficacy to contracts with "the faithful":

---

[24] SALEH, N., 1998, supra note 20, p. 253.
[25] Ezekiel 18:20. King James Version.
[26] Numbers 30:2. King James Version.
[27] WEHBERG, H., 1959, supra note 12, pp. 775–776.
[28] Matthew 5:37. King James Version.

> *"Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? And what communion hath light with darkness?"*[29]

Taken as a rule established in regards to businesses, the above exhortation represents a break with the Talmudic idea of the sanctity of contracts, by conditioning their efficacy to the religion of the parties.[30] The effect of this passage can actually be felt up to this day, with some Christian fundamentalist communities refusing to "yoke" with unbelievers.[31]

The Islamic Qur'an also contains several provisions that, in an elaborate fashion, order Muslims to respect their covenants. As a matter of fact, under sharia law, "*there is a much stronger presumption than in most legal systems for leaving the contractually formalized bargain undisturbed.*"[32] What is more, the Islamic commandment to fulfill all contracts comes from god, and not from a human lawgiver.[33] This is best exemplified in the Arabian aphorism *"Al-Aqud Sharia't Al-Mua' äqdïn"*, *"the contract is the Shari'a of the parties,"* meaning that the contract is not merely *law* between the parties, but *sacred* law.[34]

Islam's favorable position towards contracts and covenants appears to be the result of reasons not only of sanctity, but also of pragmatism. As a merchant, Mohammed had a clear incentive to make sure that the regulations that he was creating would not affect commerce negatively, but actually encourage and strengthen it.[35] As a result, Islamic

---

[29] 2 Corinthians 6:14. King James Version. Although some translations of the Bible, like the King James Version, use the term "fellowship", others, like the International Standard Version and the New American Standard, use the term "partnership".

[30] While the meaning of this biblical passage has been debated, the idea that it separates Christians from unbelievers seems to be the traditional view. HUTSON, for example, a prominent American Baptist pastor of the early 20th Century, explained that "[f]*or a Christian to be yoked up in spiritual matters with an unbeliever means a fellowship of righteousness with unrighteousness; it means communion of light with darkness; it means the temple of Gods and of idols in agreement"* (in HUTSON, C., *Who is a Fundamentalist?*, 1982, Sword of the Lord, pp. 18–19).

[31] The idea that Matthew 5:37 separates Christians from non-Christians in regard to contracts plays an important role among the Amish, where, as a result of this biblical command, "*business partnerships or conjugal bonds with outsiders are forbidden*" (HOSTETLER, J. A., 'The Amish and the Law: A Religious Minority and its Legal Encounters', 1984, 41 *Washington and Lee Law Review*, no. 1, p. 35).

[32] SHARMA, K. M., 'From Sanctity to Fairness: An Uneasy Transition in the Law of Contracts', 1999, 18 *The New York Law School Journal of International and Comparative Law*, no. 2, p. 98. *See* also ANDERSON, J. & COULSON, N. J., 'The Moslem Ruler and Contractual Obligations', 1958, 33 *New York University Law Review*, no. 7, p. 928 *("*[i]*t is abundantly clear, then, that* […] *Moslems are strictly bound by every lawful contract or covenant into which they may have entered"*).

[33] WEHBERG, H., 1959, supra note 12, p. 775.

[34] HABACHY, S., 'Property, Right, and Contract in Muslim Law', 1962, 62 *Columbia Law Review*, no. 3, p. 465. *See* also SHARMA, K. M., 1999, supra note 32, p. 98.

[35] As SALEH explains:

> *"Mohammad was a businessman, who had no reason to scorn legitimate profit* [… he] *introduced into practice a number of directives and rules with the aim of regulating commerce* […] *By and large, trade, the general concept of contracting, and contracts practised in Mecca and Medina, were regulated by the precepts of the Qur'an and by the Prophet's own conduct and sayings."*

tradition is full of commands regarding the fulfillment of promises and agreements, both between the people, as well as between them and their creator.[36] Among them:[37]

> *"O ye who believe! Fulfil (all) obligations."*[38]

> *"Fulfil the Covenant of Allah when ye have entered into it, and break not your oaths after ye have confirmed them; indeed ye have made Allah your surety; for Allah knoweth all that ye do. And be not like a woman who breaks into untwisted strands the yarn which she has spun, after it has become strong. Nor take your oaths to practise deception between yourselves, lest one party should be more numerous than another: for Allah will test you by this; and on the Day of Judgment He will certainly make clear to you (the truth of) that wherein ye disagree."*[39]

> *"As for those who have honoured the treaty you made with them and who have not supported anyone against you: fulfill your agreement with them to the end of their term. God loves those who are righteous."*[40]

> *"Successful indeed are the believers* [...and] [t]*hose who faithfully observe their trusts and their covenants."*[41]

Interestingly enough, as the above passages show, Islamic tradition actually went further than its Christian counterpart, mandating respect for all covenants, regardless of the creed of the parties. This might, again, be the result of practical considerations, as a way ensure that commerce, even international commerce, would not be jeopardized.

SALEH, N., 1998, supra note 20, p. 263. Driving his point home, he also refers to a tradition under which Mohammed was quoted as saying that *"there is no harm in selling for eleven what you buy for ten and you are allowed to take a profit for expenses* (ibid., p. 263). *See* also ANDERSON, J. & COULSON, N. J., 1958, supra note 32, pp. 925–926.

[36] HABACHY, S., 1962, supra note 34, p. 467.

[37] ANDERSON, J. & COULSON, N. J., 1958, supra note 32, pp. 923–925.

[38] Surah *Al-Ma'idah* 5:1. Yusuf Ali Version (Saudi Rev. 1985). HABACHY makes sure to highlight the importance of this passage:

> *"The verse expresses the rule of law Pacta sunt servanda, with which we are familiar, but with an important difference-in Islam the exhortation to fulfil contracts does not come from a human lawgiver. It is an order emanating from God Himself. To borrow [...] from the language of the Muslim scholar Yusuf Ali: 'This line has been justly admired for its terseness and comprehensiveness.' While Article 1134 of the French Civil Code makes contracts the law of the parties to them, the corresponding rule of Muslim law makes them the Shari'a, the sacred law of the parties."*

HABACHY, S., 1962, supra note 34, p. 468.

[39] Surah *An-Nahl* 16:91. Yusuf Ali Version (Saudi Rev. 1985). Despite the references to god, this passage has been understood as going beyond religious obligations, so that when it speaks of "covenant" it is applicable to all agreements, *"for in all such the Moslem may be regarded as making God his witness"* (ANDERSON, J. & COULSON, N. J., 1958, supra note 32, pp. 923–925).

[40] Surah *At-Taubah*, 9:4. Wahiduddin Khan Version.

[41] Surah *Al-Mu'minun*, 23:1-8. Yusuf Ali version (Saudi Rev. 1985).

While it is undisputed that religious mandates played a fundamental role in the development of the western tradition of the sanctity of contracts (with the exception of Islam, the effects of which were felt elsewhere), god alone was not sufficient to elevate it to the level of a legal principle.[42] As we show below, the *legal* origins of this idea might come from a different source.

1.3 Developing Pacta Sunt Servanda as a Legal Principle

Pacta sunt servanda has the particularity of being one of the few Latin aphorisms that, despite the numerous changes that have affected our legal philosophy, continues to be seen as a fundamental element of the law of contracts. This linguistic issue, that at first glance might seem of merely anecdotal importance, actually speaks to the impact that this aphorism, and of course its meaning, has had on our legal institutions. This is particularly so in the case of Civil Law systems, where *pacta sunt servanda* is seen not merely as a general rule, but rather as a moral imperative. Based on this principle, it is not an "option" for the contractual parties to fulfill their obligations, as they are not in a position to make judgments as to whether they are really bound or not. Thus, compliance with their word, with the terms of their agreements and covenants, is not merely an ideal, but a true moral necessity.

In order to really understand the power associated with this maxim, and the effects it has had on our legal systems, it is perhaps useful to compare it with another famous maxim that uses the same grammatical construction: "*Carthago delenda est*".[43] Although the exact wording is still debated in academic circles, *Carthago Delenda Est* (from the alleged original "*Censeo Carthaginem esse delendam*") is reported to have been said by the Roman statesman Cato the Elder (234 BC – 149 BC) at the end of his speeches, during the Punic

---

[42] SHARMA is clear in regards to the importance of Islamic tradition in the modern legal world:

> *"Since '[n]early one-fifth people in the world today are Muslims, and Islamic law is at the very core of their beliefs and social system' it is pertinent not to overlook what the sharia has to say about contractual obligations. This is particularly so, because a large number of transnational transactions (for example, oil and mineral concessions, production sharing projects, joint ventures, transfer of technology, construction and operation of public utilities as well as loan and other financing agreements), on which the economy of the Western world so vitally depends, have been the subject-matter of many international commercial disputes and arbitrations. These have in turn involved an interplay of the notions of fairness with the Islamic veneration of the stipulations voluntarily inserted by the parties, that is, ufu bil uqud (honor your contracts)."*

SHARMA, K. M., 1999, supra note 32, p. 99.

[43] '"We See by the Papers"', 1949, 44 *The Classical Journal*, no. 4, p. 263 ("[the reference to the principle of pacta sunt servanda] *may have stirred in many minds dim memories of something in the Latin grammar called the gerundive, which the old grammar said was used to imply 'obligation, necessity or propriety' -the most familiar example being the one about Carthage which old Cato kept insisting must be destroyed"*).

Wars.[44] His meaning was clear: If Rome was to survive, Carthage had to be destroyed. Using plenty of theatrical and rhetorical tools, Cato made sure to convey that the razing of Carthage was a vital task, a moral necessity. The conveyance of this moral imperative also employed linguist tools which sought to highlight this obligation.

Indeed, just as it happens with *Pacta Sunt Servanda,* Cato's (alleged) words employ a rather special linguistic construction, rare in Latin aphorisms and maxims. While most were stated in present indicative (e.g. "*Contra non valentem agere non currit praescriptio"*; "*Culpa lata dolo aequiparatur"; "Nemo auditor propriam turpitudinem allegans"*)[45], both the *Pacta* and the *Delenda* maxims employed a gerundive.[46]

In Latin, the gerundive was a verbal form used to imply a necessity, a "*moral principle of what ought to be*".[47] By using the gerundive, Cato's words were not meant to be seen as a mere suggestion of something that *could* be done, nor as an exhortation as to something that *should* be done, but rather a dire statement related to Rome's very survival: If Rome was to exist, then Carthage would have to be destroyed. From this perspective, *Delenda* in Cato's words represented "a *statement of absolute social necessity to which there can be literally no excuse, to which all other concerns, no matter how weighty, whether of family, of life, or of fortune, must necessarily yield, lest the polity itself be eradicated."*[48]

In light of the above, the traditional translation of Cato's words as *"Carthage must be destroyed"* appears incomplete, as it does not really reflect the truly imperative character of his words. Thus, a more appropriate translation might be that "[a]*s a matter of imperative social necessity, Carthage must, at all costs and for all time, be totally annihilated*".[49] Following the same linguistic analysis, due to the grammatical similarities between the two, a correct translation of the *pacta sunt servanda* maxim would be: *"As a matter of imperative social necessity, commitments must, at all costs and without exception, be completely*

---

[44] In yet another parallel with the *pacta sunt servanda* maxim, which cannot be traced back to the Romans, Cato's words might also be the product of later commentators. As LITTLE explains, the phrasing actually *"represents a rhetorical and dramatic description of the scenes in the senate in Cato's last days from about 151 to his death in 149"* (LITTLE, C. E., 'The Authenticity and Form of Cato's Saying "Carthago Delenda Est"', 1934, 29 *The Classical Journal*, no. 6, p. 434).

[45] HYLAND, R., 'Pacta Sunt Servanda: A Meditation', 1994, 34 *Virginia Journal of International Law*, no. 2, p. 408.

[46] Due to the absence of a similar linguistic element in the English language, the particularities of the Latin gerundive cannot be explained in a few words. For the purposes of this book, suffice it to say that it is a verbal category that allows to express that something *must* be done (*See* KRANICH, S. & BECHER, V. et al., *A Tentative Typology of Translation-Induced Language Change*, in Kranich, S. et al. (eds.), *Multilingual Discourse Production*, 2011).

[47] HARRIS, J. G., 'The "Latin Gerundive" as Autobiographical Imperative: A Reading of Mandel'shtam's Journey to Armenia', 1986, 45 *Slavic Review*, no. 1, p. 4 Although HARRIS does have some remarks on MANDEL'SHTAM's words, particularly in regards to the examples he uses for the Latin gerundives, he deems his definition of the gerundive as correct.

[48] HYLAND, R., 1994, supra note 45, p. 411.

[49] ibid., p. 411.

performed", or "[t]*he given word must be kept, the promise must be performed whatever it costs*".[50]

Although, in principle, drawing a parallel between such two apparently dissimilar phrases, considering the context in which they were used, might seem whimsical at best, and deceitful at worst, this is not accurate. Two reasons can be put forward for this comparison, and which in our eyes makes it completely warranted: First, the importance that words have not only in normal human communication, but specially in the legal profession; second, and most importantly, that the wording of the maxim is almost as important as its content, and has actually allowed it to survive as an aphorism throughout the years, despite having never been used in the Roman legal practice.

While it might appear obvious, legal practitioners and students should always bear in mind that *words* are at the very core of our profession.[51] From a mere consumer contract for a new appliance, to an international treaty establishing the borders of a nation or the terms of an armistice, the "real" meaning of the words used are often at the center of eventual ensuing disputes. In the words of GAVIT:

> *"One thing is certain (and we should freely admit it) language is a lawyer's principle stock in trade* [...] *One can only learn about ideas (which is what law is) and he can only deal with them through the medium of language."*[52]

A similar sentiment was expressed by CHAFEE, who explained that "*words are the principal tools of lawyers and judges, whether we like it or not. They are to us what the scalpel and insulin are to the doctor, or a theodolite and sliderule to the civil engineer*".[53] It is clear, therefore, that "*the effective use of words and language is an indispensable skill for success, not only in law school, but, more importantly, in the practice of law*."[54]

It is undisputed that proper comprehension of the law requires a thorough understanding of the language, be it English, with its *"extraordinary richness, vitality, and fluidity"*, German, Dutch, Spanish or, of course, Latin. [55] As the *pacta sunt servanda* maxim has

---

[50] ibid., p. 411.

[51] BENSON illustrates this importance explaining that "*just as it is obvious to every school child who has ever scrawled a dirty word on the chalkboard that language is power, so it ought to be obvious to all of us that lawyers' language is power exercised by a power elite and that the stakes in it are very real and very high*" (BENSON, R. W., 'The End of Legalese: The Game is Over', 1984, 13 *New York University Review of Law & Social Change*, no. 3, p. 520).

[52] GAVIT, B. C., 'Where Do We Go from Here in Legal Education', 1950, 23 *Rocky Mountain Law Review*, no. 1, pp. 28–29.

[53] Chafee, Zechariah, Jr., 'The Disorderly Conduct of Words', 1941, 41 *Columbia Law Review*, no. 3, p. 382.

[54] RE, E. D., 'Legal Writing as Good Literature', 1984-1985, 59 *St. John's Law Review*, no. 2, p. 214. The seriousness with which legal scholars see the proper understanding of language is, perhaps, best manifested in the work of MEHLER, who referred to the lack of the required linguistic skills as an *"educational carcinoma"* (MEHLER, I. M., 'Language Mastery and Legal Training', 1961, 6 *Villanova Law Review,* p. 205).

[55] RE, E. D., 1984-1985, supra note 54, p. 212.

passed through generations of legal practitioners, and repeated *ad-nauseam* to our students, it is important to not only *remember* it, but to understand how it has managed to survive. We argue that its original meaning, product of the already mentioned use of the Latin gerundive, played a fundamental role in the way in which it was originally adopted and implemented.

Despite being formulated in Latin, the language of the Roman Empire, this aphorism is *not* Roman in origin, neither linguistically nor in regards to its effects. In other words, not only is the expression "*pacta sunt servanda*" not found in the documentary record of the time, but also the idea of "all agreements must be kept" or, "there is a social necessity to maintain and enforce all agreements" simply did not exist in Roman legal theory.[56]

Indeed, even though there is a common belief that our modern understanding of the inviolability and freedom of contracts is founded, among other places, "*in the age-old Roman adage of pacta sunt servanda ex fide bona*," contemporary Roman sources do not seem to back this claim.[57] As a matter of fact, the idea that an agreement between parties to give, do or abstain from something can be enforced by means of legal sanctions "*was as alien to classical Roman law as to English law until less than 400 years ago.*"[58] This is quite interesting, as it means that a big part of what we consider the basis on which modern contract law was built is, to put it bluntly, nonexistent.

Despite widespread assumptions, *pacta sunt servanda* is not found in the *Corpus Juris Civilis* of Justinian I. The closest reference to this rule, yet far from identical, only appears in Ulpian's comments on the rules of the praetor in the *Digest*, stating "*Pacta conventa, quae neque dolo malo, neque adversus leges plebiscita senatus consulta decreta edicta principum, neque quo fraus cui eorum fiat, facta erunt, servabo*";[59] *"I will enforce agreements in the form of a pact which have been made neither maliciously nor in contravention of a statute, plebiscite, decree of the senate or edict of the emperor, nor as a fraud on any of these*".[60]

While scholars have understood the above reference in the *Digest* to be the origins of our modern understanding of the *pacta sunt servanda* principle, this is not correct.[61] The

---

[56] HYLAND, R., 1994, supra note 45, p. 413 ("[w]*hatever the Roman jurists believed about the enforceability of agreements, they did not phrase their belief in terms of pacta sunt servanda.* [...] *Even as late as the reign of Justinian, the Roman jurists did not conceive of the performance of promises as a matter of urgent social necessity*").

[57] SHARMA, K. M., 1999, supra note 32, p. 97.

[58] KAHN-FREUND, O., 1973-1974, supra note 16, p. 894.

[59] Digest, 2.14.7.7.

[60] HYLAND, R., 1994, supra note 45, pp. 411–412 It should be noted that HYLAND's citation of the Digest opts for the spelling *"conuenta"* instead of the much more common, *"conventa". See* also SALEH, N., 1998, supra note 20, p. 256 ("[p]*acta sunt servanda* [...] *is an abbreviated form of a crucial rule stated in Justinian's Code"*).

[61] *See*, for example, GIMÉNEZ CANDELA, T., 'La Modificación de las Condiciones del Contrato: La Cláusula "Rebus Sic Stantibus"', 2009, 1 *Revista Juris da Faculdade de Direito, São Paulo,* p. 48 (*"pacta sunt servanda* [....] *has its roots in the Edict pacta convent servabo clause*[...]*"*) and ZARTMAN, I. W. & TOUVAL, S., *International Cooperation: The Extents and Limits of Multilateralism*, 2010, Cambridge University Press, p. 19 ("[t]*he origins of the principle can be*

words in the *Digest* did not aim to impose a moral duty for the parties regarding compliance (let alone a duty responding to a moral necessity), seeking instead to state the practice of adjudication of the praetor; it is clear, therefore, that compliance with the terms of an agreement (and hence its enforceability) was up to the individual praetor. In other words, *some* agreements were enforced, while others were only available as an exception. "[A]*s Ulpian wrote, Sed cum nulla subest causa, propter conuentionem hic constat non posse constitui obligationem: igitur nuda pactio obligationem non parit, sed parit exceptionem (But when no causa exists, it is settled that no obligation arises from the agreement; therefore, a naked agreement gives rise not to an obligation but to a defense).*"[62]

Furthermore, not only was the modern understanding of the sanctity of contracts unknown in Roman law, but was even expressly repudiated. Thus, for instance, Cicero explicitly rejected the absolute sanctity of contracts in *De Officiis*, arguing that some promises do not need to be kept if they have become too burdensome for those who made them (*"Ergo et promissa non facienda"*).[63] What Cicero sought to emphasize, and which appears to have represented the general understanding within the Roman legal sphere, is that morality and justice do not demand an absolute obedience to agreements, and actually excuse non-compliance in certain occasions. What is more, when excusing some contractual breaches, Cicero did not limit himself to the traditional considerations of whether true "freedom" had existed when agreeing or whether all the formalities had been complied with, also considering cases where morality allows the breach, even if the law appeared to say otherwise.

> *"Cicero considered the case of a lawyer who has agreed to appear for a client in court, and whose child then falls ill. Cicero held that the lawyer is morally permitted to breach the promise of representation. However we ourselves might decide this particular case, Cicero's understanding is clearly correct. The law often compels the performance of promises that morality would excuse. The law is more rigid and formal than is morality. What Cicero's reflections demonstrate is that morality does not require that promises always be kept."*[64]

We have the canon lawyers to thank for our modern ideas regarding the sanctity of contracts, and even for our current wording of the maxim.[65] After all, until the canonists

---

traced back to the expression in Ulpian in D.14.7.7 [...] *turned into a general maxim by the canon lawyers* [...] *thus making informal contractual agreements enforceable"*).

[62] HYLAND, R., 1994, supra note 45, p. 412.

[63] ibid., p. 414. These ideas, together with the works of canon lawyers and naturalists, would later serve as a basis for the unforeseeability doctrine. *See* MAGOJA, E. E., 'La Teoría de la Imprevisión: El Gobierno de la Equidad en la Ejecución de los Contratos', 2012 *Prudentia Iuris*, no. 74.

[64] HYLAND, R., 1994, supra note 45, p. 414.

[65] As COLLINET explains,

> *"It was left to canon law to take the final step of proclaiming the rule pacta sunt servanda which represents the triumph of the effect of the concurring wills and is the very reverse of primitive law."*

exerted their influence, at least in Western Europe, around the year 1000 A.D., there was "*no general principle that a promise or an exchange of promises may in itself give rise to legal liability.*"[66] As for "*pacta sunt servanda",* it was in his famous *Decretals*, that Pope Gregory IX used the sentence "*pacta quantumcunque nuda servanda sunt*" ("*pacts, however bare, should be observed*"), and which served as the direct root of the modern maxim.[67]

It is hard to overstate the role that the canonists played in the move towards "consensualism." Their work represented a departure from the formalistic approach that was present in Roman law, moving towards a view under which mere agreements ("*nuda pacta*") were to be considered binding and enforceable. Taken a series of sources as their basis, including the Justinian texts, Germanic law and, of course, the Bible and canon law, the canonists established consensualism as a general principle, making consensual obligations legally binding. On the basis of this, *"the promisee had a right against the promisor, enforceable in an ecclesiastical court, to the performance of the promise or else to compensation for losses."*[68] And so it was that, thanks to canon law, consent became the essential element of the contract ("*solus consensus obligat", "agreements alone bind*") and the idea of "*pacta sunt servanda*" became the norm.[69]

The reasoning behind the canonists' position in regards to the binding character of agreements is obvious, and goes back to religious considerations: "*quia ius canonicum et divinum non facit differentiam inter simplicem promissionem et iuramentum", "canon and divine law do not draw a distinction between a simple promise and one under oath*".[70] Put in another way, the breaking of a promise is just as bad whether the promise was made under oath or not. Formalities are, therefore, irrelevant in regards to someone's guilt before god. While this shift was clearly based on the idea that breaking a promise is a sin, the fact remains that sins in and of themselves do not give rise to a liability to others, but only to religious penitence. Legal liability actually came as a combination of both religion and the changes in society that affected the European continent in the twelfth century,

---

COLLINET, P., 1932, supra note 17, pp. 493–494.

[66] BERMAN, H. J., 'The Religious Sources of General Contract Law: An Historical Perspective', 1986, 4 *Journal of Law and Religion*, no. 1, p. 107. *See* also SHARP, M. P., 1941, supra note 14, p. 783 ("[t]*he Church, with its large temporal interests and power, and its able lawyers, criticised these limits* [established in Roman law regarding the enforceability of contracts]. *It taught that Christians should keep their promises"*).

[67] HARTKAMP, A. S. & BAR, C. von, *Towards a European Civil Code*, 2011, Kluwer Law International, p. 38 An earlier use of this expression appears in a Catholic consilium from AD 348, held in Carthage, referring to ecclesiastical issues. *See* VISSER, C., 'The Principle Pacta Servanda Sunt in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade', 1984, 101 *The South African Law Journal*, no. 4.

[68] BERMAN, H. J., 1986, supra note 66, p. 109.

[69] HYLAND, R., 1994, supra note 45, pp. 416–417.

[70] VISSER, C., 1984, supra note 67, p. 646. *See* also SOLA, P. R., *Fundamenta Iuris: Terminología, Principios e Interpretatio*, 2012, Editorial de la Universidad de Almería, p. 451.

and in which economic expansion brought with it the increasing importance of commerce.[71]

Because of its obvious convenience, a contract law based on agreements was quickly embraced by the merchant community, becoming part of the *lex mercatoria*.[72] This phenomenon is easy to understand, as merchants are interested in maintaining a constant flow in their transactions, avoiding unnecessary delays; the problems inherent to a contract system based in cumbersome formalities certainly explain why an agreement-based system would have been appealing to them.[73]

The canonists were thus instrumental in the shift from formalism to consensualism, establishing some of the basic principles that would go on to form general contract law. Among them:[74]

> *"*[T]*hat agreements should be legally enforceable even though they were entered into without formalities (pacta sunt servanda), provided that their purpose (causa) was reasonable and equitable."*
>
> *"*[T]*hat agreements entered into through the fraud of one or both parties should not be legally enforceable."*
>
> *"*[T]*hat agreements entered into through duress should not be legally enforceable."*
>
> *"*[T]*hat agreements should not be legally enforceable if one or both parties were mistaken concerning a circumstance material to its formation."*
>
> *"*[T]*hat silence may be interpreted as giving rise to inferences concerning the intention of the parties in forming a contract."*
>
> *"*[T]*hat the rights of third-party beneficiaries of a contract should be protected."*
>
> *"*[T]*hat a contract may be subject to reformation in order to achieve justice in a particular case."*
>
> *"*[T]*hat good faith is required in the formation of a contract, in its interpretation, and in its execution."*
>
> *"*[T]*hat in matters of doubt rules of contract law are to be applied in favor of the debtor (in dubis pro debitore)."*
>
> *"*[T]*hat unconscionable contracts should not be enforced."*

---

[71] BERMAN, H. J., 1986, supra note 66, p. 109. *See* also KAHN-FREUND, O., 1973-1974, supra note 16, p. 894.
[72] VISSER, C., 1984, supra note 67, p. 647.
[73] BERGER, K. P. (ed.), *European Private Law, Lex Mercatoria and Globalisation*, 2011, p. 60 ("[The lex mercatoria] *is characterized by openness, flexibility and informality*").
[74] BERMAN, H. J., 1986, supra note 66, p. 110.

Among the canonists who participated in this process, HOSTIENSIS (Henricus de Segusia, 1200-1271), the Cardinal Bishop of Ostia, played a key role, allegedly even coining the expression *pacta sunt servanda*.[75] HOSTIENSIS, and by extension the canonists, would greatly influence the development of European law, particularly through the work of Samuel PUFENDORF (1632-1694), who would then transform *Pacta Sunt Servanda* into a true universal principle.

With the Thirty Year's War in living memory, PUFENDORF's work was greatly influenced by conflict, as he was aware of how unstable peace could be. He believed that the law was essential for maintaining the peace, with private agreements filling the gaps left by natural law (which he derived from theological constructions). While HOSTIENSIS might have coined the *pacta* maxim in the 16th century, it was PUFENDORF who set aside the skepticism that affected canonists in regards to establishing it as a legal principle, and not merely a moral one, elevating it to the level of a natural, moral, and legal mandate.[76]

PUFENDORF had very pragmatic reasons to justify this new approach to agreements, as he was convinced that the deceit represented by a broken promise had the potential to create chaos and destruction. Coming full circle, and perhaps remembering that the Punic wars also came as a result of a breached treaty, a broken promise, he cited the events that lead to the destruction of Carthage, and the constant winds of war that polluted both the Romans and the Carthaginians.[77] If words were kept, if agreements were respected, conflicts could be prevented. Never again would people be annihilated and their lands salted. As long as "*pacta sunt servanda*" reigned, *"Cartago Delenda Est"* would never again need to be uttered.

1.4 Pacta Sunt Servanda as a Legal Norm

Despite the increasing philosophical acceptance of the *pacta sunt servanda* principle, it is undeniable that its real success only came once it became accepted as a proper legal norm. After all, even though philosophical and moral arguments are valuable in legal theory, they will fall short of being useful in practice if they are not echoed in the legislation or

[75] HOGG, M., *Promises and Contract Law: Comparative Perspectives,* Cambridge University Press, p. 117. HYLAND seems to be skeptical of this, and credits PUFENDORF as the source, albeit under the influence of HOSTIENSIS' work (HYLAND, R., 1994, supra note 45, pp. 416–417).

[76] Canonists were wary of the possible negative consequences of mere consensus as a source of obligations, particularly when the manifestation of the intent of the parties doesn't leave any sort of material evidence. They feared, perhaps understandably, that if the only thing required to create an obligation was to manifest consent, then there was a risk that there would be less reflections on the part of the promisors as to what was being agreed to(FORTICH, S., 'Solus Consensus Obligat: Principio General Para el Derecho Privado de los Contratos', 2012, 23 *Revista de Derecho Privado,* pp. 185–186).

[77] HYLAND, R., 1994, supra note 45, pp. 421–422.

the case law. Thus, it wasn't until this principle was expressly incorporated into the legal systems that a true era of consensualism (even if not absolute) began.

The 19th Century, the Century of Individualism, was a fertile ground for the ideas emanating from the *pacta sunt servanda* principle.[78] This was partly due to the influence of the *"will theory,"* based on the idea that since contracts are real agreements, and those agreements are the result of the union of wills, they are inherently worthy of respect.[79] As SOTO COAGUILA explains:

> *"*[I]*f the state has given autonomy and freedom to the people so that they themselves can regulate their interests, by concluding all kinds of contracts, within the established limits, then it follows that the state must have also given them binding force. Otherwise there would be no legal certainty in contracting, this being the aim of the rule of law. In this sense, the legislator creates rules to give people legal certainty, so that if tomorrow they conclude a contract, and a party does not fulfill her obligations, then the afflicted party will be able to demand the performance."*[80]

The sanctity of contracts, the binding character of agreements, thus became part of the legislation, particularly in Civil Law countries.[81] Indeed, for example, the Napoleon Code, the French *Code Civil*, arguably the most important Civil codification in history, echoed the philosophy of PUFENDORF regarding the validity of the *nuda pacta* as a source of obligations.[82] It did so in Article 1108, when it establishes the requirements that an agreement must fulfill in order to be binding:

> *"Four requisites are essential for the validity of an agreement:*
>
> *The consent of the party who binds himself;*
>
> *His capacity to contract;*
>
> *A certain object which forms the subject-matter of the undertaking;*
>
> *A lawful cause in the bond."*[83]

---

[78] FORTICH, S., 2012, supra note 76, p. 186.
[79] HUGHES PARRY, D., 1959, supra note 13, pp. 15–17.
[80] SOTO COAGUILA, C. A., 'El Pacta Sunt Servanda y la Revisión del Contrato', 2012 *Revista de Derecho Privado (México, D.F.)*, no. 1, pp. 204–205.
[81] HYLAND, R., 1994, supra note 45, p. 406 ("[t]*he rule 'pacta sunt servanda' is therefore not only a basic legal norm but* […] *a self-evident value* [in Civilian systems]").
[82] ibid., pp. 424–425.
[83] "*Article 1108*
Quatre conditions sont essentielles pour la validité d'une convention :
Le consentement de la partie qui s'oblige ;
Sa capacité de contracter ;
Un objet certain qui forme la matière de l'engagement ;

The most important element in the cited Article 1108 is not so much what it establishes, but actually what it omits. This provision did not establish any formality requirements for an agreement to be binding. While, of course, not every agreement was seen as enforceable by the *Code,* and there were occasions in which formalities had to be followed, by and large the formalism that had permeated contract law since Roman times was severely diminished.

Article 1134 of the *Code Civil* further confirmed the binding character of agreements, by establishing that:

> *"Agreements legally formed have the force of law over those who are the makers of them.*
>
> *They cannot be revoked except with their mutual consent, or for causes which the law authorizes.*
>
> *They must be executed in good faith."*[84]

With this provision, the Code established, beyond a shadow of a doubt, that once an agreement has been made (the majority of which are *nuda pacta*) then the parties are bound to comply. *This* was "pacta sunt servanda." By adopting the Roman concept of "*legem contractus dedit,*" the idea that the contract has force of law, the Code placed the importance of contracts on a similar level as that of the public law.[85]

The importance of the "consensual" (as opposed to "formalistic") system being adopted in a legal body as influential as the *Code Civil* is enormous. As BLANC-JOUVAN has explained:

> *"*[D]*uring the XIXth century and for a number of reasons – first military conquests and diplomatic successes, then an objective evaluation of its merits and, later, the impact of colonization -, the* [French] *Civil Code was imposed, adopted, copied or imitated in a number of countries (almost anywhere indeed, except in the common law world). It even exerted some influence* [...in the United States] *through David Dudley Field, and it was near serving as a model in New York around 1830".*[86]

Une cause licite dans l'obligation."

[84] "*Article 1134*

Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.

Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise.

Elles doivent être exécutées de bonne foi."

It has been argued that the real source of Art. 1134 of the *Code Civil* was not really the freedom of choice principle associated with consensualism, but rather *"morals and equity"* (WILSON, C. P., 'Notas Críticas Sobre el Fundamento de la Fuerza Obligatoria del Contrato. Fuentes e Interpretación del Artículo 1545 del Código Civil Chileno', 2004, 31 *Revista Chilena de Derecho*, no. 2, pp. 228–229).

[85] SOTO COAGUILA, C. A., 2012, supra note 80, pp. 203–204.

[86] BLANC-JOUVAN, X., *Worldwide Influence of the French Civil Code of 1804, on the Occasion of its Bicentennial Celebration,* p. 2

Of course, the impact of the consensualism and enforceability of contracts established in the *Code Civil* was felt in a particularly strong fashion in Civil Law countries. Thus, for example, the Spanish, Italian, Chilean, Colombian and Lithuanian codes, to name a few, included such provision in some shape or form.[87]

The recognition of *pacta sunt servanda* as a core principle of a given legal system goes beyond merely establishing a moral standard, as it also brings forward a number of practical differences between these systems and those which were not influenced in the same manner. This is of particular importance when it comes to issues of noncompliance, where the rights of the aggrieved party, as well as the options available for the defaulting party, greatly differ.

Since, based on the principle of the sanctity of contracts, compliance with contractual agreements is seen as a moral *duty* for the debtor, and a moral *right* for the creditor, the law seeks to ensure that the contract will be fulfilled. This manifests itself in the preference given in Civil Law systems to specific performance over money damages, which are only left as a secondary option.[88] The reasoning behind this phenomenon is that systems influenced by the *pacta sunt servanda* maxim, where the sanctity of promises and the duty to perform are seen as the backbone of the law of obligations, the view is that the breaching party should not have *"an option either to perform or to pay damages* [...and] *should not be allowed to buy himself free of a contract he has violated."*[89]

In stark contrast with this Civil Law position, in Common Law nations (where the influence of the *Code Civil* and the Roman legal philosophies that shaped it was

---

[87] See, for example, Art. 1091, Spanish Civil Code ("*Las obligaciones que nacen de los contratos tienen fuerza de ley entre las partes contratantes, y deben cumplirse a tenor de los mismos*;" "*The obligations born of contracts have the force of law among the parties to the contract, and must be performed according to their terms*"), Art. 1372, Paragraph 1, of the Italian Civil Code ("*Il contratto ha forza di legge tra le parti*;" "*A Contract has the force of law among the Parties*") Art. 1545 of the Chilean Civil Code, which was used verbatim in Art. 1602 of the Colombian Civil Code ("*Todo contrato legalmente celebrado es una ley para los contratantes, y no puede ser invalidado sino por su consentimiento mutuo o por causas legales*;" "*Every legally formed contract has the force of law for the parties and can only be nullified by mutual agreement or by legal causes*"), and Art. 6:189, numeral 1, of the Lithuanian Civil Code ("*Teisėtai sudaryta ir galiojanti sutartis jos šalims turi įstatymo galią. Sutartis įpareigoja atlikti ne tik tai, kas tiesiogiai joje numatyta, bet ir visa tai, ką lema sutarties esmė arba įstatymai;*" "*A contract which is formed in accordance with the provisions of laws and is valid shall have the force of law between its parties. The contract shall bind the parties not only as to what it expressly provides, but also to all the consequences deriving from its nature or determined by laws*"). For some other examples *See* also SOTO COAGUILA, C. A., 2012, supra note 80, pp. 201–202.

[88] A distinction should be made between the theoretical background on this topic, *vis à vis* what actually happens in practice. So, while in theory specific performance is given priority over money damages, accounts differ as to how common it is to actually seek (not to mention obtain) specific performance in court. On this topic, *See* LANDO, H. & ROSE, C., 'On the Enforcement of Specific Performance in Civil Law Countries', 2004, 24 *International Review of Law and Economics*, no. 4, 473–487 and Gebhardt, J. H., 'Pacta Sunt Servanda', 1947, 10 *The Modern Law Review*, no. 2, p. 162.

[89] HERMAN, S., *"Pacta sunt servanda" Meets the Market: Enforcing Promises in Spanish and United States Law*, in Espiau Espiau, S. & Vaquer i Aloy, A. (eds.), *Bases de un Derecho Contractual Europeo*, 2002, p. 439.

considerably weaker) private law and morality are considered more or less separate in what, to borrow a phrase from Stephen JAY GOULD, would be non-overlapping magisteria.[90] As Justice Oliver Wendell HOLMES stated,

> *"The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, - and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can."*[91]

As it is evident, in the Common Law there are no moral qualms in allowing the debtor to breach, his obligations, even if this breach was deliberate and wanton, as long as he pays damages. Thus, for example, while in the Civil Law tradition the extent of the damages for which the breaching party is liable will depend on the degree of fault exhibited by her, with malice or serious negligence being punished with a higher liability, the Common Law has traditionally rejected this differentiation, not distinguishing between the degree of fault that existed on the part of the defaulting party.[92]

This difference between the Civil and the Common Law systems, where in the latter *"the merchant realizes that his demand for specific performance may profit his lawyer more than himself*," is rooted in deeply-held philosophical convictions, resulting in a completely different understanding of agreements.[93] Clearly, the morality that the Roman-influenced systems see in compliance seems absent from the Common Law systems, where contracts and agreements are seen by the law as inherently commercial.[94]

---

[90] According to HYLAND, attorneys in the Common Law are trained "*to find ways of getting around or out of contracts, and, as lawyers, we occasionally even counsel clients to breach them. Civil lawyers, on the other hand, are much more committed to elaborating a legal mechanism to enforce as precisely as possible those promises that are actually made and intended.*" HYLAND, R., 1994, supra note 45, p. 405.

[91] HOLMES, O. W., 'The Path of the Law', 1997, 110 *Harvard Law Review*, no. 5, p. 995. HOLMES also stated this view in his famous 1881 book *"The Common Law"*:

> *"The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses."*

HOLMES, O. W., *The Common Law*, 2009, Harvard University Press, p. 272.

Some have argued that HOLMES did not have such an absolute opinion in regards to damages in case breach, as opposed to specific performance (*See*, for example, Gebhardt, J. H., 1947, supra note 88, p. 164).

[92] HYLAND, R., 1994, supra note 45, pp. 429–430.

[93] HERMAN, S., 2002, supra note 89, p. 446.

[94] GEBHARDT disagrees with this characterization, arguing that although "*English positive law does not enforce the performance of a contract, at least in the sense that it does not furnish the promisee with a right that the promise be kept, it should still be recognised that the rule Pacta sunt Servanda is a part of English law if we define law as the sum of rules which the community consider binding upon themselves, instinctively or consciously.*"
Gebhardt, J. H., 1947, supra note 88, p. 170.

It is certainly hard to determine what exactly is responsible for the different way in which *pacta sunt servanda*" affected different legal systems. Although in the end the difference might be simply that of a language, in the words of HYLAND, *"what a language it was"*.[95]

[95] HYLAND, R., 1994, supra note 45, p. 433.

Chapter 2
Freedom of Contract and Bargaining Power

> *"The value of all things contracted for, is measured by the Appetite of the Contractors: and therefore the just value, is that which they be contented to give."*
>
> Thomas Hobbes.[96]

> *"The law of contract, in that it partakes of the wills of the parties, leans towards equality for the strong; in that it partakes of the will of the judge and of the wills of legislator and administrator, it leans towards equality for the weak. And with this blend of equalities, the contract institution leans toward liberty".*
>
> Clark Havighurst.[97]

2.1 Introduction

Once the parties have concluded their the contract, they are bound to comply with its terms. The reliable enforcement of contracts is essential.[98] It is also fundamental for the correct working of a market economy and of international trade.[99]

As one author has noted, *"*[t]*he successful operation of a free market economy rests on the government's willingness to deploy enough 'terror' to assure that commercial promises are kept."*[100] This reliability allows people to predict the outcome of their dealings, so as to adequately prepare for the future, based on the understanding that they will be able to seek the enforcement of their contracts before a court of competent jurisdiction or, at least, to obtain damages for the breach. This ability to enforce contracts also works as a

[96] HOBBES, T., *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil*, 1839, John Bohn, London, p. 137.
[97] Cited in REITER, B. J., 'The Control of Contract Power', 1981, 1 *Oxford Journal of Legal Studies*, no. 3, p. 374.
[98] WEHBERG, H., 1959, supra note 12, p. 786.
[99] JIANG, P., 'Drafting the Uniform Contract Law in China', 1996, 10 *Columbia Journal of Asian Law*, no. 1, p. 248.
[100] NEUBORNE, B., 'Ending Lochner Lite', 2015, 50 *Harvard Civil Rights-Civil Liberties Law Review*, no. 1, p. 190.

safekeeping mechanism for the maintenance of peace, as it eliminates the need for private enforcement in case of noncompliance, by means of violence or force.[101]

The above notwithstanding, however, there are times when courts will refuse to enforce a contract or a specific clause contained therein. Besides cases in which enforcement will be denied by reasons of public policy or lack of real and free assent, there are situations in which even a valid agreement will not be enforced. A court might find, for example, that one of the parties acted in an abusive manner against the other, and that the resulting bargain is too harsh, too unfair, to be enforced by the courts. *Prima facie*, this seems to go against one of the most basic tenets of contract law, the principle of freedom of contract, and which seeks to ensure, first and foremost, that the will of the parties is respected.

The principle of freedom of contract is made up of two distinct elements. On the one hand, the ability to decide whether or not to enter into a specific contract (what German legal theory calls *Abschlussfreiheit*); and, on the other, the ability to co-determine (i.e. to negotiate) the specific terms of the contract (the *Gestaltungsfreiheit*).[102] This principle rests at the very core of western legal theory, representing a fundamental value within our liberal conception of society.[103] Based on the idea that the parties are the best arbiters of their own needs and abilities, the principle of freedom of contract aims to ensure that they themselves will be the ones deciding the exact shape and extent of their rights and obligations, free from external interference.[104]

Beyond this basic concept, however, several issues and factors, many of which are the consequence of the evolution and increasing complexity of our societies, have affected the way in which we see and understand the principle of freedom of contract. First among these issues is that of bargaining power, the ability that each party possesses to impose their will upon the other at the time of negotiating the terms of their agreement. While in simple economies, where free market theories were conceived, parties were assumed to be meeting on an even-playing field at the time of contracting, the increasing concentration of market power in an ever-smaller number of players has dramatically changed this

---

[101] MALLOR, J. P., 'Unconscionability in Contracts Between Merchants', 1986, 40 *Southwestern Law Journal*, no. 4, p. 1084.

[102] LENHOFF, A., 'Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law', 1961, 36 *Tulane Law Review*, no. 4, p. 482. In regards to the *Gestaltungsfreiheit*, it is important to note that freedom of contract refers to the *ability* to co-determine the terms, and so whether or not this ability is exercised by one of the parties is irrelevant (WILSON, N. S., 'Freedom of Contract and Adhesion Contracts', 1965, 14 *The International and Comparative Law Quarterly*, no. 1, p. 181).

[103] HILL, J. et al., 'Comparative Law, Law Reform and Legal Theory', 1989, 9 *Oxford Journal of Legal Studies*, no. 1, p. 106 ("[w]*estern legal tradition reveals a strong commitment to certain values, such as individual liberty, freedom of contract, and private property* […]"). *See* also MAXEINER, J. R., 'Standard-Terms Contracting in the Global Electronic Age: European Alternatives', 2003, 28 *Yale Journal of International Law,* p. 113 ("[c]*ontract law in Western countries is based on the principle of freedom of contract*").

[104] ROSENBERG, A., 'Contract's Meaning and the Histories of Classical Contract Law', 2013, 59 *McGill Law Journal*, no. 1, pp. 189–190.

landscape. Influenced by the social theories regarding the abuses of the *Herrschaft des Menschen über den Menschen*, the rule of man over man, an increasing body of regulations, both in the form of statutes as well as case law, has sought to prevent these abuses by limiting the way in which the parties can negotiate, as well as the issues over which negotiation and dickering is permitted.

Regulatory efforts on these issues have been, to say the least, controversial. On the one hand, there is a vested interest of those in advantageous bargaining positions to have as little regulation as possible, maintaining a *laissez faire* business environment, in accordance with their legitimate desire to maximize their profits and market share.

> *"Neoliberal theory posits that individual freedoms are best guaranteed by unregulated trade practices. The cornerstone of a neoliberal political-economic order is privatization and deregulation. Only free market mandates should mediate aspects of economic, political, and social life. Competition, according to the ground rules of the free market, between and among individuals and institutions is the primary means of social and cultural interactions. Capital accumulation by individual actors is of primary importance and treasured within the neoliberal marketplace. Therefore, the paramount feature of governing rests upon the notion that state apparatuses exist to protect and favor individual private property. In theory, the goal of the emerging neoliberal state is to facilitate the appropriate conditions for competition and capital accumulation."*[105]

On the other side of the aisle, however, so-called "weak" parties, be it individual consumers, workers, small businesses, etc., having often been the victims of draconian terms included in their contracts (which were often of adhesion) expect the government

---

[105] COCO, L., 'Debtor's Prison in the Neoliberal State: Debtfare and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005', 2012, 49 *California Western Law Review*, no. 1, p. 13.
As a caveat to the otherwise legitimate desire of businesses to increase their profits, it should be kept in mind that this goal will often clash with the social desire to be protected from the externalities that come associated with the economic activities in question. Indeed, it has often been the case that regulatory actions have been met with significant opposition from the affected industries, even when the regulations intended to prevent public health problems. RANKIM BOHME, et. al. painted a grim picture of these attempts, arguing that:

> *"Corporations and industries use various tactics to obscure the fact that their products are dangerous or deadly. Their aim is to secure the least restrictive possible regulatory environment and avert legal liability for deaths or injuries in order to maximize profit. They work with attorneys and public relations professionals, using scientists, science advisory boards; front groups, industry organizations, think tanks, and the media to influence scientific and popular opinion of the risks of their products or processes. The strategy, which depends on corrupt science, profits corporations at the expense of public health."*

RANKIN BOHME, S. et al., 'Maximizing Profit and Endangering Health: Corporate Strategies to Avoid Litigation and Regulation', 2005, 11 *International Journal of Occupational and Environmental Health*, no. 4, p. 338.

to prevent and curtail those abuses.[106] The law of contracts thus appears as "*trying to balance the upholding of traditional market liberalism with the need to protect those who may be vulnerable.*"[107]

Understanding the limitations imposed on freedom of contract is an essential part of the study of contract law. In order to properly draft an agreement, it is first necessary to know which the terms can be enforced in a court of law, and which ones, despite the otherwise valid agreement, will be rejected. Beyond individual terms and regulations, however, it is perhaps even more essential to understand not just *what* is prohibited, but *why*. It is the balancing of the relevant interests involved in the limitation of freedom of contract, the *Reaganomics* deregulatory worldview of some, *vis à vis* the paternalistic desires of others, as well as the historical and legal developments that lead to their regulation, that occupies this chapter.[108]

2.2 A Laissez-Faire Approach to Contractual Freedom

Classical contract theory is comprised of two elements; first, the binding character of contracts (*pacta sunt servanda*) and, second, the principle of freedom of contract.[109] As we have already seen, the former refers to the so-called sanctity of contracts, the latter deals with the ability of people to decide whether to enter into an agreement at all and, if they do decide to be bound by one, determine its content, and to enforce it in case of noncompliance.

Freedom of contract stems from the principle of freedom of choice ("*l'autonomie de la volonté*"), and according to which "*the contract will be based solely on the will of the contract undertaker,* [with] *nothing being able, in principle,"* to affect it.[110] In other words, freedom of

---

[106] For stylistic variation, the terms "contract of adhesion", "standard form contract", "boilerplate contract" and similar terms will be used interchangeably throughout this work. Unless otherwise stated, or if the context makes it clear, they should be considered as equivalent to each other.

[107] BROWNE, M. N. & BIKSACKY, L., 'Unconscionability and the Contingent Assumptions of Contract Theory', 2013, 2013 *Michigan State Law Review*, no. 1, p. 213.

[108] According to ZINAM,

> *"Philosophically, Reaganomics is identified with individualism and libertarianism: Economic decisions must be left to individuals and enterprises since they know best what is good for them, while government should be limited only to those economic decisions which the former cannot make for themselves. In the light of this philosophy, our government is overregulating and overcontrolling the economy and thereby depriving the private sector of its initiative and slowing down its growth."*

ZINAM, O., 'A note on Reaganomics', 1982, 10 *Atlantic Economic Journal*, no. 4, p. 98.

[109] AGUILAR GUTIÉRREZ, A., 'La Evolución del Contrato', 1955, 22 *Boletín del Instituto de Derecho Comparado*, no. 22, p. 27.

[110] GEORGE, G., 'The Principle of Contractual Freedom', 2010 *AGORA International Journal of Juridical Sciences*, no. 2. Although we use the term "*freedom of choice*" as a translation of the French *l'autonomie de la volonté*" ("*la*

contract seeks to ensure that the parties will be the only ones able to control the content of their agreements, as they are seen as the best arbiters to determine what will and will not benefit them.[111]

Freedom of contract, and the related principle of freedom of choice, are products of liberalism and of the Enlightenment, as they represent an end (even if not absolute, and only temporary) to the paternalistic approach of the feudal era.[112] Once it was understood that, as postulated by the naturalists, individuals possessed inalienable rights to own property, it naturally followed that they also possessed the ability, and even the right, to "*make their own arrangements to deal with that property, and hence to make contracts for themselves*".[113] Within this philosophical framework, private parties were seen as *"little absolute monarchs, sovereign and independent,"* able to make whatever decision they deemed appropriate in regards to their own dealings.[114]

From this perspective, the role of the law and the courts was seen as limited to merely enforcing the agreements reached between the parties, setting aside, at least for the most part, ideas of "justice" and "fairness". This principle sees the individual will of the parties as virtually omnipotent, and only limited by what is strictly necessary to maintain the social order.

> *"Under classical* [contract] *theory, the binding character of contracts binds both the parties as well as the judge. The former because they are bound to comply with their agreements, and to fulfill the obligations they acquired when they contracted, in the same manner that they are bound to obey and follow the law. The judge because he is not allowed to review and correct the terms of the contract* [...] *being limited to only ensure their compliance in case of breach."*[115]

---

autonomía de la voluntad" in Spanish) a more literal translation would be *"the autonomy of the will."* Since this variation, however, is not very popular in the English-language legal scholarship, we have opted for *"freedom of choice"* as an alternative. Although other variations, such as "party autonomy", do exist, in our choice we follow the European Commission, which has also used this variation in its documents, as shown, for example, in: Commission of the European Communities, 2003, 'Green Paper: on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernisation', Brussels, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0654:FIN:EN:PDF> (last visited 29 November 2015). For an author using *"autonomy of the will," See* BAUDOUIN, J.-L., 'Oppressive and Unequal Contracts: The Unconscionability Problem in Louisiana and Comparative Law', 1985, 60 *Tulane Law Review*, no. 6, p. 1119. In any case, throughout this work these terms should be considered as equivalent, unless they are expressly differentiated, or the context makes it clear that they are meant to be distinguished.

[111] SOTO COAGUILA, C. A., 2012, supra note 80, pp. 198–199.

[112] FORTICH, S., 2012, supra note 76, p. 187 ("[f]*reedom of choice is an important element of freedom in general")*.

[113] SMITH, S. A. & ATIYAH, P. S., *Atiyah's Introduction to the Law of Contract*, 2006, OUP Oxford, p. 9.

[114] AGUILAR GUTIÉRREZ, A., 1955, supra note 109, p. 28.

[115] ibid., p. 29.

In what ATIYAH has called the "*Classical Period*" (c. 1770-1870) in the Common Law, the dominant philosophical schools, and which undoubtedly responded to the authoritarian and tyrannical regimes of old, held the virtually absolute belief that "*people could be trusted to look after their own interests, whether in the marketplace or at the hustings*"; based on this belief, judges "*simply thought that, in nearly all cases, it was in the public interest to enforce private contracts*".[116] The philosophy was, therefore, to allow the people to decide for themselves what was best for them.

This importance given to private agreements, almost placing them beyond the regulatory role of the State, was best expressed by Sir George JESSEL MR of the English Court of Chancery. In the 1874 case of *Printing and Numerical Registering Company v Sampson,* he unequivocally explained that:

> *"If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of justice."*[117]

This idea that private arrangements were to be kept unregulated (at least for the most part) would eventually serve as the core of capitalist economics, where State intervention was to be considered altogether undesirable. The logic behind this was that since, in the words of Ayn RAND, *"in a capitalist society, all human relationships are voluntary*", whatever terms are decided by the parties will, by their very nature, always be just, as they reflect

---

[116] SMITH, S. A. & ATIYAH, P. S., 2006, supra note 113, p. 10. REITER explains the motivations behind the rise of this freedom-focused theories arguing that

> *"in an effort to throw off feudal and religious shackles, to release energy and to give vent to new theories of social justice, a broad coalition was forged over the sixteenth through the nineteenth century. The coalition, including economic liberals, utilitarians, and classes rising in power politically and intellectually, adduced powerful arguments in support of the market. The central benefits they attributed to organization in this form included the following: First, the market would provide powerful incentives motivating individuals to work and to produce wealth in society. The resultant gain would improve the lot of all (or of most, depending on the economist) individuals in society. The notion of incentives could be, and indeed was, pushed to the point of urging the necessity of a substantial level of poverty in society and of starvation as a sharp stick to keep the incentive structure keen. Second, market organization offered promises of efficiency. The consumer would determine what society produced: the cheapest mode of production of the right quantities of goods and an efficient distribution network were explicit outcomes of the model. Third, market organization would allow for innovation. This was a particularly critical attribute given the substantial barriers to innovation that had been erected by the guilds and other local protective arrangements. Fourth, the market meant freedom from imposition by governmental or religious authorities. This freedom offered a consent basis to society, a basis seen both as good in itself and as a legitimating force. Finally, the market promised justice. The entire notion of market rewards and failures could be and was linked to a personal merit principle."*

REITER, B. J., 1981, supra note 97, p. 349.

[117] *Printing and Numerical Registering Company v Sampson* [1874-1875], 19 Eq. L.R., 462, p. 465.

their own free will.[118] This is the backbone of economic liberalism which, based on the idea that society will reap more benefits if private interactions are left alone, championed a deregulated market.

The mindset of the time is best represented by FOUILLE's famous adage "*qui dit contractuel dit juste,*" "*anything contractual is fair*".[119] This liberal economic theory is quite telling, as it shows a proclivity to dismiss any consideration of fairness that might come from State power or from the courts, based on the idea that if the parties agreed to it, then it must be what they really wanted and deserved. From this perspective, as long as a person is mentally sound, then he has a right to dispose of his property in whatever way he pleases, under any terms that he may freely decide. On the basis of this theory, *"whether his bargains are wise and discreet, or profitable or unprofitable or otherwise, are considerations not for courts of justice but for the party himself to deliberate upon."*[120]

Evidently, freedom of contract is an eminently practical principle that serves as the direct reflection of a free enterprise system. Since contracts, from this libertarian approach, are private affairs, and not social institutions, the judicial system should limit itself to enforce and interpret them, without trying to create contracts for the parties. "*There is no contract without assent, but once the objective manifestations of assent are present, their author is bound. A person is supposed to know the contract that he makes."*[121]

This libertarian approach is, if anything, a response to the overreaching power of the State that existed in previous years, and against which liberalism stood. *"The older Calvinistic argument for government rested on the need of restraining the wickedness of man (due to the corruption of the flesh) by rules and magistrates deriving their power from God. Against this the deistic and bourgeois Enlightenment developed the contrary view, that men are inherently good and that their dark deeds have been due to the corruption and superstition brought about by tyrants and priests."*[122] The problem was that in this attempt to avoid governments that become too powerful, the libertarian proponents were too overzealous, and forgot that people do, at least sometimes, need the protection afforded by governments and communities.

Indeed, as time passed and economies grew increasingly complex, it became clear that proponents of the *laissez-faire* approach were putting forward an unworkable theory,

---

[118] RAND, A., *What is Capitalism?*, in Rand, A. (ed.), *Capitalism: The Unknown Ideal*, 1986, p. 19

[119] Quoted in GEORGE, G., 2010, supra note 110. *See* also BAUDOUIN, J.-L., 1985, supra note 110, p. 1120 (noting that in the 19th century *"this conception and ideology of contractual relationship remained unquestioned and unchallenged for a long time*").

[120] EDWARDS, C., 'Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues', 2008, 77 *University of Missouri-Kansas City Law Review*, no. 3, p. 656.

[121] KESSLER, F., 'Contracts of Adhesion--Some Thoughts about Freedom of Contract', 1943, 43 *Columbia Law Review*, no. 5, p. 630.

[122] COHEN, M. R., 1933, supra note 16, p. 559.

based on an idea of society in which all parties to a contract are assumed to be negotiating on an equal footing.[123] Of course, in such a scenario of equality, the parties are indeed responsible for the terms of their own contracts, and it is their responsibility to avoid oppressive bargains by simply shopping around, be it for better terms or for better contractual partners.[124] As such, *"within the classical law of contract, the relative bargaining strength of the contracting parties is not a question for any inquiry by the courts of law, as any superiority in bargaining power is itself a matter for the market to rectify."*[125] When all parties are the same, the State is wrong in interfering with private covenants, punishing those who profit from their contracts, and unjustly protecting those who failed to act diligently.[126]

Nowadays, situations in which the bargaining power of the parties is similar, let alone the same, hardly ever exist, with inequality of bargaining power being the rule rather than the exception. This is a fairly old problem, as already in the 19th Century *"it was realised that although liberty and equality before the law are essential to democracy, they have not in themselves any necessary connection with economic justice, and may, where there is great economic disparity between individuals, operate as instruments of oppression. Applied to the field of contract this led to the recognition that freedom is only reasonable as a social ideal when equality of bargaining power is assumed."*[127]

---

[123] As BAUDOUIN notes, traditional contract law was based in a large part on the principle of liberty (the parties are free to enter into whatever contract they want) and the principle of equality (the parties are presumed to be on equal footing). Based on these two principles, as well as on the perceived benefits of ensuring contractual stability and certainty, traditionally there was very little relief to *"people who had either not clearly realized what they were getting into, or had been pushed by necessity, lack of attention or education into an unfair contract"* (BAUDOUIN, J.-L., 1985, supra note 110, p. 1122). On the issue of the naivete of presuming these principles still apply, *See* AGUILAR GUTIÉRREZ, A., 1955, supra note 109, p. 33 ("[t]*oday nobody believes* […] *that there is equality between the parties*"), MENSCH, B., 'Freedom of Contract as Ideology', 1980, 33 *Stanford Law Review*, no. 4, p. 754 ("[f]*reedom of contract has been conclusively labelled a naïve myth* […]") and COHEN, M. R., 1933, supra note 16, p. 554 ("[t]*he idea that men can fix their rights and duties by agreement is in its early days an unruly, anarchical idea. If there is to be any law at all, contract must be taught to know its place*"). *See* also *Ocean Accident & Guarantee Corporation v. Industrial Accident Commission* [1927], 32 Ariz., 275–286, pp. 278–279 (where the Arizona Supreme Court refers to society outgrowing *laissez-faire* theories as *"the grown man has* [outgrown] *the swaddling clothes of the babe"*).

[124] KESSLER, F., 1943, supra note 121, pp. 630–631

[125] ALIAS, S. A. et al., 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts', 2012, 6 *Australian Journal of Basic and Applied Sciences*, no. 11, p. 331

[126] MORANT, B. D., 'The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses', 2003, 7 *Journal of Small and Emerging Business Law*, no. 2, p. 258 ("[i]*f one sees the parties as the best arbiters of their own interests, then paternalistic intervention could stray from the parties' original, contractual intent, and lead to inefficient results*").

[127] WILSON, N. S., 1965, supra note 102, p. 174. *See* also PIZARRO WILSON, C., 'La Eficacia del Control de las Cláusulas Abusivas en el Derecho Chileno', 2004, 6 *Revista Estudios Socio-Jurídicos*, no. 2, p. 120 ("*the liberal idea* [of contracts] *is based on a hypothetical and theoretical equality between the contract parties, which is disconnected*

The increasing complexity of the market that made it impossible for the *laissez-faire* contractual theory to survive. Indeed, while a *free-for-all* approach to contracts in which the parties are always responsible for their agreements might be suitable for simple markets, it seems incompatible with a complex society in which different players possess dramatically different levels of market power and importance.[128] It was this complexity that, in the words of DAWSON, relegated this view of freedom of contract to *"a world of fantasy, too orderly, too neatly contrived, and too harmonious to correspond with reality."*[129]

2.3 Evolution and Regulation

As ATIYAH has explained, virtually absolute contractual freedom could not survive for long. By the late 19th Century there were already plenty of criticisms raised against *laissez-faire* economics, stemming from the issue of externalities, specially those related to reduction of competition (and which proved that the effects of private contracts would often go beyond the parties) and, particularly, from the increasing realization that contractual "freedom" was not always such.

> *"On the one hand, it was pointed out that the idea of freedom of contract means little to someone who lacks the means or talents to make contracts for food, clothing, shelter or employment. To say that such a person chose to not to make such contracts would be true only in a restricted sense. On the other hand, it was thought that the legal meaning of 'free and voluntary' provided no guarantee that the contracts that were made were fair or just. The main reason was that in many cases an individual or business had no real choice as to who to contract with."*[130]

It was realized that although liberty and equality are an essential part of society, they alone do not necessarily ensure that there will be economic justice, particularly when

---

from the economic realities, and which increasingly became no more than a fiction for the legislators of the past century").

[128] AGUILAR GUTIÉRREZ, A., 1955, supra note 109, p. 30 ("[absolute] *freedom of contracts was in harmony with the economic and social reality of the early 19th Century, that is with a regime for small businesses and industries, which made inequalities between the parties less noticeable"*).

[129] DAWSON, J. P., 'Economic Duress and the Fair Exchange in French and German Law', 1937, 11 *Tulane Law Review*, no. 3, p. 345.

[130] SMITH, S. A. & ATIYAH, P. S., 2006, supra note 113, p. 11. As COHEN put it, the limits on the freedom of contract actually aimed at enhancing freedom:

> *"To put no restrictions on the freedom to contract would logically lead not to a maximum of individual liberty but to contracts of slavery, into which, experience shows, men will 'voluntarily' enter under economic pressure - a pressure that is largely conditioned by the laws of property. Regulations, therefore, involving some restrictions on the freedom to contract are as necessary to real liberty as traffic restrictions are necessary to assure real freedom in the general use of our highways."*

COHEN, M. R., 1933, supra note 16, p. 587.

there is a notorious economic disparity between the individuals who operate in the market.[131] This new viewpoint in regards to contracts and, most of all, fairness, was in stark contrast with the downright Darwinian view of previous years, when the philosophy seemed to be that *"no man is his brother's keeper; the race is to the swift; let the devil take the hindmost"*.[132] It was now clear that "freedom", understood merely as the absence of restraints, was not freedom at all. As COHEN has so eloquently put it:

> *"The freedom to make a million dollars is not worth a cent to one who is out of work. Nor is the freedom to starve, or to work for wages less than the minimum of subsistence, one that any rational being can prize- whatever learned courts may say to the contrary"*.[133]

Those advocating the *laissez-faire* contractual approach also faced a problem with the increased development of mass-market products and the subsequent appearance and increasing ubiquity of contracts of adhesion.[134] This was (and remains) a situation in which the large majority of contracts no longer *"resemble the Platonic ideal of a document of*

---

[131] WILSON, N. S., 1965, supra note 102, p. 174. Similarly, *See* PIERS, M., 'Good Faith in English Law - Could a Rule Become a Principle', 2011, 26 *Tulane European and Civil Law Forum,* p. 131 (arguing that "*absolute adherence to the idea of market-individualism and an extreme observance of the principle of freedom of contract would also be out of touch with economic reality*").

[132] EDWARDS, C., 2008, supra note 120, p. 648.

[133] COHEN, M. R., 1933, supra note 16, p. 560. A similar view was expressed by KESSLER, who stated that although the traditional conception of freedom of contract was based on the idea that "[t]*he play of the market if left to itself must* […] *maximize net satisfactions*," this idea could not last:

> *"Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege. Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals. This spectacle is all the more fascinating since not more than a hundred years ago contract ideology had been successfully used to break down the last vestiges of a patriarchal and benevolent feudal order in the field of master and servant […]. Thus the return back from contract to status which we experience today was greatly facilitated by the fact that the belief in freedom of contract has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture."*

KESSLER, F., 1943, supra note 121, pp. 640–641 (emphasis added).

[134] Speaking about the current contractual landscape, WOODWARD notes:

> "[Nowadays] *it is scarcely possible to purchase anything without an attempt by the vendor to bind the consumer to explicit contract terms. These terms can come tucked in the box under the mail order computer, in the automobile's glove box, on a warranty card, somewhere on a website, on a screen that blocks access to a recently-purchased product unless the viewer clicks the 'I accept' button, or perhaps, in the preparation area for undergoing a serious operation."*

WOODWARD JR, W. J., 'Contraps', 2015, 66 *Hastings Law Journal*, no. 4, p. 918.

jointly negotiated terms, but rather are lists of terms presented by one party to the other on a pre-printed form."[135] Although the freedom *to* contract remained, in the sense that the weaker party still had the possibility to *not* contract, it became evident that this freedom was often more theoretical than real, due to the absence of any alternatives.[136] Thus, while it is true that a person could choose to live without proper housing, lighting, heating, water or gas, this was not a real "choice". This massification of *á prendre ou ál laisser* contracts, "take it or leave it" agreements, made it virtually impossible to defend the libertarian contractual view.

The above problems were, of course, exacerbated by information asymmetries. The party offering the standardized contract (the "contract of adhesion") understands all of its implications and effects, but not so the weaker party.[137] This "adherent" party to the

---

[135] BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, p. 212. *See* also AGUILAR GUTIÉRREZ, A., 1955, supra note 109, p. 36 and BARNETT, R. E., 'Consenting to Form Contracts', 2002, 71 *Fordham Law Review*, no. 3, p. 627 (calling form contracts *"ubiquitous,"* and adding that they *"are everywhere"*).

[136] On the issue of the lack of alternatives, the Supreme Court of New Hampshire stated in 1986 that:

> *"The disparity in bargaining power may arise from the defendant's monopoly of a particular field of service, from the generality of use of contract clauses insisting upon assumption of risk by all those engaged in such a field, so that the plaintiff has no alternative possibility of obtaining the service without the clause; or it may arise from the exigencies of the needs of the plaintiff himself, which leave him no reasonable alternative to the acceptance of the offered terms."*

Barnes v. NH Karting Association [1986], 128 NH, 102, p. 107.

[137] "Contracts of adhesion", as well as their essential elements, have been the subject of countless articles by legal scholars, as well as several attempts by legislatures and courts to establish a clear definition. Part of the reason why such an apparently small issue (i.e. defining the term) has created such a large body of work is that many of the elements that are commonly associated with contracts of adhesion are not necessarily applicable to all of them. For example, the use of pre-printed forms might appear, *prima facie*, as a tell-tale sign of a contract of adhesion, and yet this is not necessarily the case. As RAKOFF explained, this element is not sufficient to infer the existence of a contract of adhesion, since *"two parties could employ standard forms as the basis for a negotiating session, and no one would be concerned. Another of the central factors is the presentation of demands on a take-it-or-leave-it basis. That too, considered alone, is not enough; sellers quote prices on a nonnegotiable basis in many quite unobjectionable contexts. It is the combination of the two elements that characterizes the problem"*(RAKOFF, T. D., 'Contracts of Adhesion: An Essay in Reconstruction', 1983, 96 *Harvard Law Review,* p. 1177). This is an important distinction, and which KESSLER had already raised in his seminal 1943 article on the topic: "*Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.* [...] *Thus, standardized contracts are* ***frequently*** *contracts of adhesion; they are á prendre ou á laisser*" (KESSLER, F., 1943, supra note 121, p. 632, emphasis added). This *combination* of factors has been recognized by the courts both in Common Law countries as well as those of the Civil tradition; the Supreme Court of California, for example, in *Steven v. Fidelity & Casualty Co.* [1962], 58 Cal. 2d, 862, p. 882, has defined the term as:

> *"*[A] *standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a 'take it or leave it' basis, without opportunity for bargaining and under such conditions that the 'adherer' cannot obtain the desired product or service save by acquiescing in the form agreement."*

contract is not only prevented from making any changes, but also, and most importantly, is often incapable of truly comprehending what is being put in front of him.

> *"Typically where standard terms are used* [...] *parties are asked to submit to them unread or, if read, not necessarily understood. Moreover, when parties do read and understand standard terms and object to them, the parties imposing them may refuse any alteration. Where standard terms are inalterable, parties asked to 'agree' to the terms in some instances will have no easy alternatives other than to submit."*

A similar definition was adopted by the Canadian Supreme Court of British Columbia in *Continental Securities v. McLeod* [1995] CanLII, 355, which, quoting Black's Law Dictionary, defined contracts of adhesion as:

> "[Those] *offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms."*

The Mexican Supreme Court, in *Amparo directo 1477/87. Compañía Mexicana de Aviación, S.A de C.V. 7 de diciembre de 1987* [1988], 1 SJF Octava Época, 794, p. 794, defined them as those in which:

> "[T]*he clauses have been drafted by an authority or unilaterally by the parties, without the other party being able, in order to accept them, to negotiate its content".*

A very similar definition was adopted in the Chilean Consumer Protection law (Law 19.496, Article 1, nº6) which defined them, in the consumer realm, as:

> "[Contracts in which] *the clauses were proposed unilaterally by the provider without the consumer, in order to celebrate it, being able to modify their content".*

In one of the rare cases in which the legislator has taken it upon himself to establish a general definition of this contractual figure, Article 1390 of the Peruvian Civil Code establishes:

> *"A contract is of adhesion when one of the parties, given the alternative of accepting or rejecting the terms established by the other party as a whole, manifests his acceptance."*

Perhaps more efficient than attempting a definition of contracts of adhesion, due to the many nuances associated with this concept, is to establish a set of characteristics that are inherent to them. This was the approach taken by RAKOFF, and which seems to be one the most thorough (RAKOFF, T. D., 1983, supra note 137, p. 1177). According to him, there are seven characteristics that define a "*model*" contract of adhesion:

1. *"The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.*
2. *The form has been drafted by, or on behalf of, one party to the transaction.*
3. *The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine.*
4. *The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.*
5. *After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.*
6. *The adhering party enters into few transactions of the type represented by the form - few, at least, in comparison with the drafting party.*
7. *The principal obligation of the adhering party in the transaction considered as a whole is the payment of money."*

MAXEINER mentions that an important element of these contracts, and which is lacking in RAKOFF's otherwise thorough analysis, is that they "*alter the default solutions provided by law*" (MAXEINER, J. R., 2003, supra note 103, p. 110).

Of course, it was hardly possible to describe as "free" a situation in which a party is virtually forced to contract (e.g. due to a natural monopoly), without understanding the effects of his acquiescence.[138] As a matter of fact, it was well understood that there was no "consent" in its traditional sense in the case of adhesion contracts, having been replaced instead by a construct of "implied consent," according to which *"any contractor accepting an instrument known to contain the terms of his contract, is conclusively bound by all of the terms written therein."*[139] And so, although it was never proposed that it would be appropriate to void any agreements in which asymmetries existed, these asymmetries did prove that unrestricted freedom did not, in and of itself, ensure the most beneficial outcomes.

This new understanding of contractual freedom was closely related to the development of the welfare state, aimed at protecting those who were seen as the "weaker elements" of society.[140] Indeed, there was a serious concern that simply enforcing any "apparent" agreement, would allow *"the powerful party to essentially govern over consumers and weaker parties."*[141] It was because of this that the welfare state represented a clear break with the previously dominant libertarian ideas that saw the market as the best way to organize society. Now, the same ideas of fairness that had once been repudiated were introduced into the law of contracts, as a way to prevent abuses from those in positions of power. [142]

What is perhaps the best-known example of this shift in contractual philosophy is that of labor law. Aware of the rampant abuses that existed in the labor market, with abusive shifts and unfair conditions of employment, the legislature and the courts realized that there had to be some sort of protection for those who were exposed to the abuse. In England, for example, the Truck Act of 1831 *"made it an offence for an employer to contract that wages payable to his servant should be paid otherwise than in current coin of the realm and*

---

[138] D'AGOSTINO, E., *Contracts of Adhesion Between Law and Economics: Rethinking the Unconscionability Doctrine*, 2014, Springer, p. 19 ("[s]*ince sellers draft the contract without consumers' participation, they are obviously more informed about the contract clauses and may exploit this informational power in order to raise their payoffs to the detriment of consumers. We allow consumers to fill the informational gap by reading fine print; however, reading is costly and consumers have to decide whether to read or not to read by forming (rational) beliefs about what sellers might have included in fine print*").

[139] LENHOFF, A., 1961, supra note 102, p. 483. These problems associated with the consent (or lack thereof) that can be given to a contract of adhesion motivated BEN-SHAHAR, echoing RADIN, to categorically argue that "*the fine print is not a contract. There is no agreement to it, no real consent, not even 'blanket assent.' It is nothing but paperwork and should have the legal fortune of junk mail*" (BEN-SHAHAR, O., 'Regulation through Boilerplate: An Apologia', 2014, 112 *Michigan Law Review*, no. 6, p. 883).

[140] SMITH, S. A. & ATIYAH, P. S., 2006, supra note 113, p. 14.

[141] BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, p. 212. *See* also NEUBORNE, B., 2015, supra note 100, p. 197 ("*given widespread disparities in bargaining power in many settings, automatically enforcing unfairly bargained contracts would enable the economically powerful to use contracts of adhesion as a vehicle to impose harsh terms against the economically weak*").

[142] AGUILAR GUTIÉRREZ, A., 1955, supra note 109, p. 41 ("*the evolution of contractual theory is characterized by the increasing intervention of the State in the formation and performance of contracts* [...] *replacing the principle of freedom of choice, whose area of action progressively decreases*").

declared a contract to that effect to be illegal and void. Nor must a contract of service contain a provision indicating how or where the wages are to be spent".[143] A similar situation happened in Chile, where the practice of the saltpeter mining companies of paying their employees in tokens that were only redeemable in their own shops, made it necessary for the legislature to establish minimum working conditions.[144]

Labor legislation clearly shows how and why the State sought to interfere in, and curtail the, freedom of contract in this domain. In most situations, a person in need of employment will find herself in an inferior position to that of her prospective employer; as a result, and particularly in cases where the applicant is in dire need of income, there is a clear possibility that she will accept any term imposed by the employer. This was the position put forward by, for example, the Arizona Supreme Court in *Ocean Accident & Guarantee Corporation v. Industrial Accident Commission*, recognizing the flaws of the *laissez-faire* approach to contracts:

---

[143] HUGHES PARRY, D., 1959, supra note 13, p. 30

[144] The history of the saltpeter mines in Chile represents a dramatic example of abuses on the part of the employers against their workers, and which required legal reform to restore some degree of balance to their contractual relation. As the miners lived within the property of the owners of the mines, the latter exercised arbitrary and sometimes downright tyrannical powers over their employees. As a Congressional investigation revealed:

> *"*[T]*he industrialists, or at least part of them, attribute themselves prerogatives or faculties of such nature that they only seem to be compatible with the old regimes of slavery and servitude. So, this Commission has been able to verify that, within these establishments, the working population is under a strict regime of discipline; a regime in which the owners or their employees give themselves the right to meddle in anything related to the lives of their workers or their families; and a regime, in summary, where the fundamental laws of the Republic are neither complied with nor respected, nor the most essential individual rights and warranties that they establish.*
>
> *There are establishments where it is prohibited, and punishable with absolutely arbitrary penalties, not only the commerce by travelling salesmen, but also the establishment within the worker's camps of the most meager and humble stores, set up by the families that need to increase their income, such as those in which food is sold. In the same manner, it is prohibited, and severely punishable, in some companies, if not all, the purchase of goods in the in nearby communities or anywhere but the stores owned by the company."*

MIRANDA, S. G. & M, G. et al., *Hombres y mujeres de la Pampa: Tarapacá en el ciclo del salitre*, 2002, LOM Ediciones, p. 134.

As denounced in 1901 by Representative Gonzalo BULNES:

> *"The* [saltpeter] *offices have the monopoly on the sale of any consumption goods for the workers, and in order to prevent that, for example, if any man selling cigarrettes or any woman selling tortillas actually comes there, they have their own police. Any salesperson who comes near the offices is considered a smuggler* […] *There in the pulperías* [the stores owned by the mining companies] *what is worth fifteen, twenty or twenty five cents, is sold for a whole peso; so the workers leave, I can attest to this, fifty percent of what they earn."*

LETELIER, F. O., *El Movimiento Obrero en Chile, 1891-1919*, 2005, LOM Ediciones, p. 101.

It was not until 1924 that, finally, the Chilean Code of Labor was modified so as to order that salaries could only be paid in legal tender, ending this abusive and tyranical practice of the mining companies.

> *"It was under the influence of these* [laissez-faire] *ideas that the fellow-servant rule and that of assumption of risk were applied to an industrial civilization for which they were utterly unfitted, and it was gravely insisted by bench, bar and the leaders of society that the individual working man, without money, friends or influence, must be 'protected' in his right to contract freely with his employer, by this time generally a corporation with immense resources, and no personal touch with or interest in its employees; which considered labor as a mere commodity to be bought at the cheapest possible price, used till worn out, and then scrapped like any other worn-out tool. Our enlightened modern thought realizes that an equality of bargaining power between two such unequal parties is impossible, and has attempted to equalize the balance through the labor unions and state regulation of industry; but old ideas die hard, and the pathways of progress are strewn with the fragments of legislation designed for this purpose but wrecked on the insistence of court after court that the state must not interfere with the 'free right of contract.' The eight-hour day, protection for women and children in industry, and every reform which has lightened the burden and brightened the life of the workman has had to fight its way up against this insistence on applying a philosophy which was perhaps just enough at one time, to a civilization which has outgrown it as the grown man has the swaddling clothes of the babe."*[145]

In COHEN's view, labor contracts are "contracts" in name only, since there is hardly any bargaining in them. As he explained:

> *"There is, in fact, no real bargaining between the modern large employer* [...] *and its individual employees. The working man has no real power to negotiate or confer with the corporation as to the terms under which he will agree to work. He either decides to work under the conditions and schedule of wages fixed by the employer or else he is out of a job. If he is asked to sign any paper he does so generally without any knowledge of what it contains and without any real freedom to refuse."*[146]

The *"emergence of the consumer as a contracting party"* in the 20th Century was another nail in the coffin of *laissez-faire* economics.[147] The appearance of mass market products, couple with the lack of proper information being given to the consumer, made it clear that it was necessary to drop the *caveat emptor,* "let the buyer beware", approach altogether. As the contact between consumer and producer disappeared (e.g. through retail shopping) the information asymmetries became dramatic and required governmental intervention as a way to ensure that the consumers would be adequately informed. Improper labelling, withholding of vital information and, of course, downright dangerous products,

---

[145] *Ocean Accident & Guarantee Corporation v. Industrial Accident Commission* [1927], pp. 278–279.
[146] COHEN, M. R., 1933, supra note 16, p. 569.
[147] SMITH, S. A. & ATIYAH, P. S., 2006, supra note 113, p. 13.

represented a threat to consumers that could not be overlooked by the State. It was evident that there was no real "freedom of contract" for the consumers in situations where not only their bargaining power, but also their ability to be informed, simply did not exist.

During the first half of the 20th Century, lack of proper regulatory actions on the part of the State allowed widespread abuses in the market. In the case of the United States, for example, *"most contract transactions were not subject to government regulation and* [as a result] *dishonest and greedy parties flooded the marketplace with defective merchandise and unfinished services"*[148]. This represented such a clear risk for both consumers and society in general, that regulation became unavoidable.[149]

In the Common Law, it had become evident that the philosophy behind the law of contracts was simply anachronistic. These rules "*which rested upon nineteen century radical individualism, were indifferent to abuses in bargaining power that did not rise to the level of fraud, duress, or undue influence*."[150] Furthermore, as the courts were not able to act unless a case was brought to their attention, it was up to the legislature to attempt to amend the current state of affairs.

2.4 Balancing Justice, Freedom and Party Autonomy

The push against the classical notions of contract was anything but peaceful. In the United States, for example, *"the Supreme Court struck down more than two hundred state statuses designed to protect American workers"*, arguing that such protections ran against the freedom of contract, as established by Article 1(10) of the United States Constitution, as well as the 5th and 14th Amendments.[151] It is worth bearing in mind that *"Jeffersonian democracy finds its cardinal tenet in restricting governmental activities and allowing individual free play,"* and so the State meddling into private dealings was subjected to an exceptionally high level of scrutiny.[152] This constitutional debate over the limitations

---

[148] EDWARDS, C., 2008, supra note 120, p. 648

[149] For an interesting and thorough commentary on some the contractual abuses that were rampant in England in the early 20th Century, particularly in the field of so-called "alternative medicine", *See* Simpson, A. W. B., 'Quackery and Contract Law: The Case of the Carbolic Smoke Ball', 1985, 14 *The Journal of Legal Studies*, no. 2.

[150] EDWARDS, C., 2008, supra note 120, p. 658. As HUGHES PARRY noted in 1959, reflecting on the increasing move against a strict understanding of the sanctity of contracts:

> *"*[W]*e must at all times keep in mind the question whether the time is not fast approaching when the whole structure of contract law, with its preconceived ideas and nineteenth-century doctrines, has not become so rigid and static that it cannot be expected to bear on all fronts the strains and stresses of modern economic and social pressures."*

HUGHES PARRY, D., 1959, supra note 13, p. 71.

[151] EDWARDS, C., 2008, supra note 120, p. 659.

[152] WILLISTON, S., 'Freedom of Contract', 1920, 6 *The Cornell Law Quarterly*, no. 4, p. 366.

imposed on freedom of contract is interesting because it highlights the importance that is attributed to this particular freedom, placed on the same level as life and property.

Article 1(10) of the United States Constitution establishes:

> *"No State shall* [...] *pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."*

The 5th Amendment to the United States Constitution establishes:

> *"No person shall be* [...] *deprived of life, liberty, or property, without due process of law* [...]*"*

Finally, in the same fashion, the 14th Amendment establishes:

> *"No State shall* [...] *deprive any person of life, liberty, or property, without due process of law* [...]*"*

The Civil Rights Act of 1866 further cemented the vital role given by the American legislator to freedom of contract, stating in its preamble:

> *"That all persons born in the United States and not subject to any foreign power* [...] *shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, inherit, purchase, lease, sell, hold, and convey real and personal property* [...]*"*

Starting with the 1897 US Supreme Court case of *Allgeyer v. Louisiana,* American courts interpreted these constitutional provisions (the "due process clauses") as referring to not only physical freedom, but also to economic liberty.[153] Based on this interpretation, the State (be it the Federal Government or the individual States of the Union) was not allowed to interfere in private contracts that had been freely agreed upon by the parties. Thus, for example, in the *Allgeyer* case, the Court ruled that:

> *"The 'liberty' mentioned in* [the Fourteenth] *amendment means not only the right of the citizen to be free from the mere physical restraint of his person* [...but also] *the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."*[154]

The same principle would be further established, this time emphasizing the prohibition against the State to limit the parties' ability to determine the terms of their contracts, in

---

[153] *Allgeyer v. Louisiana* [1897], 165 US, 578. *See* also HUGHES PARRY, D., 1959, supra note 13, p. 68.
[154] *Allgeyer v. Louisiana* [1897], p. 589.

the now infamous 1905 Supreme Court Case of *Lochner v. New York*.[155] Here Joseph Lochner, the owner of a bakery in Utica, New York, was indicted twice, in 1899 and 1901, for violating the 1895 Bakershop Act, and which established that bakers could not work more than 10 hours per day, with a maximum of 60 hours per week. As his appeal against his second indictment was rejected by both the Appellate Division of the New York Supreme Court and the New York Court of Appeals, he took his case to the Supreme Court of the United States, arguing that his constitutional rights were being violated.[156] The Court agreed with Mr. Lochner, striking down the statute as unconstitutional, holding that the State had no right to interfere with the freedom of the bakers to decide how much they could work:

> *"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."*[157]
>
> *"There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.*
>
> *It is a question of which of two powers or rights shall prevail, -the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general*

---

[155] *See,* generally, SHAMAN, J. M., 'On the 100th Anniversary of Lochner v. New York', 2004, 72 *Tenn. L. Rev.*
[156] *Lochner v. New York* [April 17, 1905], 198, 45.
[157] ibid., p. 53.

> *right of an individual to be free in his person and in his power to contract in relation to his own labor."*[158]

In the eyes of the Court the only people who were actually being affected by the number of hours worked by bakers were those same bakers. Because of this, the Court reasoned that the State could not legislate against the bakers' own decisions, under the pretense of protecting some ethereal social value of justice, let alone of "health".[159]

Although the Supreme Court's position in regards to state interference in private contracts would continue to be the norm for years, Oliver Wendell HOLMES' dissenting opinion in *Lochner v. New York* already reflected the winds of change, rejecting the libertarian view of freedom of contract:

---

[158] ibid., pp. 57–58.

[159] It would take quite a bit of time before the American judicature recognized that the weaker parties in a contract, particularly in a labor setting, were often not in a position to say "no" to their employer's rules. For instance, the Kansas Supreme Court, when reviewing a case in which an employer required his employees to sign away their rights to form and participate in unions, stated that it is

> *"a fact of general knowledge that employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof. To many the demands for housing, food, and clothing for their families and the education of their children brook no interruption of wages to the bread-winner. Necessity may compel the acceptance of unreasonable and unjust demands."*

State v. Coppage, 87 Kan., 8, pp. 10–11 (*See* also BARNHIZER, D. D., 'Inequality of Bargaining Power', 2005, 76 *University of Colorado Law Review*, no. 1, p. 162)**.**

The US Supreme Court, surprisingly, reversed this decision. First the Court recognized that inequalities are a fact of life:

> *"*[I]*t is self-evident that unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."*

Coppage v. Kansas [1915], 35 S.Ct., 240, p. 245. Then, on the basis of this general idea, the Court ruled that contracts where unionization was prohibited (known as "yellow-dog contracts") were fully enforceable:

> *"*[t]*o ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other; for 'it takes two to make a bargain.' Having accepted employment on those terms, the man is still free to join the union when the period of employment expires; or, if employed at will, then at any time upon simply quitting the employment. And, if bound by his own agreement to refrain from joining during a stated period of employment, he is in no different situation from that which is necessarily incident to term contracts in general."*

ibid., p. 246. Of course, the problem with the understanding of "freedom" demonstrated here by the Supreme Court is that it did not seem to establish any limits to the demands made by the employer. Following the Court's logic, nothing would prevent the employer to, for example, require prospective female employees to agree that they will not get pregnant for the duration of their contract, or that they renounce their right to sue for sexual harassment.

> *"This case is decided upon an economic theory which a large part of the country does not entertain* [...] *It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.* [...] *Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."*[160]

The *Lochner* decision has gone down in history as a truly infamous moment for the Supreme Court of the United States.[161] In fact, as SHAMAN explains:

> *"Over the years, it has gained a certain eponymous infamy, as the phrase 'Lochnerism' has come to signify the practice of incorporating extreme laissez-faire economic policy into constitutional provisions, thereby invalidating many remedial statutes designed to regulate wages, prices, and working conditions. Lochner, a case in which the Supreme Court equated constitutional proscriptions with an outmoded, discredited economic policy to the point of inhumanity, has hence come to symbolize the excesses of judicial intervention."*[162]

Lochner represented what NEUBORNE has called "*the disconnect between the traditional consent-based justification for protecting and enforcing contracts, and the reality of radical bargaining inequality*."[163] Indeed, it dealt with (and actually overlooked) the issue that in

---

[160] *Lochner v. New York* [April 17, 1905], pp. 75–76

[161] *See*, for example, STRAUSS, D. A., 'Why Was Lochner Wrong?', 2003, 70 *The University of Chicago Law Review*, no. 1, p. 373 ("*Lochner v New York' would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years* [...] *Lochner is one of the great anti-precedents of the twentieth century. You have to reject Lochner if you want to be in the mainstream of American constitutional law today.*")

[162] SHAMAN, J. M., 2004, supra note 155, p. 456.

[163] NEUBORNE, B., 2015, supra note 100, p. 190. Similarly, HUGHES PARRY sees decisions like the one rendered in *Lochner* as a result of the *"emphasis in common law countries on the beneficent economic effects of freedom of contract,"* and as a result of which there were many *"over-statements of the degree of protection given to freedom of contract in the Constitution"* (HUGHES PARRY, D., 1959, supra note 13, p. 69).

many contracts, particularly those between employers and prospective employees, it is impossible to speak of a "real" consent between the parties. Under the pretense of protecting the freedom of the bakers, the Court harmed them by removing a protection aimed at preventing their exploitation.[164]

Despite the blow that reformist ideas suffered at the hands of the Supreme Court in *Lochner*, and the occasional academic defending the *laisse-faire* approach, many scholars celebrated the legislative attempts to protect the weaker parties in the contract *"of whom one is under the pressure of absolute want, while the other is not"*.[165] This issue of balancing the relation of the parties, equalizing, as much as possible, their bargaining power, thus became a fundamental issue in contract law. Because of this, the deregulatory movement arguing that a *laissez faire* contract law would protect people of any condition or background would soon lose its momentum. The problem was that this movement overlooked, perhaps willfully, that in order for both parties to benefit from an agreement there must be a certain balance allowing them to protect their respective interests.

It was within this historical and philosophical context that in the United States, in the late 1930s and early 1940s, there was a move to reform contract law in order to "*channel the exercise of liberty toward cooperation and decency, and, thus, to preserve the bargain contract as the vehicle to facilitate the most efficient distribution of resources in the economy.*"[166] These efforts would materialize in both a shift in the case law, where the *laissez-faire* contractual philosophy lost a big part of its adherents, as well as in the enactment of the Uniform Commercial Code (UCC), adopted into law by several states in the 1950s and 1960s, and which contained a series of provisions aimed at ensuring balance. This shift showed an interest on the part of the legislator (by means of recognizing doctrines such as those of good faith and unconscionability) *"to transform community norms of honesty and decency into legal obligations and to create a market climate that discourages irresponsible contract behavior"*.[167]

The move towards reform continued in the second half of the 20th Century, as ideas of fairness and justice continued to play an even larger role in the law of contracts, with

---

[164] Interestingly, the *Lochner* decision was met with a barrage of criticism from the academic, political, and legal circles, coming from both sides of the political spectrum. Right wing commentators decried it as an affront to state's rights, while progressives saw it as an attack on the very kind of social issues that concerned them. It was simply a bad decision (WALL, J. F., 'Social Darwinism and Constitutional Law with Special Reference to Lochner v. New York', 1976, 33 *Annals of Science*, no. 5, p. 472).

[165] EDWARDS, C., 2008, supra note 120, p. 661.

[166] ibid., p. 649. Indeed, it was during this period that the so-called *Lochner* era came to an end, via the Supreme Court decision in *West Coast Hotel Co. v. Parrish* [1937], 300 US, 379. Only then did the Supreme Court acknowledge that the protections granted by the due process clause of the Constitution could not be extended to protect an absolute freedom of contract when there is a clear inequality in the bargaining power of the parties (*See* STRAUSS, D. A., 2003, supra note 161, p. 374).

[167] EDWARDS, C., 2008, supra note 120, p. 650.

regulatory efforts beginning to target contracts *in general*, and not only specific types (as had been the case in previous years, particularly with consumer and labor legislation). In England, for example, the Unfair Contract Terms act of 1977, *"in addition to the special protection that it gave consumers* [...] *also gave judges a general authority to strike down unreasonable exemption clauses, regardless of the category of contract"*.[168] In a similar fashion, other Common Law countries, like the United States, Canada and Australia, saw the rise of the doctrine of unconscionability, and which allowed courts to strike down terms, or complete contracts, which were excessively one-sided or downright abusive.[169]

This period was marked by a clear erosion of the Benthamite idea that "*as happiness consists in a maximum of pleasure, and that as each man knows best what will please him most, a contract in which two parties freely express what they prefer is the best way of achieving the greatest good of the greatest numbers*".[170] This erosion was a consequence of an increasing social understanding of the fact that, as COHEN notes, "*men in fact do not always know what will turn out to their advantage, and some of them have the talent for exploiting the ignorance or the dire need of their neighbors to make the latter agree to almost anything*".[171] Fairness and justice were therefore no longer seen as merely desirable social values, but rather as goals and objectives that had to be actively pursued by the law of contracts, so as to ensure that contractual agreements reflected the interest of both parties.

The last two decades of the 20th Century, and all the way up to the present day, have seen a dichotomy arise within contract law.[172] As the tyrannical regimes within the Soviet Union started to collapse, right wing economics experimented a revival in the West, with the governments of Ronald Reagan in the United States, Margaret Thatcher in the United Kingdom, and a plethora of other democracies (and dictatorships) following their footsteps in terms of economic policies and reforms.[173] Those proposing the almost absolutist free market approach argued that the problems that existed in the past had not been because the market was free, but rather because it wasn't free *enough*. Adopting a sort of "No True Scotsman" approach to economics, proponents of liberalization argued that if the market had really been free, then problems would not have arisen; hence, since problems arose, then it meant the market had not been free.

---

[168] SMITH, S. A. & ATIYAH, P. S., 2006, supra note 113, p. 15.
[169] *See* Chapter IV.
[170] COHEN, M. R., 1933, supra note 16, p. 563.
[171] ibid., p. 563.
[172] SMITH, S. A. & ATIYAH, P. S., 2006, supra note 113, p. 16.
[173] On some of the free market reforms conducted in this period, *See*, generally, STEPHENS, B., 'How Milton Friedman Saved Chile', 2010 *Wall Street Journal*, FRAZER, W., 'Milton Friedman and Thatcher's Monetarist Experience', 1982, 16 *Journal of Economic Issues*, no. 2, SHLEIFER, A., 'The Age of Milton Friedman', 2009, 47 *Journal of Economic Literature*, no. 1, CARCAMO-HUECHANTE, L. E., 'Milton Friedman: Knowledge, Public Culture, and Market Economy in the Chile of Pinochet', 2006, 18 *Public Culture*, no. 2.

Despite the occasional fallacy, it would be a mistake to simply dismiss the arguments of free market advocates. Indeed, their views are often completely reasonable and grounded on common sense. They argued, for example, that the use of standard forms and boilerplate contracts was not, per se, a sign of unfairness. This is a sensible position, as it is evident that negotiating terms individually with every partner, particularly when it comes to mass market products, would not only be prohibitively costly, but also downright impossible.[174] These considerations, however, have not stopped the widely-held belief that standardized contracts are, mostly, if not *per se,* a result of inequality and imbalance. They are seen, therefore, as somehow nefarious by nature, and not as a natural consequence of complex economies. This was the position put forward, for example, by the New Jersey Supreme Court in *Henningsen v. Bloomfield* which when, deeming unenforceable a pre-printed exclusion clause, ruled that:

> *"The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position."*[175]

The problem with the view expressed by the New Jersey Supreme Court, as well as several authors, is that it overlooks the fact that standardized contracts, regardless of the criticisms that might be made against specific terms, make commerce possible. ANGELO and ELLINGER, for example, were clear on this, arguing that:

> *"It would be unreasonable to suggest that the use of standard form contracts is, in itself, objectionable or unconscionable. A large industrial entity has a genuine interest in defining its liability to customer and in standardizing the terms on which it supplies goods or furnishes services. While parties may negotiate some specific terms, such as the price or the date of payment, the standard form usually governs the general terms and conditions related to the supply of goods or to the furnishing*

---

[174] As COHEN argued:

> *"The notion that standardization* [of contractual terms] *is necessarily inimical to real freedom is a fallacy of the same type as the one that habits are necessarily hindrances to the achievements of our desires. There is doubtless the real possibility of developing bad social customs, as we develop bad individual habits. But in the main, customs and habits are necessary ways through which our aims can be realized. By standardizing contracts, the law increases that real security which is the necessary basis of initiative and the assumption of tolerable risks."*

COHEN, M. R., 1933, supra note 16, p. 588.

[175] *Henningsen v. Bloomfield Motors, Inc.* [1960], 161 A. 2d, 69, p. 389. *See* also BAIRD, D. G., 'The Boilerplate Puzzle', 2006, 104 *Michigan Law Review*, no. 5, p. 940.

> *of services. Other sectors of the commercial world, such as lending institutions, carriers, and insurers, use the standard form in a similar manner."*[176]

Indeed, a market in which sellers and buyers must individually negotiate every part of their agreements is downright illusory. Standardized contracts are not the problem in and of themselves, as they are more economically efficient (and cheaper) than individual contracting, reducing transactional costs. It should be noted, however, that this says nothing about the fact that abuses in the market do allow for unfair clauses to be inserted into boilerplate terms. Furthermore, as the market power concentrates into an ever-decreasing number of players, form contracts become much more prone to be abused.[177]

> *"The economic cause of this contractual transformation and this accumulation of capitals and the concentration of enterprises, which has caused a change in the personality of the contractual parties. Now we deal with powerful organizations that draft agreements in the same way that the legislator drafts the Law. Among those contracting parties, some colossal, some miniscule, the freedom of choice stops*

---

[176] ANGELO, A. & ELLINGER, E. P., 'Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States', 1992, 14 *Loyola of Los Angeles International and Comparative Law Review*, no. 3, pp. 457–458.

[177] As LONEGRASS put it:

> *"Standard form contracts are ubiquitous, but hardly innocuous. In fact,* ***form contracts are rife with potential for abuse.*** *Their nature and universality permit drafters to impose any numbers of onerous terms on unwary customers, including arbitration agreements, class action waivers, liquidated damages provisions, warranty disclaimers, exculpatory clauses and choice-of-law provisions. […] Although essential to the American economy, form contracts expose consumers to a parade of one-sided, risk-and rights-shifting provisions."*

LONEGRASS, M., 'Finding Room for Fairness in Formalism--The Sliding Scale Approach to Unconscionability', 2012, 44 *Loyola University of Chicago Law Journal,* p. 3 (emphasis added).

BAIRD does not really share this rather bleak view, since he sees the use of abusive boilerplate as a rather impractical way for a seller to take advantage of a buyer. In his view, abusing boilerplate requires a seller that is planning to stay in the market for a long time, enough to profit from, for example, draconian exclusion clauses buried in the fine print, something that a long-term seller cannot afford to do in order to protect his reputation. He even adds that *"*[s]*ellers who use too much fine print are shunned"* (BAIRD, D. G., 2006, supra note 175, p. 938). The problem with this argument is that it goes against the available evidence, where we see several market players who, despite a long trajectory, insert abusive clauses in their contracts, profit from them, and stay in the market. Furthermore, the large majority of contracts that people conclude every day are actually made up of almost nothing *but* fine print, with the respective sellers not really being the victims of any kind of shunning whatsoever. The best example of this situation is that of the American credit card market, where long, complex, and often abusive, terms are sent to consumers in barely readable forms, and yet millions of Americans sign up for new credit cards every year. As MANN explains, a typical credit card agreement *"might have about eight single-spaced pages of small (seven-point) type, including about eighty separately numbered provisions,"* and *"*[m]*any of the terms in the agreement are comprehensible only for cardholders with specialized knowledge"* (MANN, R. J., '"Contracting" for Credit', 2006, 104 *Michigan Law Review*, no. 5, p. 907).

> *making sense; contractual liberty becomes unilateral because it only works in the benefit of the strong."*[178]

The calls for regulation have changed over the years. As *laissez faire* proponents dwindle, the regulatory actions being sought are no longer based on the alleged weakness of some of the market participants, but rather on the fact that perfect markets simply do not exist, and that regulation will actually serve to improve and facilitate commerce.[179] The proponents of regulation have accurately argued that people would be more likely to enter into contractual agreements if they knew that that there were few chances of encountering nefarious terms and unwelcome surprises in their contracts. Although this point might appear to be moot when it comes to monopolistic powers (since a person might be forced to contract anyway, regardless of the terms, due to the lack of alternatives) it is precisely in those situations where the issue of regulation becomes even more essential, as it is then when people need to be protected from being at the mercy of a ruthless and unethical contractual party.

Due to its long and eventful history, it is easy to predict that the issue of regulation will continue to be a point of discussion for years to come. Although since the fall of the Soviet Union, and the massive failure of absolute statism, the calls for an overbearing state have subsided everywhere except in the fringes of politics, the calls for absolute libertarian utopias have also lost a big part of their strength. The issue no longer seems to be about whether or not to regulate, but rather what, how much and how often should it be done. As REITER argued:

> *"We have observed the replacement of the idea that contract alone might be the balance wheel of society by one suggesting that political institutions ought to perform this role instead.* [...] *Ultimately, 'the market' turns out to have been a short term bridge philosophy carrying society from a period of organization in religious and feudal terms to the modern era of democratic political direction. A contemporary theory of contract must recognize these facts by rejecting 'the market' in favour of an institutionally mixed and discretionary measure of social progress."*[180]

2.5 Reading the Fine Print

Despite the occasional vitriol, it seems clear that boilerplate contracts are useful.[181] They greatly reduce the cost of doing business, since the drafter "*familiar with its products and*

[178] AGUILAR GUTIÉRREZ, A., 1955, supra note 109, pp. 31–32.
[179] SMITH, S. A. & ATIYAH, P. S., 2006, supra note 113, pp. 18–19.
[180] REITER, B. J., 1981, supra note 97, pp. 352–353.
[181] KESSLER, F., 1943, supra note 121, p. 631.

services, can best determine the risks it can efficiently bear and the risks better allocated to the consumer. Further businesses that use standard forms do not have to bear the cost of bargaining over terms. Drafters can reduce prices because of these savings."[182] As KESSLER argued in his seminal work on contracts of adhesion, "[i]*n so far as the reduction of costs of production and distribution thus achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts. And there can be no doubt that this has been the case to a considerable extent."*[183]

RAKOFF also argues that these form contracts legitimately benefit the companies using them, promoting efficiency within *"a complex organizational structure,"* since:

> *"First, the standardization of terms, and of the very forms on which they are recorded, facilitates coordination among departments. The costs of communicating special understandings rise rapidly when one department makes the sale, another delivers the goods, a third handles collections, and a fourth fields complaints. Standard terms make it possible to process transactions as a matter of routine; standard forms, with standard blank spaces, make it possible to locate rapidly whatever deal has been struck on the few customized items. Second, standardization makes possible the efficient use of expensive managerial and legal talent. Standard forms facilitate the diffusion to underlings of management's decisions regarding the risks the organization is prepared to bear, or make it unnecessary to explain these matters to subordinates at all. Third, the use of form contracts serves as an automatic check on the consequences of the acts of wayward sales personnel. The pressure to produce may tempt salesmen to make bargains into which the organization is unwilling to enter; the use of standard form contracts to state the terms of the deal obviates much of the need for, and expense of, internal control and discipline in this regard."*[184]

Additionally, some proponents of boilerplate contracts stress that the adhering parties will not be victims of abuse, because they will always be able to shop for better terms (paying for them, of course) if they choose to do so. As the theory goes,

> *"sellers have little incentive to take advantage of the buyer because they risk lowering their reputation. In addition, the buyer does not incur the risk of reputation loss because, in a competitive market, the buyer can seek other available distributors. As a result, the appearance of one-sided terms may not be one-sided after all. The seller's reputational considerations and disinclinations to sue*

[182] HILLMAN, R. A., 'Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?', 2006, 104 *Michigan Law Review*, no. 5.
[183] KESSLER, F., 1943, supra note 121, p. 632.
[184] RAKOFF, T. D., 1983, supra note 137, pp. 1222–1223.

> *consumers are a significant cost for the seller and, as a result, the seller behaves in the consumer's best interests."*[185]

The problem, as KESSLER pointed out, is that contracts of adhesion are often used by parties with a strong bargaining power. And so, even though these contracts *"are not objectionable in the abstract, they do tend to be one-sided documents"*.[186] As a result, there is a very high risk that they will contain one-sided terms that negatively affect the weaker parties, who are in need of the goods or services provided by that strong enterprise, and who will *"not* [be] *in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses."*[187] As such, *"*[t]*hey have become one of the many devices to build up and strengthen industrial empires."*[188]

Boilerplate contracts are also plagued by issues related to their fine print or standard terms. This is particularly (but not exclusively) relevant when it comes to consumer contracts, where it is understood that the consumer, a person who is most likely not versed in "legalese" or in the technical details of what he's acquiring, must agree to the terms placed in front of him.[189] As SLAWSON notes, *"*[t]*he extreme specialization of function*

---

[185] RICHARDSON, M. S., 'The Monopoly on Digital Distribution', 2014, 27 *Pacific McGeorge Global Business & Development Law Journal*, no. 1.

[186] ANGELO, A. & ELLINGER, E. P., 1992, supra note 176, p. 458. MAXEINER mentions that parties that employ standard form contracts do so *"in their own interests,"* citing the legal counsel of a certain Fortune 500 company who said *"*[t]*he purpose of form contracts is primarily to protect the needs of our* [internal] *clients, not to protect the interests of our customers"* (MAXEINER, J. R., 2003, supra note 103, p. 114).

[187] KESSLER, F., 1943, supra note 121, p. 632.

[188] ibid., p. 632.

[189] Defined by Webster's Dictionary as "*the specialized language of the legal profession*", legalese has been the object of much debate. BECKER, for example, explains that legalese often comes as a result of some kind of "professional entitlement," as some legal writers claim *"that they have earned the right to use an elite jargon"* (BECKER, S. M., 'Improve Your Written Communication Skills: Eliminate Legalese', 1992, 7 *Commercial Law Bulletin*, no. 4, p. 15). BENSON explains that the issue with legalese is not that it is simply a different style or prose; instead, legalese *"is strange in the extreme, off the edge of the range of normal prose styles even in a diverse society. It is so out of touch with ordinary language that-in the hands of a powerful, exclusive profession- it becomes at best a symbol of alienation and at worst a tool to intimidate and exploit the public"* (BENSON, R. W., 1984, supra note 51, p. 522).
Despite the numerous criticisms levelled against legalese, however, ARMSTRONG defends its use, suggesting that these criticisms often mistaken. He explains that "[t]*he fact that nonlawyers fail to understand legal documents without interpretation and explanation is immaterial so long as their meaning is perfectly clear to other lawyers. Legal documents are, after all, drafted primarily for the benefit and use of other lawyers*" (ARMSTRONG, W. P., 'Point: In Defense of Legalese', 1992, 3 *The Scribes Journal of Legal Writing,* p. 34). In his rebuttal to ARMSTRONG, JOHANSON suggests that lawyers should not draft documents that only lawyers can understand, since "[w]*e ought to be drafting "workable" documents -contracts, say, that our clients can both understand and apply in everyday life.* [...] [T]*he effect of addressing one's documents primarily to some mythical judge - and not the ordinary person on the street - is that the meaning becomes more obscure to judges and lawyers as well as to ordinary people*" (JOHANSON, S. M., 'Counterpoint: In Defense of Plain Language', 1992, 3 *Scribes Journal of Legal Writing,* p. 39). Confirming JOHANSON's words, research shows that lawyers and judges seem to prefer plain language over the often complex legal jargon (KIMBLE, J. & Prokop Jr, Joseph A, 'Strike Three for Legalese', 1990, 69 *Michigan Bar Journal*)

of modern life requires that we contract with each other too frequently to take time to reach even a mildly complicated agreement every time we do, and the complexity of modern life and modern law combine to demand that even minor agreements usually be complicated."[190] What is more, these long and dense terms will be drafted by a vendor whose principal concern is protecting himself (or his clients).[191]

Despite its special relevance to consumers, these issues surrounding the use of boilerplate are also applicable to business contracts, where one of the parties will often be in a much better position (both in terms of knowledge and bargaining power) compared to its counterpart, even if they are dealing within their own trade. Small businesses will often have a rather limited capacity to understand both legal and technical terms, and can thus also fall victim to a powerful party that dictates terms in a complex manner.[192]

---

something that in itself seems to contradict ARMSTRONG's assertions about addressing legal documents to lawyers and judges.

In general, it seems safe to say that the phenomenon observed in contracts, as well as even in some court decisions, is one of "writer-centric writing", instead of "reader-centric." In the latter, the writer places an emphasis on the reader being able to understand the information being conveyed, in the former, however, the writer is "*not writing at all; he's merely communing privately with himself - that is, he's simply putting thoughts down on paper*" (SALZWEDEL, M. R., 2015, supra note 6, pp. 72–73).

[190] SLAWSON, W. D., 'Standard Form Contracts and Democratic Control of Lawmaking Power', 1971, 84 *Harvard Law Review*, no. 3, p. 532. BROWNE and BIKSACKY also add as a complication, closely related to that of specialization, the high complexity of modern merchants. As they explain:

> *"*[M]*odern commerce is interdependent-multiple parties are all working together to buy and sell products and services. The result of this interdependence is that each party engages in specialization and relies on the information of other parties with whom they conduct business.* [...] *That is, parties become more ignorant about the information required for informed transactions because they can place confidence in other contracting parties."*

BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, p. 239.

Although these authors make this comment within a general commentary on consumer contracts, their reflections are fully applicable to commercial contracts. Indeed, interdependence is just as important in commerce as it is in consumer contracts, even if some caveats (such as a larger expectation of knowledge on the part of merchants) should be kept in mind.

[191] WOODWARD JR, W. J., 2015, supra note 134, p. 918.

[192] HOFER, A., 'Legalese to the Detriment of Small Business: Midwest Family Mutual Insurance Co. v. Wolters', 2015, 41 *William Mitchell Law Review*, no. 4, p. 1554 ("[f]*ew contractors are trained in the complexities of contract interpretation and may not be aware of the broad meanings courts sometimes attach to common terms*"). Defining a term as elastic as "small business" is a very complex task, and definitions often exclude or include more businesses than they should. According to MORANT, for example:

> *"The prototypical small business usually consists of a locally and privately owned enterprise with a limited number of employees. Except for generalized size characteristics, small businesses often defy stereotype. They usually cater to a segment of the market not served by many other businesses. Their variant commercial objectives, dictated by the desire to appeal to a particular niche as defined in a coherent business plan, generally ensure some semblance of commercial uniqueness."*

MORANT, B. D., 2003, supra note 126, p. 240. From this perspective, it would seem that the character of "small business" comes from both the size as well as the "niche" in which they work. Limiting our understanding of "small businesses" to niche commerce, however, seems unnecessarily strict, as it would seem to exclude small companies that are simply trying to be part of an already established economic sector. While we might disagree

Furthermore, just like consumers, small businesses will often be unable to afford to hire attorneys to review the contracts they sign, or to discuss the implications of contractual terms. This situation forces small businesses to have to rely on their own limited experience in order to make decisions, something that is often insufficient.[193] As MORANT notes:

> *"The competitive nature of the free market system and the usually limited resources of these enterprises potentially prejudice their bargaining status. Moreover, the formalistic starkness of contractual rules often aggravates their bargaining difficulties."*[194]

UDELL illustrates this point by referencing the case of franchises, where the franchisor will be in a much more powerful situation than the individual franchisee, and so will be able to impose the terms. Simply expecting the small business to dicker over the terms, or to have the necessary skills required to understand everything in his contract is unrealistic:

> *"Despite admonishments to 'read the contract before you sign', many franchisees sign agreements that are not in their best interest. As a consequence they suffer. One of the major reasons franchisees sign unfair contracts which contain* [unfair] *provisions* [...] *is that they do not understand the terminology and 'legalese' used in most franchise agreements. While some franchisees do obtain legal advice, their lawyers are frequently ill-prepared to evaluate the franchise agreement from a managerial point of view. Consequently, the franchisee is poorly protected from the abuses of franchising."*[195]

---

with MORANT's reference to a specific economic niche, definitions of small businesses usually resort to an individual characteristic as a tell-tale sign of its "small" character. Indeed, as STREET & CAMERON note,

> *"a small business is alternately defined in terms of structural characteristics such as the number of employees or number of functional divisions, performance characteristics such as amount of annual revenues or depth of the product line, or both. Definitions also vary depending on factors such as industry type. We also observe that small business is a relative term that often refers to a firm that has fewer resources (for example, employees, revenue, or assets) when compared to others in its industry".*

STREET, C. T. & CAMERON, A.-F., 'External Relationships and the Small Business: A Review of Small Business Alliance and Network Research', 2007, 45 *Journal of Small Business Management*, no. 2, p. 240. In light of the difficulties defining the term, and once again echoing the words of STREET & CAMERON, for the purposes of our work, the term "small business" will be defined as "*an independently owned and operated enterprise that is not dominant in its field or industry and which has relatively fewer resources than other companies in its market*" (ibid., p. 240). Although, certainly, some flaws can probably be found in this definition, it is both wide and narrow enough for our ends.

[193] STEVERSON, J. W., 'I Mean What I Say, I Think: The Danger to Small Businesses of Entering into Legally Enforceable Agreements That May Not Reflect Their Intentions', 2003, 7 *Journal of Small and Emerging Business Law*, p. 285.

[194] MORANT, B. D., 2003, supra note 126, pp. 236–237.

[195] UDELL, G. G., 'Franchising: America's Last Small Business Frontier?', 1973, 11 *Journal of Small Business Management*, no. 2, p. 34.

Despite these problems, and which affect virtually the majority of contracts that are concluded every day, adhesive terms are often treated like any other contractual clause.[196] Indeed, when it comes to the matter of readership, that is whether the parties actually read and understand what they sign, the standard position is rather straightforward: A party cannot excuse herself from the contract arguing that she did not read or understand the terms, as it was her duty to protect her own interests by reviewing her agreement.[197] As a US District Court Judge ruled in a 2003 case:

> *"The fact that* [...a party] *claims that he did not read the contract is irrelevant because absent fraud* [...], *failure to read a contract is not a get out of jail free card."*[198]

As WILKINSON-RYAN explains:

> *"As a matter of black letter law, not knowing the terms of one's contract does not excuse a party from liability.* [...] *Non-readership is no excuse, even when the facts are sympathetic. In* [Heller Fin., Inc. v. Midwhey Powder Co.], *a party subject to a forum-selection clause argued that the term should be unenforceable because of the plaintiff's poor eyesight; the Seventh Circuit noted that 'it is no defense to say, 'I did not read what I was signing." In still another case, mortgage borrowers who discovered that their agreement contained an adjustable rate that they did not apprehend before signing were held liable; the court reasoned '[t]hat the plaintiffs did not read any of these documents does not place culpability on the defendant.' In sum, whether or not a party has read the contract is usually irrelevant to the determination of mutual assent."*[199]

---

[196] CHING, K. K., 'What We Consent to When We Consent to Form Contracts: Market Price', 2015, 84 *University of Missouri-Kansas City Law Review*, no. 1, pp. 2–3 ("[n]*o one challenges this premise* [that people do not read their contracts], *but sometimes it seems to be forgotten, and form contracts are analyzed as if people did read them*").

[197] CALAMARI, J. D., 'Duty to Read--A Changing Concept', 1974, 43 *Fordham Law Review*, no. 3, pp. 341–342 ("*a party who signs an instrument manifests assent to it and may not later complain that he did not read the instrument or that he did not understand its contents. A leading case has stated that 'one having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature.' The feeling is that no one could rely on a signed document if the other party could avoid the transaction by saying that he had not read or did not understand the writing*").

[198] *DeJohn v. The TV Corporation International* [2003], 245 F. Supp. 2d, 913–926, p. 919.

[199] WILKINSON - RYAN, T., 'A Psychological Account of Consent to Fine Print', 2014, 99 *Iowa Law Review*, no. 4, pp. 1753–1754 *See* also *Heller Financial, Inc. v. Midwhey Powder Co., Inc* [1989], 883 F. 2d, 1286. It is worth mentioning that even when this readership doctrine is accepted, its application is not absolute since, as BECHER notes, the duty to read is

> *"only one of many factors to be considered and balanced when deciding whether to hold parties to the written terms of their agreement. The* [American] Restatement [(Second) of Contracts], *for example, still grants relief from terms that the drafting party has reason to know are unintended by the other party. Thus, the duty to read does not encompass all terms that might be found in print. For instance, courts will not strictly apply the duty when terms are in fine print; when provisions and notices are*

This represents a challenge for the courts, since, as CHING notes,

> "*the drafters of these contracts know not only that their forms will not be read, but also that it is reasonable for consumers to sign them unstudied,* [so] *a reasonable drafter should have no illusion that there has been true assent to these terms. So, if the drafter of a form contract should know that a particular term was not read by the promisor, it is unreasonable to think the promisor meant to bind himself to that term, even if he signed the agreement, clicked 'I agree,' or somehow manifested his assent to the form."*[200]

The 1934 English High Court case of *L'Estrange v F. Graucob Ltd*. perfectly illustrates the problems associated with this idea of being bound by what a party is expected to have read when she signed, even if in reality there was no actual reading being done.[201] In this case, the plaintiff, the owner of a café, purchased a cigarette machine from the defendants. The contract signed by the plaintiff, and which she admitted she had not read, included a series of clauses in small print that, among others, excluded "*any express or implied condition, statement, or warranty, statutory or otherwise"* that were not contained in the contract.[202] After the machine failed several times, the plaintiff informed the seller that she was forfeiting her deposit and that she wanted to terminate the transaction. After the defendants refused to terminate the contract, the plaintiff brought an action

---

> *relatively hidden, such as in letterheads and in tags; or when a party misrepresents the terms. Simply stated, some other contract doctrines, such as unfair surprise, unconscionability, duress, and fraud, might trump the duty to read."*

BECHER, S. I., 'Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met', 2008, 45 *American Business Law Journal*, no. 4, p. 730.

Furthermore, despite WILKINSON-RYAN's dire words, sometimes facts can be sympathetic enough for the courts to consider that a party who did not read the contract can escape the bargain. In *St. John's Hospital v. McAdoo*, for example, a New York court allowed a defendant to escape from a contract he had signed with the hospital in a situation of trauma and anxiety during a medical crisis. As the Court explained:

> *"It is settled law that as a literate, competent adult,* [a] *defendant is ordinarily held legally responsible for his contractual obligations, once it is determined that he has signed the contract. However, there are circumstances under which a reasonable person might sign a contract, without reading or understanding it, so that requiring adherence to its terms would be grossly unfair. In such situations some courts have inquired behind the objective fact of the signature to the contract, into the circumstances under which it was signed and into the relative positions of the parties. The courts do so in recognition of the possibility that the contract in question may have been signed without opportunity for arm's length negotiations.*
> […]
> *It is reasonable in this situation for [the] defendant to have seen himself as powerless to do anything other than sign the form. A hospital emergency room is certainly not a place in which any but the strongest can be expected to exercise calm and dispassionate judgment. The law of contracts is not intended to use 'superman' as its model. If the reasonable man standard is applied here, defendant's failure to read the document or to give it more than the most cursory attention is understandable."*

St. John's Hospital McAdoo [1978], 94 Misc. 2d, 967–971, pp. 969–970.

[200] CHING, K. K., 2015, supra note 196, p. 4.

[201] *L'estrange v. F. Graucob Ltd.* [1934], 2 KB, 394–407.

[202] ibid., p. 396.

against them arguing, inter alia, that there had been a breach of the implied warranty *"on the sale of the machine that it was reasonably fit for the purpose for which it was sold."*[203] The defendants argued in response that the plaintiff had signed a contract excluding such warranties. The lower court ruled in favor of the plaintiff, holding that the she did not know the clauses that she was agreeing to, and that the defendants did not do *"what was reasonably sufficient to give the plaintiff notice of the conditions."*[204] The Court of Appeal, however, reversed the decision and ruled in favor of the plaintiffs. As SCRUTTON LJ explained in his decision:

> *"In this case the plaintiff has signed a document headed 'Sales Agreement,' which she admits had to do with an intended purchase, and which contained a clause excluding all conditions and warranties. That being so, the plaintiff, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she has not read them."*[205]

This decision shows the inadequacy of the idea of readership as an absolute duty on the part of the adhering party, as it seems to be more apt for times long gone, and which were characterized by brief and simple agreements. The best illustration of the unsatisfactory character of this decision comes from the words of MAUGHAM LJ, one of the judges in this case, and who started his concurring decision with the words:

> *"I regret the decision to which I have come, but I am bound by legal rules and cannot decide the case on other considerations."*[206]

As this case shows, the problem with this general rule on readership is that it places itself outside the realms of rationality, justice and reality. If it is a known and accepted fact that people, for many different reasons, do not read boilerplate terms, then perhaps blindly

---

[203] ibid., p. 398.

[204] ibid., p. 400.

[205] ibid., p. 404. Although we cite a Common Law case, Civil Law decisions holding an adhering party to the terms of an unread contract are also quite common. In a 1970 case, for example, the Colombian Supreme Court ruled that

> *"For a legal act that produces obligations to become a contract, it is enough that two or more people participate in its formation, and it is not relevant whether, at the time, one of them simply accepted the conditions imposed by other; by giving that* [acceptance] *she has contributed to the formation of the contract, since she has voluntarily agreed even though she could have opted not to."*

Cited in LAGUADO GIRALDO, C. A., 'Condiciones Generales, Cláusulas Abusivas y el Principio de Buena Fe en el Contrato de Seguro', 2003, 105 *Universitas,* p. 234.

[206] *L'estrange v. F. Graucob Ltd.* [1934], p. 405. An even stronger condemnation would come later from Lord DENNING who, despite having represented the defendant in *L'estrange v. Graucob*, from his position as Master of the Rolls referred to this and other similar decisions as *"a bleak winter for our law of contract." See George Mitchell (Chesterhall) Ltd. v Finney Lock Seeds Ltd.* [1983] QB, 284–315, p. 297.

accepting their enforceability due to an abstract "duty to read" should not be done so quickly. After all, as BURKE noted:

> *"Courts know that parties sign or manifest assent to standard form contracts that they have not read, understood or negotiated."*[207]

2.6 Boilerplate and the Opportunity to Read

The problems associated with the use of fine print terms are many. First, it is widely believed (and empirical evidence confirms it) that people simply do not read the terms of the contracts they sign; second, evidence also shows that even among the very small minority of people who do read the terms, very few of them actually understand what they read.[208] This poses a big challenge to the idea of contractual freedom, as it is hard to believe that there is freedom in an agreement on terms that were not read or understood, often because it is virtually impossible to do either.[209] Adding to the problem is the fact that, as evidence suggests, simply adding more information does not necessarily affect the purchasing decisions of the consumers; in other words, even when the consumers know more about the product or about the terms of the contract, the decision of whether or not to purchase the item seems unaffected.[210]

At this point it is important to note that the issues arising from the use of boilerplate are not, necessarily, a justification to do away with fine print altogether. Instead, they are merely a justification to tread carefully when it comes to its analysis. It is not, therefore, that boilerplate is negative in and of itself, but rather that it creates a somewhat dangerous situation for the adhering party and, as such, requires close scrutiny and regulation. It is an issue of consent, and about what value we can give to the "agreement" given to a boilerplate contract.

---

[207] BURKE, J. J. A., 'Contract as Commodity: A Nonfiction Approach', 1999, 24 *Seton Hall Legislative Journal*, no. 2, p. 299.

[208] For some studies on the issue of readership, *See*, for example, PLAUT, V. & BARTLETT [III], R. P., 'Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements', 2012, 36 *Law and Human Behavior*, no. 4; BAKOS, Y. et al., 'Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts', 2014 *New York University Law and Economics Working Papers*; EIGEN, Z. J., 'When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance', 2012, 41 *The Journal of Legal Studies*, no. 1; and EIGEN, Z. J., 'Experimental Evidence of the Relationship between Reading the Fine Print and Performance of Form-Contract Terms', 2012, 168 *Journal of Institutional and Theoretical Economics*, no. 1.

[209] MANN, R. J., 2006, supra note 177, p. 903 ("*the reality is that the typical consumer contract requires a level of literacy and reading comprehension that is far beyond the grasp of the normal American*").

[210] MAROTTA-WURGLER, F., 'Does Contract Disclosure Matter?', 2012, 168 *Journal of Institutional and Theoretical Economics JITE*, no. 1, p. 96.

> *"Form contracts present opportunities for overreaching that make it unfair to presume that a person's signature on a contract indicates consent. Such contracts might give the appearance of mutual consent, but they totally lack agreement in any realistic sense of the word. As a practical matter, few people read form contracts. Even if a person wants to read a form contract, he may not be afforded the time to read it. If he is permitted the time to read it, he may not have the education or business experience to be able to understand the language used in the contract or the likely legal effect of such language. If he understands the language and effect of the contract, he may not notice terms written in fine print or printed in unexpected places on the document. Even if he reads and understands the contract perfectly, he may not have any ability to negotiate for its terms and may enter the contract because he has no alternative."*[211]

MARINELLI, echoing the seminal work of LLEWELLYN, concurs with this idea of a lack of real consent to boilerplate, arguing that:

> *"Instead of thinking about 'assent' to boilerplate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on this form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in."*[212]

---

[211] MALLOR, J. P., 1986, supra note 101, p. 1069. WOODWARD goes as far as suggesting that boilerplate and contracts should be seen as completely different entities. He warns, however, that "[t]*his will be hard to do and will be met with organized business resistance. Considering these forms to be 'contracts' serves vendors well, providing the ready explanation 'you agreed to it' when attempting to enforce a one-sided term to the individual's detriment"* (WOODWARD JR, W. J., 2015, supra note 134, p. 935).

[212] MARINELLI, A. J., 'Evolving Concept of Unconscionability in Modern Contract Law', 1998, 5 *Journal of Law & Business,* p. 18. According to LLEWELYN, an analysis of form contracts requires that these are divided in two separate agreements:

> *"One contract comprises the 'dickered' terms, those actually bargained for, to which the non-drafting party has manifested a specific assent. The other comprises the 'supplementary boilerplate' contract, based on the un discussed (and almost certainly unread) terms printed on the form. The non-drafting party does not manifest any specific assent to the supplementary boilerplate contract. He assents only to the general pattern of the transaction, and to any reasonable and decent terms which might be expected in such a transaction, in addition to those bargained for."*

SPANOGLE, J. A., 'Analyzing Unconscionability Problems', 1969, 117 *University of Pennsylvania Law Review*, no. 7, p. 939.

This idea of the "blanket assent", the acceptance by the adhering party to *"any not unreasonable or undecent terms"* is *"said to dominate American treatment of standard forms"* (MAXEINER, J. R., 2003, supra note 103, p. 116).

Some case law has been sympathetic to this view of the fine print. Indeed, as Lord REID expressed in a 1966 case on exemption clauses included in a charterparty:

> *"Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining."*[213]

As some have argued, the blind acceptance of the enforceability of boilerplate terms is the product of a legal system that "*owes its foundations to the days of the arm's length bargain to trade a horse – to the notion that contract provisions come prior to the transaction and are known and custom designed by the parties. In that setting, of course, reading the contract is a simple task that is commonly done and is necessary to assure that the text reflects the terms agreed upon*."[214] The problem is that, as it has been described above, nowadays contracts are very different from the simple transactions that gave rise to contract law, being more often than not drafted by only one party, and "negotiated" only in a take-it-or-leave-it basis.[215]

> *"In the world of standardized terms and contracts, the range of choice is quite narrow. Negotiation is typically not an option. The consumer's only substantial options are to accept the terms presented, continue shopping for other potential providers, or abandon the purchase altogether. If the document is likely to be hard to read and even harder to revise, a rational consumer might not expend the effort to review the terms."*[216]

---

[213] *Suisse Atlantique Société d'Armement Maritime S.A. v N.V. Rotterdamsche Kolen Centrale* [1967], 1 AC, 361, p. 406. Lord REID went on to distinguish these "non-bargained" terms from *"the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason."*

[214] BEN-SHAHAR, O., 'The Myth of the 'Opportunity to Read' in Contract Law', 2009, 5 *European Review of Contract Law*, no. 1, pp. 2–3.

[215] WILHELMSSON, T., *Standard Form Conditions*, in Hartkamp, A. S. et al. (eds.), *Towards a European Civil Code*, 2011, p. 571 ("[t]*raditional contract thinking is built on the ideal of individual contracting. Each part of the contract is thought of as expressly agreed upon by the parties. As is well known, however, probably a rather small percentage of all contracts is actually made in this way. Modern mass transactions require standardized conditions*").

[216] MANN, R. J., 2006, supra note 177, pp. 905–906 As KIM noted, in regards to electronic commerce:

> *"It is not a viable option for the consumer to decline the terms of any particular agreement if the consumer wishes to engage in online activity. The party's 'assent' is void of volition and merely reflects a refusal on the part of the consumer to resist market forces through self-deprivation that would have profound social and economic consequences."*

Cited in WAISMAN, D. A., 'Preserving Substantive Unconscionability', 2015, 44 *Southwestern Law Review*, no. 2, p. 101.

From this perspective, it is naive, if not downright illusory, to think that there is any real negotiation or bargain to speak of when dealing with a contract of adhesion.[217] As D'AGOSTINO explained, the traditional free market view of contracts, and according to which

> *"a free competitive market provides efficient clauses in equilibrium* [...] *can be true only when consumers are perfectly informed about any relevant aspect of the transaction they are involved in. This is an assumption that may collapse in the presence of contracts of adhesion if consumers have to pay a high cost to read some clauses or if they are not 'sophisticated' enough to take into account the risk involved in signing without reading."*[218]

The above issues have not gone unnoticed, and there is actually a rather widespread consensus on the fact that boilerplate terms pose a challenge to the free market and to meaningful assent.[219] Although this consensus might not extend to exactly *how* to regulate this matter, agreement exists on the fact that some degree of regulation is required, as the alternative would give the dominant party a great opportunity to commit abuses against the weaker one.[220]

> *"The existence of obligational asymmetric information is a serious market failure that can undermine the efficiency of many consumer transactions. Contracts will systematically increase welfare if, and only if, contracting parties have the*

---

[217] WHITE has referred to this situation as one "*autistic contracts,"* arguing that:

> *"Parties to modem form contracts sometimes interact with one another in the same way a parent of an autistic child interacts with that child. When a licensor offers a software license with the assertion that it will infer acceptance of all the license terms if the licensee removes the power cord from its plastic wrapper, the licensor is drawing an inference from the licensee's behavior just as doubtful as the inference a hopeful parent draws from an autistic child's apparently knowing response to the parent's statement."*

WHITE, J. J., 'Autistic Contracts', 1999, 45 *Wayne Law Review*, no. 4, p. 1693.

[218] D'AGOSTINO, E., 2014, supra note 138, p. 3.

[219] *See* also COHEN, M. R., 1933, supra note 16, p. 589 ("*standardized contracts* [...] *serve the interests of some better than those of others; and the question of justice thus raised demands the attention not only of legislatures but also of courts that have to interpret these standard forms and of administrative bodies that have to supervise their enforcement"*). On some examples of legislative measures aimed at preventing the abuse of boilerplate, *See* HAHLO, H. R., 'Unfair Contract Terms in Civil-Law Systems', 1981, 98 *South African Law Journal*, no. 1, p. 72.

[220] *See* SALAZAR, D. F., 'Theoretical Approximation and Experimental Evaluation of Market Functioning when Transactions are Regulated by Adhesion Contracts', 2008 *Latin American and Caribbean Law and Economics Association (ALACDE) Annual Papers,* p. 2 ("[t]*he reason for State intervention was that adhesion contracts had become a means of increasing company advantage at the cost of adherents through the imposition of abusive clauses which were not completely understood by those who accepted them"*) and also FAURE, M. G. & LUTH, H. A., 'Behavioural Economics in Unfair Contract Terms: Cautions and Considerations', 2011, 34 *Journal of Consumer Policy*, no. 3, p. 340 ("[i]*nformation asymmetries are also often advanced as a reason to intervene in consumer markets"*). LONEGRASS notes how the consensus regarding the need for regulation has strongly manifested itself in consumer law, where *"legal and interdisciplinary scholarship has definitely established that meaningful, voluntary assent to standardized terms is an impossibility, as consumers are largely unable to understand the contracts that they sign and are virtually powerless to find better terms elsewhere in the market"* (LONEGRASS, M., 2012, supra note 177, p. 3).

> *information necessary for an informed evaluation of all transactional aspects (including, of course, contract terms). Stated slightly differently, information inequalities belie the maxim that promisees (i.e., consumers) are the best judges of their own utility. Where imperfect information exists, the ability of parties to maximize utility via open market transactions will inevitably decrease."*[221]

As a way to lessen the problems inherent to boilerplate, scholars and regulators have developed the doctrine of "the opportunity to read". Based on this doctrine, the issue is not so much whether a party to a boilerplate contract *read* the terms, but rather whether he had the *opportunity* to do so. Since, practically speaking, there is no way to force someone to read the terms of his contract, this doctrine argues that the law should strive to ensure that, if he wishes to do so, he can at least be able to review those terms before signing. The manner in which this goal is achieved (or at least attempted) is by means of increasing disclosure, so as to empower the parties by giving them all the necessary information to give their assent.

As the theory goes, more information means more power for the adhering party, an increased ability to make informed decisions and, in the long run, a more democratic market system.[222] Additionally, even if it is accepted that many people will not read, those who do engage in the reading process would anyway benefit those who do not, because their knowledge would force businesses to adapt their terms to make them more competitive and attractive. This "informed minority" would thus shape the boilerplate terms into something friendlier for all consumers, even for those who did not bother to look at what they were signing. From this perspective, it would be incorrect to focus on whether *individuals* are informed, since the truly relevant factor would be whether competition among firms allows for the market to reach an optimal price, something that would be reached thanks to this minority of comparison shoppers.[223]

As MAROTTA-WURGLER explains, the appeal of the "opportunity to read" is easy to understand:

> *"In theory, disclosure is an ideal regulatory solution because it preserves consumer choice, does not interfere with market mechanisms, and is cheaper to implement than more invasive alternatives such as mandatory terms or minimum standards. The theorist's hope is that disclosure regulation forces sellers to compete on the*

---

[221] BECHER, S. I., 2008, supra note 199, p. 734. Although BECHER mentions consumers specifically, his comments on boilerplate can also apply, *mutatis mutandis,* to commercial contracts.
[222] BEN-SHAHAR, O. & SCHNEIDER, C. E., 'The Failure of Mandated Disclosure', 2010, 159 *University of Pennsylvania Law Review*, no. 3, p. 650.
[223] WOODWARD JR, W. J., 2015, supra note 134, pp. 923–924.

> *information disclosed and thus represents a superior alternative to measures that might distort markets or reduce choice."*[224]

On the basis of this theory, it has been proposed that different degrees of disclosure duties for businesses should be established.[225] This system, akin to that established for foods and their "Nutritional Facts" information, would force the businesses to provide or make available to the adhering party the terms and conditions of their contract prior to its conclusion. This is the position adopted in, for example, the Principles of the Law of Software Contracts (hereafter "PLSC") by the American Law Institute (hereafter "ALI"), and in several European regulatory texts and model drafts. The premise underlying these regulatory texts and proposals is to allow for a more substantial opportunity to read, so as to increase the number of people reading the terms that they sign, allowing for a more meaningful assent.[226]

In the realm of software contracting, the PLSC tackled this challenge by establishing a disclosure obligation on the software provider. In essence, this obligation establishes that *"a transferee will be deemed to have adopted a standard form contract if* […] *the standard form is reasonably accessible electronically prior to the initiation of the transfer at issue"*, even adding the additional requirement that the terms must be *"reasonably comprehensible."*[227]

The drafters of the PLSC were particularly concerned with so-called shrink-wrap contracts, agreements where the adhering party only becomes aware of the terms after he gives his acquiescence.[228] Clearly, the ALI understood that that market forces alone would

---

[224] MAROTTA-WURGLER, F., 'Even More than You Wanted to Know About the Failures of Disclosure', 2015, 11 *Jerusalem Review of Legal Studies*, no. 1, p. 63.

[225] We use the terms "business" or "provider" loosely, referring to the party that imposes her terms in the contract of adhesion. It should be noted, however, that by the use of these words we do not mean to limit the applicability of this discussion to a consumer setting.

[226] BEN-SHAHAR, O., 2009, supra note 214, pp. 3–4.

[227] PLSC § 2.02.

[228] The name "shrink-wrap contract" is a reference to the shrink-wrap around the box of a product, the opening of which was deemed as an acceptance of the terms contained inside of the box. These post-purchase terms are also referred to as "pizza-box contracts." LYNN explains the different kind of terms presented in electronic transactions as follows:

> *"Electronic contracts of adhesion are generally categorized as clickwrap, shrinkwrap, or browsewrap. A clickwrap agreement involves a consumer's assent to the terms of an Internet transaction by clicking on an 'I accept' or 'I agree' box. Reading the terms is irrelevant. If the box is not clicked, the transaction will not be completed.* […]
>
> *A shrinkwrap contract is inserted into a product package, often software. The act of opening the product constitutes assent. This also applies to downloading software directly from the Internet where assent is implied by the use of the program.* […]
>
> *Browsewrap refers to terms and conditions that are posted on a website, typically accessible via a hyperlink at the bottom of the page. Browsewrap agreements do not require users to affirmatively manifest consent. The user is deemed to have consented if she continues on the website after having had notice of the terms."*

not be able to ensure that providers would not abuse their market power and impose unfair terms on the adhering party. However, since the drafters were wary of direct regulation of terms (e.g. prohibiting certain provisions), they opted instead for a procedural approach, ensuring the fairness of the contracts not by regulating their content, but the way in which the contracts were made. By doing this, the ALI hoped that disclosure would "*promote the emergence of an informed minority*", while avoiding "*the intrusive and controversial nature of direct regulation of terms.*"[229]

American case law shows a strong preference for disclosure of terms as a requirement for enforceability.[230] Numerous decisions, often regarding electronic contracting, show the reluctance of the courts to enforce terms that were not properly disclosed to the adhering party. In *Nguyen v. Barnes and Noble Inc.*, for example, the US Court of Appeals for the 9th Circuit refused to enforce a forum selection clause contained in a browsewrap agreement for lack of proper notice.[231] As the Court stated:

> "[W]*here a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice. While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract* [...] *the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers.*"[232]

LYNN, K., 'Browse the Web, Enter a Contract... Arbitrate? The Enforceability of Mandatory Binding Arbitration Provisions in Consumer Browsewrap Contracts', 2015, 6 *JCCC Honors Journal*, no. 1, p. 3.
For a further discussion of "shrink-wrap," "browse-wrap," and "click-wrap" agreements, *See*, generally, BLOCK, D., 'CAVEAT Surfer: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction with Websites', 2001, 14 *Loyola Consumer Law Review*, no. 2.

[229] MAROTTA-WURGLER, F., 'Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's" Principles of the Law of Software Contracts"', 2011 *The University of Chicago Law Review,* pp. 166–167. *See* also BEN-SHAHAR, O., 2009, supra note 214, pp. 3–4.

[230] WOODWARD JR, W. J., 2015, supra note 134, p. 924 *See* also BEN-SHAHAR, O. & SCHNEIDER, C. E., *More Than You Wanted to Know: The Failure of Mandated Disclosure*, 2014, Princeton University Press, p. 3 (calling mandated disclosure "*the most common and least successful regulatory technique in American law*").

[231] *Nguyen v. Barnes & Noble, Inc.* [2014], 763 F. 3d, 1171. For a case outside of electronic commerce where notice is required for enforcement, *See Tri-City Renta-Car & Leasing Corp. v. Vaillancourt* [1969], 33 AD 2d, 613.

[232] *Nguyen v. Barnes & Noble, Inc.* [2014], pp. 1178–1179. The Court based the bulk of its decision on the 2002 case of *Specht v. Netscape*, where the US Court of Appeals for the 2nd Circuit also ruled a forum selection clause unenforceable due to lack of constructive notice, stating that:

> *"Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."*

Specht v. Netscape Communications Corp [2002], 306 F. 3d, 17, p. 35.

In addition to the judicial preference for disclosure of terms, as well as the applicability of the doctrine in internet contracts, in the United States, for example, a plethora of federal and state regulations, municipal ordinances, administrative regulations demand elaborate disclosures in order to allow the agreement to exist. BEN-SHAHAR, in what is certainly not an exhaustive list, mentions that these go

> *"from businesses that issue car, student, or other consumer loans; mortgagees; home-equity lenders; credit card companies; banks accepting deposits; mutual funds; securities brokers; credit-reporting agencies; investment advisors; ATM operators; pawnshops; payday lenders; rent-to-own dealers; installment-sales vendors; insurers of property, health, life, cars or rented vehicles, self-storage facilities, and much else; car-towing companies; car repair shops; motor clubs; residential real estate agencies, developers, and landlords; time-share programs; sellers and lessors of mobile homes; membership camping facilities; providers of home improvements, services, and repairs; home-alarm installers; vocational schools; traffic schools; agents selling electricity; immigration consultants; dog breeders and sellers; travel services and travel agencies; art dealers; police; doctors; hospitals; managed care organizations; colleges and universities; restaurants and other food establishments; halal-food dealers; and endlessly more."*[233]

Section §2-316 of the American Uniform Commercial Code also establishes this disclosure requirement in regards to warranty disclaimers. In the relevant part, this provision establishes that in order to "*exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.*" A similar (albeit much longer) provision appears in § 2302 of the

---

In this case the Court considered that clicking the "*Download*" button did not communicate assent to the terms of Netscape's contract, and which *"only became visible if the user scrolled to the button of the page"* (DAVIS, N. J., 'Presumed Assent: The Judicial Acceptance of Clickwrap', 2007, 22 *Berkeley Technology Law Journal*, no. 1, pp. 585–586).

It is important to note that that the US courts' preference on this issue deals with whether or not the contract terms were informed to the other party, and whether she expressly consented to them, without much regard being paid to the terms' actual content (the enforceability of which might depend on other doctrines). As a matter of fact, in a fairly unanimous manner, since the first *clickwrap* case was litigated in 1998, courts have considered *clickwraps* to be a valid manifestation of assent. As DAVIS explains:

> *"Essentially, courts have settled on a mechanical approach to determining whether assent was given by simply testing whether the click can be proved. Over time, courts have made it clear that absent fraud or deception, the user's failure to read, carefully consider, or otherwise recognize the binding effect of clicking 'I Agree' will not preclude the court from finding assent to the terms."*

ibid., p. 579.

[233] BEN-SHAHAR, O. & SCHNEIDER, C. E., 2010, supra note 222, p. 650

Magnusson-Moss Warranty Act, which also requires a "[f]*ull and conspicuous disclosure of terms and conditions."*[234]

In the European Union, the importance given to disclosure of contractual terms manifests itself in both the internal rules of Member States, as well as in community regulations. A good example of this was a 2008 proposal for a Directive on Consumer Rights.[235] In regards to disclosure, this Proposal, which in Chapter V included a lengthy section devoted exclusively to "*Consumer rights concerning contract terms*", established:

> *"Article 31*
>
> *Transparency requirements of contract terms*
>
> *1. Contract terms shall be expressed in plain, intelligible language and be legible.*
>
> *2. Contract terms shall be made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract, with due regard to the means of communication used."*

It bears mentioning that the Directive on Consumer Rights which was finally adopted (Directive 2011/83/EU) did not contain such a general provision regarding disclosure, nor did it touch upon unfair contractual terms.[236]

The European Draft Common Frame of Reference (hereafter "DCFR") also took such an approach in regards to disclosure of the contractual terms, in light of the fact that *"the classical* [contractual] *defenses were developed at a time when most contracts were of a simple kind that the parties could understand readily. This* [...] *has changed, particularly with the development of longer-term (and therefore more complex) contracts and the use of standard terms."* [237] It goes on to add that, with standard terms, *"there is the risk that the parties may not be aware of their contents or may not fully understand them"*.[238]

The DCFR actually goes further in regards to disclosure and information than similar works, extending it beyond the field of consumer contracts to which it has usually been

---

[234] *See* UCC §2-316 and 15 U.S. Code § 2302.

[235] COM (2008) 614/3.

[236] The general information duties included in the final text of the Directive (Art. 5) mostly deal with the characteristics of the product and with issues such as warranty and payment; there does not seem to be a general duty to make the terms available to the consumer in the way expressed in the draft. Furthermore, although the final version does include the requirements of intelligible language, they are only established in regards to "off - premise" (Art. 7) and "distance" (Art. 8) contracts. The adopted Directive also did away with the "black" and "gray" lists of terms, allegedly to ensure the maximum level of harmonization between the individual Member States (MCCLAFFERTY, A., 'Effective Protection for the E-Consumer in Light of the Consumer Rights Directive', 2012, 11 *Hibernian Law Journal,* p. 115).

[237] BAR, C. von & CLIVE, E. et al., *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Outline Edition*, 2009, Sellier. European Law Publishers, p. 67

[238] ibid., p. 67.

restricted. This is due to the fact that "*as the laws of many Member States recognize, the problem may occur also in contracts between businesses. Particularly when one party is a small business that lacks expertise or where the relevant term is contained in a standard form contract document prepared by the party seeking to rely on the term, the other party may not be aware of the existence or extent of the term.*"[239] In this manner, the DCFR extends its "disclosure protection" to business contracts, although in a way that is considerably more limited than that used in the case of consumer dealings.[240]

German law also has also paid attention to this issue, with the BGB establishing important information duties in sections §305 to §310, including the duty of the service provider to grant the subscribing party the "*opportunity to read*" the terms (§305). This German approach is far from unique, particularly within European law, as in Europe "*the opportunity to review and understand standard terms is seen as one of the fundamental ways to avoid unfair surprise and achieve a fair result.*"[241]

With this apparent widespread support for the idea of granting the adhering party an opportunity to become acquainted with the terms of the contract, the issue then turns into determining whether this approach is actually useful. Sadly, as far as the evidence shows, the answer is a resounding "no".[242]

2.7 Why Disclosure Does Not Matter

In theory, increasing disclosure of contractual terms and establishing a duty to read would be beneficial. It would increase the number of readers, which in turn would force businesses to provide better terms in order to attract customers. All of this, at a relatively low cost. As BEN-SHAHAR and SCHNEIDER explain:

> *"Mandated disclosure is alluring because it resonates with two fundamental American ideologies. The first is the free-market principle. Markets work best when buyers are informed; disclosures inform them. Buyers fear sellers' rapacity and the perils of caveat emptor; disclosures protect them without distorting markets by specifying prices, quality, and terms. The second ideology is the autonomy principle.*

---

[239] ibid., p. 67- *See* also GRUNDMANN, S., 'The Structure of the DCFR – Which Approach for Today's Contract Law?', 2008, 4 *European Review of Contract Law*, no. 3, p. 239.
[240] BOOYS, T. Q. de et al., 'How the CFR Can Improve the Consumer Rights Directive: A Comparison between the Model Rules in the Draft Common Frame of Reference and the European Commission's Proposal for a Consumer Rights Directive', 2009 *Centre for the Study of European Contract Law Working Paper Series*, no. 9, p. 7.
[241] OAKLEY, R. L., 'Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts', 2005, 42 *Houston Law Review,* p. 1078.
[242] MAROTTA-WURGLER, F., 2015, supra note 224, p. 64.

> *People are entitled as a matter of moral right and of practical policy to make the decisions that shape their lives. Disclosures equip them to do so.*
>
> *Mandated disclosure is* [also] *alluring because it seems to regulate lightly. Direct regulation of economic behavior— imposing safety and quality standards or restricting sales of products or services— can be clumsy and costly; can reduce freedom, innovation, and efficiency; can inspire burden some bureaucracy and regulations. Mandated disclosure lets sellers sell and buyers buy, as long as buyers know what sellers are selling."*[243]

Furthermore, mandated disclosure is supposed to create an incentive to *not* draft abusive terms, since the drafting enterprise could always be "denounced" by watchdog groups and suffer a reputational damage.[244] Additionally, it has been argued that this opportunity/duty to read also encourages the adhering parties to be more diligent and careful in their contracting, as there would be less opportunities to claim that theirs was a "hollow assent" to the terms.[245]

Although this theory might appear, in principle, like a good tool to protect parties and increase diligence, this is not the case Indeed, like the road to hell, the doctrine of the "opportunity to read" is made up of little more than good intentions. As evidence shows, it is based on a flawed understanding of human psychology and behavior. To put it simply, *"increasing disclosure does not, and most likely cannot, increase contract readership to any meaningful rate."*[246] It does not matter how prominent the terms are made, the majority of people simply will not read them.[247]

> *"Not only does the empirical evidence show that mandated disclosure regularly fails in practice, but its failure is inevitable. First, mandated disclosure rests on false assumptions about how people live, think, and make decisions. Second, it rests on false assumptions about the decisions it intends to improve. Third, its success requires an impossibly long series of unlikely achievements by lawmakers, disclosers,*

---

[243] BEN-SHAHAR, O. & SCHNEIDER, C. E., 2014, supra note 230, p. 5

[244] HILLMAN, R. A., 2006, supra note 182, p. 853. MAROTTA-WURGLER is skeptical of the reliance on consumer groups or independent reviews. She argues that, in fact, there is no evidence that (a) people will be motivated enough to even seek these third parties' opinions; (b) those third parties will actually render useful advice in a way that is not affected by the same shortcomings of disclosure; and (c) the people reading will even understand the advice. For more on the problems associated with a reliance on watchdog groups (MAROTTA-WURGLER, F., 2015, supra note 224, p. 65).

[245] HILLMAN, R. A., 2006, supra note 182, pp. 845–846 *See* also WILKINSON - RYAN, T., 2014, supra note 199, pp. 1756–1758.

[246] MAROTTA-WURGLER, F., 2012, supra note 210, pp. 108–109. *See* also BEN-SHAHAR, O. & SCHNEIDER, C. E., 2014, supra note 230, pp. 6–7.

[247] MAROTTA-WURGLER, F., 2012, supra note 210, pp. 108–109.

> *and disclosees. That is, the prerequisites of successful mandated disclosure are so numerous and so onerous that they are rarely met."*[248]

Even before analyzing the (dubious) merits of the opportunity to read doctrine, the first criticism that can be leveled against it, as well as against the related enforceability of unread boilerplate terms, is that reading a contract can often be pointless. There is little to no incentive for the weaker party (be it a consumer or a business) to actually engage in the costly, long and boring process of reading complex legal and technical jargon that, for the most part, will be beyond their ability to comprehend, let alone modify.[249] Since in the vast majority of cases the adhering party will not be in a position to modify any term that she does not agree with, reading will only waste valuable time. As BEN-SHAHAR gloomily put it, highlighting the often-pointless endeavor of reading the terms of a contract of adhesion:

> *"And what if they* [the adhering parties] *did read? Surely, there is nothing they can do about the bad stuff they know they will find. Are they going to cross out the unfavorable clause? Are they going to call some semi-automatic 'customer service agent' and negotiate? Other than lose the excitement about the deal and maybe walk away from it (to what? A better contract?), there is not much individuals can do. Dedicated readers can expect only heartache, which is a very poor reward for engaging in such time-consuming endeavor. Apart from an exotic individual here or there, nobody reads."*[250]

The opportunity to read doctrine is based on the economic idea of "rational choice theory", and based on which "*when individuals are confronted with various choices they will choose the option that yields them the most expected welfare. Within this model individuals are*

---

[248] BEN-SHAHAR, O. & SCHNEIDER, C. E., 2010, supra note 222, p. 651. *See* also BEN-SHAHAR, O. & SCHNEIDER, C. E., 2014, supra note 230, p. 12 (calling mandated disclosure *"a fundamental failure that cannot be fundamentally fixed*").

[249] BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, p. 239 ("*it is unreasonable to expect consumers to be able to read and comprehend the information provided in complex contracts"*). To understand exactly how complex these terms can be, suffice it to say that a study of End User License Agreements ("EULAs") showed that they are *"on average around 2000 words and written in a way that requires a graduate degree to understand them (as measured by the Flesch-Kinkaid readability scores)*" (MAROTTA-WURGLER, F., 2015, supra note 224, p. 66).

[250] BEN-SHAHAR, O., 2009, supra note 214, pp. 2–3. Perhaps one of the best illustrations of the failure to read the terms of boilerplate contracts was a prank done by the software company PC Pitstop, who added a provision in its EULA that awarded a monetary prize "*to a limited number of authorize licensee* [sic] *to read this section of the license agreement and contact PC Pitstop*." It took 4 months, and 3,000 downloads, before a single user read the clause and contacted the company to claim his prize. He received a check for USD 1,000. PC Pitstop has stated that, in essence, they were trying to prove a point, highlighting the kind of clauses that users might (and do) overlook when they simply click on an "I agree" button, as well as the possible unfair terms that are often hidden. *See* Larry Magid, 'It Pays To Read License Agreements', <http://www.pcpitstop.com/spycheck/eula.asp> (last visited 26 August 2015), and AYRES, I. & SCHWARTZ, A., 'The No-Reading Problem in Consumer Contract Law', 2014, 66 *Stanford Law Review*, no. 3, p. 547.

supposed to maximize their own preferences and there is little reason for an intervention by the legal system," unless *"so-called market failures"* make an appearance.[251] Here, a party to a contract is seen as a "homo economicus", a rational calculator *"who is aware of all his preferences, knows all ins and outs of the options with which he is presented and is perfectly able to choose the option that maximizes his own welfare*." [252] The problem is, of course, that this is not the way people act when concluding a contract nor, in general, in their daily lives; if anything, evidence shows that individuals often base their decisions on heuristics, mental shortcuts, and not in the rational analysis and calculation of the available information in regards to costs and benefits.[253] Indeed, what the data seems to show in this regard is not that people act rationally regarding their contracts, but quite the opposite. In reality, people systematically deviate from what we might consider to be "rational behavior" when it comes to their contractual decisions.[254]

When facing a boilerplate contract, the adhering party must weigh a number of factors. Under the opportunity (and duty) to read doctrine, once she has analyzed the main terms (e.g. specifics of the product or service, price, time of delivery, etc.) the adhering party should then go through the fine print, analyze the pros and cons of its terms, weigh them against those offered by competing vendors and, finally, determine whether this is a good bargain for her. As it is obvious, to pretend that this type of behavior is the rule, or even that it is done by a significant minority, is nothing but wishful thinking.

> *"While there are occasional examples common sense itself calls this idea into question as a general proposition.* [...] *Any lawyer would find the job of assembling and then deciphering the governing terms a difficult and time-consuming job.* [...] *Any user knows at the outset that the terms are not negotiable, and many know that they will find the same or similar terms elsewhere. This will be particularly true of disclaimers of liability, limits on consequential or other damages, choice of forum*

---

[251] FAURE, M. G. & LUTH, H. A., 2011, supra note 220, pp. 337–338.

[252] ibid., pp. 337–338. *See* also KOROBKIN, R. B., 'A 'Traditional' and 'Behavioral' Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company', 2004, 26 *University of Hawaii Law Review,* p. 447 ("*most version of* [Rational Choice Theory] *assume, at a minimum, that individuals will use all available information to select behaviors that maximize their expected utility. Or, put in other words, individuals will take actions designed to maximize the differential between expected benefits of their actions expected costs"*) and D'AGOSTINO, E., 2014, supra note 138, p. 36 ("[e]*conomics usually assumes that agents are rational. Possibly not symmetrically informed about the state of the world or other circumstances directly affecting their utility, but at least rational*").

[253] KOROBKIN, R. B., 2004, supra note 252, p. 448. The cognitive dissonance among consumers is also highlighted by BARNHIZER in regards to e-commerce, where even though the majority of consumers express concern about how their "agreements" allow their information to be used, 65% of Internet-using adults report that they know what they need to do in order to protect themselves *"from being taken advantage of by sellers on the web"* (BARNHIZER, D. D., 'Propertization Metaphors for Bargaining Power and Control of the Self in the Information Age', 2006, 54 *Cleveland State Law Review,* p. 79). On other cognitive biases affecting contracting and decision-making, *See* BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, pp. 233–238.

[254] CHING, K. K., 2015, supra note 196, p. 12.

> *provisions, class action waivers enveloped in arbitration provisions* [...] *If one had the time or inclination to 'comparison shop' for terms, one would find either the same terms or variants across the spectrum. If the terms were the same, then one has to withdraw from that market or accept them. If they are similar, one needs to be a lawyer to determine what the differences in language, presentation, and style may actually mean so as to choose accordingly."*[255]

Research data supports this dire conclusion, with the *"best evidence"* suggesting that "*decision makers rarely consider more than five to ten factors when making market choices."*[256] This is a far cry from the ideal *homo economicus* that goes out of his way to not only read and analyze the terms, but also to compare them with those offered by other vendors.

To make matters worse, and as we have already argued, the fact is that even a *homo economicus* would be wasting his time reading the terms. If the adhering party manages to understand what is being said, the time that she devoted to understanding the contract will have been, in the majority of cases, wasted. Some authors have gone even as far as calling reading the terms a downright irrational conduct, since it will rarely render any positive results. BEN-SHAHAR, for example, has argued that:

> *"Processing the effect of contract terms is time consuming and boring. If we succeeded in reading the text and understanding it, we are often struck by the remoteness of the contingencies it covers – ones that we don't expect to materialize, such that cost of figuring out and improving the terms that apply to these contingencies is not worth it. I believe that the most basic reason why it is irrational to read standard form terms is that it is too difficult to know which terms are desirable and which are not."*[257]

Then, since it will often be impossible for the adhering party to know what terms are more or less desirable for her, reading them will be useless, and even senseless.

---

[255] WOODWARD JR, W. J., 2015, supra note 134, p. 925.

[256] The *homo economicus* model seems to also ignore the many shortcomings of the way *homo sapiens* think. Not only are humans often incapable of considering several factors when making a decision, but they also fall under the weight of their own overconfidence. People are often incapable of rationally analyzing the likelihood of a given event, suffering from overconfidence and optimism bias, both in terms of bad things happening to them, as well as their chances of being prepared for it. Strangely enough, people tend to analyze risks in two sets, as either events that will almost never occur, or events that will almost certainly happen (*See* KOROBKIN, R. B., 2004, supra note 252, pp. 459–462, BEN-SHAHAR, O., 2009, supra note 214, pp. 13–14, and MANN, R. J., 2006, supra note 177, p. 912). Also adding to the complexity are the human limitations regarding the comprehension of legal texts, usually made up of long sentences of *legalese*, considering that *"most legal readers processing a sentence can keep two or three ideas aloft in their minds before the period cues that the sentence has ended and the ideas presented can finally be integrated"* (CARTER, A. M., 'The Reader's Limited Capacity: A Working-Memory Theory for Legal Writers', 2014, 11 *Legal Communications and Rhetoric: JALWD*, no. 1, p. 31).

[257] BEN-SHAHAR, O., 2009, supra note 214, p. 15.

> *"Thus, reading the contract in order to find out what is in the boilerplate is senseless, because it is too hard to figure out whether the content of the contract, in light of the price paid, is good or bad.* [...] *As other commentators have analogized before, not wanting to know what's in the contract is equivalent to not wanting to know how electrons reach their destined stops in a computer's microprocessor. Now, throw into the mix the fact that there might be very little variation across vendors with respect to the legal terms that accompany the competing products. What, then, is the prospect for an individual who read the terms, understood them, considered their relative price, and decided she didn't like this 'bundle?'* [...] *It is unlikely* [...] *that comparison shopping for legal terms would be productive. Interestingly, even if there is meaningful competition between makers of a certain good, providing variety and choice over many features including price and upgrades, there may be very little competition over legal terms."*[258]

BEN-SHAHAR is not alone in viewing the reading process as inherently irrational. RAKOFF, for example, argues that not reading the terms is simply the only rational choice for the adhering party:

> *"It is notoriously difficult for most people, who lack legal advice and broad experience concerning the particular transaction type, to appraise these sorts of contingencies. And the standard forms - because they are drafted to cover many such contingencies - are likely to be long and complex, even if each term is plainly stated. Once form documents are seen in the context of shopping (rather than bargaining) behavior, it is clear that the near-universal failure of adherents to read and understand the documents they sign cannot be dismissed as mere laziness. In the circumstances, the rational course is to focus on the few terms that are generally well publicized and of immediate concern, and to ignore the rest."*[259]

Seen from this perspective, the tendency to lay blame on those who did not read the terms of their contract, as if this was a sign of negligence, is incorrect. More often than not, a party who signs an unread contract is not acting this way because of negligence, but

---

[258] ibid., p. 17. BAIRD also makes a parallel with the deliberate (and rational) action of not reading the terms with ignoring how a specific product works:

> *"When product attributes are hidden, the buyer is flying blind with respect to them. At some cost, of course, she can read the fine print or disassemble the product or ask the seller to make an explicit representation about the warranty term or the magneto coils. But in many cases, the benefit to the buyer is too small to justify the expense. The costs include not only obtaining the information, but gaining enough expertise to make sensible judgments.*
>
> [...] *The typical buyer cannot rely on her own expertise or her ability to dicker with her seller."*

BAIRD, D. G., 2006, supra note 175, pp. 935–936.

[259] RAKOFF, T. D., 1983, supra note 137, p. 1226. In a similar fashion, CHING argues that it is not only that those who do not read their contracts are not simply *"lazy,"* but that, in reality, *"as a matter of policy, we do not want people to read form contracts"* (CHING, K. K., 2015, supra note 196, p. 3).

rather as a result of the same *homo economicus* analysis that some hoped would make her read. She has nothing to win from reading the contract, since she will not be able to understand the terms anyway, nor will she be able to change them. Blindly signing at the bottom of the fine print might actually be the only rational course of action.[260]

> *"The bottom line is simple: The verbal and legal obscurity of preprinted terms renders the cost of searching out and deliberating on these terms exceptionally high … Faced with preprinted terms whose effect the form taker knows he will find difficult or impossible to fully understand, which involves risks that probably will never mature, which are unlikely to be worth the costs of search and processing, and which probably aren't subject to revision in any event, a rational form taker will typically decide to remain ignorant of the preprinted terms."*[261]

What the above makes clear is that only the obsessive-compulsive demographic would actively engage in reading boilerplate terms, since for the rest it would be a pointless endeavor.[262] This due to the fact that "[e]*ven the fastidious few who take the time to read the standard form may be helpless to vary it*."[263]

It should be noted that to see reading the fine print as an irrational behavior is not something relegated to academic discussions. Indeed, as the New Jersey Law Revision Commission noted in their Report Relating to Standard Form Contracts:

> *"The formation of standard form contracts is not based on consent and does not result from bargaining. To negotiate and to read standard form contracts prior to their formation would be impractical and wasteful."*[264]

Although it is impossible to estimate exactly how "*wasteful*" would it be to read *all* the fine print that people come across, the available evidence gives us some clues. A recent study, for example, estimated that *"if consumers took the time to simply read online privacy policies, the time to do that would cost the economy $781 billion* [American dollars] *in lost*

---

[260] As CHING notes:

> *"It is rational not to read form contracts. Given the low probability that a dispute will arise over one of the unread terms, and given the low stakes involved in most form contracts, it would be 'irrational for form-receiving parties to spend time reading, much less understanding, the terms in the forms they sign.' We don't want people to read form contracts because it would be a waste of time."*

ibid., p. 3

[261] Cited in BECHER, S. I., 2008, supra note 199, pp. 738–739. *See* also WOODWARD JR, W. J., 2015, supra note 134, p. 926 ("[consumers] *know that their time can more productively be spent on practically anything else*").

[262] CHING, K. K., 2015, supra note 196, p. 10 ("*consumers don't read form contracts. And we don't expect them to. It's a waste of time*"). On how this also affects business contracts, *See* page 48 supra.

[263] SLAWSON, W. D., 1971, supra note 190, p. 530.

[264] New Jersey Law Revision Commission, *Final Report Relating to Standard Form Contracts*, October 1998, <http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/657> (last visited 17 November 2015), p. 2.

productivity."[265] Since this study was limited exclusively to online privacy policies aimed at consumers, we can easily see that if *all* boilerplate terms were taken into consideration, both online and offline, in both consumer and commercial contracts, the amounts in lost productivity would reach astronomical proportions. Reading *everything*, therefore, would cause more harm than good.

The irrationality of reading is further highlighted by the fact that most parties to a contract of adhesion *know* that the terms of their contract will, in all likelihood, only benefit the dominant party. Because of this, the adhering parties can also *"rationally not invest the cost in reading the terms because they already know that they are likely to be bad."*[266] This, in turn, creates a "race-to-the-bottom" among the providers who, aware of the fact that the adhering parties are not reading the terms, "*follow through with putting in bad terms, particularly those that concern remote contingencies that are unlikely to affect their general reputation because of the rarity of the contingency occurring."*[267]

LONEGRASS confirms this view, actually arguing that "*form contracts are designed not to be read*", so that failure to read them is simply "*an effect of 'rational ignorance'—the irrationality of reading standardized agreements when the costs of reading outweigh the risks of failing to do so*."[268] Analyzing what lead to this situation, she argues that, at least in the case of consumers:

> *"*[They, the consumers,] *are well aware that they will likely not understand the contracts that they sign. Thus, they are largely discouraged from expending the effort required to carefully review the fine print. Moreover, the futility of reading is underscored by consumers' cognizance that they are generally powerless to negotiate standard terms. Furthermore, the contracting environment often makes reading less likely; already hurried consumers are rushed through the contracting process and made to feel as though careful review of the provisions is socially inappropriate. As a result, many consumers are reluctant to carefully scrutinize boilerplate contract language at the time of signing for fear of appearing awkward or confrontational."*[269]

On the basis of the issues analyzed above, it is no wonder that, in the end, the opportunity to read doctrine cannot work because, first and foremost, most people will simply not read their contracts.[270] Although estimates vary depending on the context of the contract, some place readership at a staggeringly low 0.2%, at least in the case of

---

[265] WOODWARD JR, W. J., 2015, supra note 134, p. 926.
[266] CRUZ, R. T. & HINCK, J. J., 'Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information', 1995, 47 *Hastings Law Journal*, no. 3, p. 668.
[267] ibid., p. 668.
[268] LONEGRASS, M., 2012, supra note 177, p. 31.
[269] ibid., p. 31.
[270] WILKINSON - RYAN, T., 2014, supra note 199, p. 1747 ("*The proposition that most people do not read the small print, heed the warning labels, or review the 'Terms and Conditions' links, is no longer controversial*").

Internet contracts.[271] In America, despite these staggeringly low figures, courts have not been moved by the problems that are caused by the adoption of this policy and, in general, will only seek to determine whether the manifestation of assent existed (v.gr. whether, in the case of Internet contracts, the adhering party clicked "I Agree") so that, if consent existed, the court will simply *"presume that the user assented to the terms of the agreement."*[272]

To make matters worse, this lack of readership does not seem to change significantly as a result of increased disclosure or availability of terms. Indeed, as MAROTTA-WURGLER has shown in several studies, *"an increase in contract accessibility does not result in an economically significant increase in readership* [of electronic contracts]. *Mandating assent by requiring consumers to agree to terms by clicking on an 'I agree' box next to the terms* [presented to consumers in an electronic transaction] *increases contract readership by at best on the order of 1 percent*."[273] While it is certainly impossible to perfectly extrapolate the results of one type of contracts into others, it should be kept in mind that Internet contracting is normally done in the comfort and privacy of one's own home, away from prying eyes or from the pressure of vendors, and without any time constraints affecting the acquisition of information. From this perspective, it might be possible to assume that non-electronic contracting would have an even lower readership, particularly when the agreement is to be concluded as soon as the terms are presented to the adhering party.[274]

---

[271] FAURE, M. G. & LUTH, H. A., 2011, supra note 220, p. 349. Although in the context of car rental and mortgage contracts, readership skyrockets to 72% and 73% respectively, these estimates correspond to "self-reported" readership, that is people saying that they do, indeed, read the contracts; as such, the results are to be taken with a grain of salt. Furthermore, the data on this topic is fairly murky, as it *"also suggests that people do not read important part of one-time contracts such as home mortgage agreements."* On these issues, *See* AYRES, I. & SCHWARTZ, A., 2014, supra note 250, pp. 546–547, and MAROTTA-WURGLER, F., 2015, supra note 224, p. 63.

[272] DAVIS, N. J., 2007, supra note 232, p. 582.

[273] MAROTTA-WURGLER, F., 2011, supra note 229, p. 168. *See* also MAROTTA-WURGLER, F., 2015, supra note 224, p. 66

[274] MAROTTA-WURGLER, F., 2012, supra note 210, pp. 96–97. HILLMAN has a different opinion on this "comfortable setting" in which Internet contracting occurs, arguing that it is not actually as comfortable as we might otherwise think:

> "[I]*f the Internet marketplace is comprised in large part of impulse purchasers or people who turn into impulse purchasers, it is obviously not the kind of environment that is conducive to reading and shopping for terms prior to a transaction. If consumers throw caution to the wind in the very decision to partake in a transaction, this suggests only a small possibility that such consumers would studiously read and shop for terms prior to the transaction. Ironically, the very lack of time pressure that might be thought to increase reading may do the opposite. Theorists of the Internet shopping process surmise that the lack of time pressure ironically may increase impulse purchasing as consumers get caught up in the enjoyment of surfing for unnecessary items."*

HILLMAN, R. A., 2006, supra note 182, p. 854.

In equally grim terms, albeit with a much more flowery language, BARNHIZER, with a particularly careful look towards data-mining practices, states that:

> *"The Internet is a dangerous place for consumers, at least according to many commentators. Amoral producers hawk their wares to unsuspecting and unsophisticated e-consumers who innocently enter the*

Furthermore, "*electronic standard form contracting,*" as some have referred to it, has become extremely commonplace due to the increased availability of computers and internet connectivity, so its intricacies and potential problems are also especially relevant.[275]

Since the focus of the opportunity to read doctrine has often been placed in consumer law, one might be tempted to dismiss its problems as relegated exclusively to consumers, and specially to the uneducated ones among them. This idea, however, can offer no consolation. As the evidence shows, failure to read the terms of one's contracts, as well as the inability to understand those which are read, is something that affects all market participants, and not only those of a lesser economic or educational background. Indeed, as WILKINSON-RYAN has shown:

> *"Even when investigators choose more elite population samples, they still find very low levels of readership. In a sample of University of Georgia undergraduates, 89% of respondents classified themselves as 'non-readers' of click-through agreements. A survey of law students—a group essentially hand-picked for its propensity to read legal documents—found that only about 4% claim to read standard online form contracts. All available evidence suggests that online form contracts are consistently unread."*[276]

Limiting these problems to consumer transactions, or even to Internet commerce, is also mistaken. What is more, although there is "*surprisingly little empirical evidence on non-readership outside of the online context,*" this might be simply the result of the fact that "*contracts scholars regard non-readership as 'folk knowledge': a claim so obvious that data would be superfluous.*"[277] Furthermore, in a commercial context, evidence shows that *"even businessmen did not read the contracts they regularly signed in the course of their commercial interactions, preferring to rely on their background sense of the deal and the counterparty."*[278] The reasons for this lack of readership among merchants are easy to understand since, "[f]*orm contracts can create the very same assent and choice problems among merchants as they*

> *dark alleys of electronic commerce, lured by the siren call of bright and flashing neon signs promising selection, price and convenience. Once there, the e-producer wraps an arm around the e-consumer's shoulder in a faux-friendly embrace and appears to recognize her by name, suggesting some wares for which his data-mining shill has indicated she'll pay top dollar."*

BARNHIZER, D. D., 2006, supra note 253, p. 75.

[275] DAVIS, N. J., 2007, supra note 232, p. 577.

[276] WILKINSON - RYAN, T., 2014, supra note 199, p. 1752. *See* also LONEGRASS, M., 2012, supra note 177, p. 30 and accompanying footnotes, where the author specifically mentions the case of legal scholars and judges, all of whom confess not reading (and sometimes not even understanding) the contracts they sign.

[277] WILKINSON - RYAN, T., 2014, supra note 199, p. 1752.

[278] ibid., p. 1752. *See* also MACAULAY, S., 'Non-Contractual Relations in Business: A Preliminary Study', 1963, 28 *American Sociological Review*, no. 1, p. 59.

create among consumers. To expect that all business people read form contracts any more frequently or understand them any better than consumers do is unrealistic."[279]

As has been pointed out, simply making the terms available does not ensure that the adhering party will really read the contract, let alone understand it.[280] Despite this, however, there might be some who see disclosure as a harmless thing to do, since the worst-case scenario would simply leave things unchanged, with no increase in readership. Since in the best-case scenario there *might* be a marginal increase in readership, however, this alone would justify adopting this doctrine. The problem is that the worst-case scenario is not that things will remain unchanged, but rather that as a result of disclosure the adhering parties will have even less chances to understand the contract. As FAURE & LUTH note, "*when the quantity of information provided is too large, individuals have difficulties to evaluate the information accurately*", as a result of what has been dubbed *"information overload."*[281] This is a phenomenon that is directly linked to the way the human psyche works (whether that of a consumer or of an experienced merchant), and which is simply unable to manage and properly process a virtually endless stream of new information.[282]

As we can see, mandating never-ending disclosures does not improve contractual fairness. On the contrary, mandatory disclosures create problems for both the party being forced to disclose, as well as the one receiving the disclosure.

---

[279] MALLOR, J. P., 1986, supra note 101, p. 1086.

[280] FAURE, M. G. & LUTH, H. A., 2011, supra note 220, pp. 337–338.

[281] ibid., p. 344 For commentary on the issue of information overload, and whether it is actually a negative factor for consumers, *See*, generally, MALHOTRA, N. K., 'Reflections on the Information Overload Paradigm in Consumer Decision Making', 1984, 10 *Journal of Consumer Research* and GRETHER, D. M. et al., 'The Irrelevance of Information Overload: An Analysis of Search and Disclosure', 1985, 59 *Southern California Law Review*, no. 2. BEN SHAHAR and SCHNEIDER draw a parallel with the case of medical and pharmacological products, where they also see a negative effect of excessive disclosure, arguing that

> *"marginally useful medical mandates drive out vitally necessary unmandated information. Providers must tell patients about advance directives (the PSDA), privacy policies (HIPAA), treatment choices (informed consent), side effects (FDA law), and safety (tort law and malpractice insurance). How much attention is left in the patient's reservoir (or the provider's) to learn about things that are life- and health-saving, like how to manage a chronic illness? Compliance rates with treatment regimes are often estimated to be around 50%. Doctors must teach and persistently prompt patients to get medicine, ingest it in the proper manner, take the right dose at the right time, and continue taking it as long as necessary. But mandated disclosure can crowd out such strenuous teaching."*

BEN-SHAHAR, O. & SCHNEIDER, C. E., 2010, supra note 222, p. 737.

Similarly, D'AGOSTINO argues that

> *"when consumers deal with complex decisions it seems that they react adopting a simple strategy: in our case, they do not read.* [...W]*hen people are asked to choose between two alternatives each with four attributes, they analyze both very carefully. When attributes become 10 or 15, some of them are not taken into account.* [...] *In general terms, as the number of alternatives and/or attributes increases, the percentage of information used to make the final choice decreases."*

D'AGOSTINO, E., 2014, supra note 138, p. 34.

[282] HILLMAN, R. A., 2006, supra note 182, p. 850.

> *"Forms become so long and elaborate that disclosers have problems assembling and organizing the information, and disclosees do not read them and cannot understand, assimilate, and analyze the avalanche of information.*
>
> *The classic overload statement is Miller's 'magical number seven' - seven being roughly the number of items people can keep in short-term memory. This number is often thought too high, but many typical disclosures easily exceed it."*[283]

To complicate matters further, research shows that even among the very small minority of shoppers who read the terms, whether the clauses are pro-shopper or pro-seller does not even play a significant role in the likelihood of concluding the contract.

> *"The results* [of this research] *indicate that there is no positive relationship between favorability of terms and the probability that a product will be purchased.* [...] *Readers do not appear to react to what they read; they are undeterred by relatively pro-seller terms.* [...] *While it is important to note that the sample of shoppers who access EULAs is not random, none of the evidence suggests that those few shoppers who do read license terms respond to them in the fashion that would be expected of an informed minority."*[284]

2.8 The Informed Minority Fallacy

Those who oppose substantive regulation of contractual terms argue that the disclosure duty, together with the associated duty to read, represent a more than just solution, as they empower buyers to make informed decisions. They argue that by removing the paternalistic State from the picture, buyers can enjoy a true freedom of contract, shopping around for the terms they like; furthermore, they add that even though most people will not read the terms, there will be enough buyers who do. This will create an "informed minority" who, by their pressure and purchasing power, will force the dominant party to adopt better terms in order to be competitive and appealing. Through this process, even those who do not read their contracts would benefit, and the market would be kept free of unnecessary direct State intervention.

As the informed minority argument goes, sophisticated parties, those who shop for better contract terms, will avoid those vendors who offer particularly unfair contracts, choosing instead those who satisfy their specific contractual concerns.[285] As the amount of those marginal parties increase in number, the benefits that the seller perceives as a result of the less-than-favorable terms in the contract would be lower than the losses that he may

---

[283] BEN-SHAHAR, O. & SCHNEIDER, C. E., 2010, supra note 222, p. 687.
[284] MAROTTA-WURGLER, F., 2012, supra note 210, p. 114.
[285] BECHER, S. I., 2008, supra note 199, p. 737.

suffer as a result of losing those informed parties. In other words, *"the cost of losing the marginal consumers will outweigh the benefits of gouging the inframarginal consumers."*[286]

The informed minority argument, despite its many proponents, is established on shaky foundations; it is a giant with feet of clay. It assumes that there is such thing as a customer that actively and avidly compares different contractual forms, and who also understands the implications of the terms he is comparing; furthermore, it assumes that this mythical creature is actually common enough so as to allow his demands to become influential. Of course, the problem is that, as we have already seen, contractual readership is too uncommon, so much so that the belief in the existence of an informed minority is the result of magical thinking.[287] In the words of RAKOFF, *"*[t]*he ideal adherent who would read, understand, and compare several forms is unheard of in the legal literature and, I warrant, in life as well."*[288] It seems fairly clear that, outside of Middle Earth and Narnia, and perhaps not even there, an informed minority of contractual readers simply does not exist.

Still, even if, for the sole sake of argument, we ignore the fact that readership is too low to create this informed minority, this theory still fails to convince. Considering the high costs of acquiring the information (i.e. the terms, their implications, etc.) we find that there is very little incentive (if any) for an individual customer to become informed, knowing that those who do read the terms will benefit him anyway. In other words, since the actions of an informed minority also benefit those who did not become informed, there is no incentive to actually be among those who engage in the costly acquisition of data, knowing that doing nothing will report the same benefits, at no cost. This problem of "free riders", deals with the very core of human psychology and economics, as it demonstrates the effects of costs and benefits in our decision-making process. As a result,

> *"we are left with a situation where all buyers would prefer that an informed minority existed* [...] *but none want to incur the cost of information necessary to be part of that minority. If nobody else does it, then the cost of becoming informed is simply a waste to the hapless buyer who does; and if enough other buyers do it, then it is more profitable not to read and to free ride on those who do. And if everyone free rides, then there will be no one to serve as an informed minority".*[289]

---

[286] CRUZ, R. T. & HINCK, J. J., 1995, supra note 266, p. 646.
[287] ibid., p. 676.
[288] RAKOFF, T. D., 1983, supra note 137, p. 1226.
[289] CRUZ, R. T. & HINCK, J. J., 1995, supra note 266, p. 669. *See* also TREBILCOCK, M. J., 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords', 1976, 26 *The University of Toronto Law Journal*, no. 4, p. 373 (arguing that the "free riders" will result in the unfair situation in which some buyers *"facing a disproportionately large part of the costs of the information while others who also value it are able to pay nothing"*).

The informed minority argument also fails to account for the fact that marginal customers are not necessarily representative of the "average" customer. A customer who engages in the costly process of information acquisition is, in all likelihood, different from the majority; his needs and priorities are so unique that any changes in the contractual terms that come as a result of his demands would not automatically benefit the rest. Contractual terms are to be seen as part of the "package" being purchased by the customer; they are no different from the horsepower of a car, the storage capacity of a computer or the specifics of a vessel carrying cargo across the ocean. Just like the kind of customer that wants a sports car is different from the kind that wants a hybrid car, the customer who will peruse the intricacies of a contract and demand different terms is different from one who will not. CRUZ and HINCK illustrate this problem, explaining that

> *"there is no reason to expect an informed minority to typify the demands of the other consumers. The sole unifying factor of the minority is that a sufficient number of them are willing not to buy a product if it does not conform to their wishes. Those wishes could be for a different warranty, for a different forum selection clause, or even for the product to be colored avocado green. If differentiation is not possible, then that minority will get its way and everyone will suffer the products dictated by the minority's preferences. Thus, there is no reason to assert that the results conform to the overall preferences of the market-are efficient-just because the minority demands them."*[290]

Another flaw is that the proponents of the informed minority argument assume that sellers are unable to differentiate among buyers, whereas the opposite is true. Sellers regularly differentiate between their buyers, based on the specific characteristics of the product being offered; a Toyota dealership, for example, knows that the type of customer that purchases a Prius is different from the one that purchases a Land Cruiser SUV and, based on this, might offer them different terms. Additionally, sellers often comply with demands from their clients regarding the terms in order to secure a deal.

> *"Ex ante, while negotiating and interacting with consumers, salesmen can sometimes quite easily discover which consumers are informed or sophisticated and which are not. A relatively simple conversation or short negotiation can frequently reveal the extent to which an individual consumer is educated, articulate, assertive, experienced, and the like. Consequently, sellers can offer informed consumers better contracts by waiving some of the latent terms, thus avoiding the need to provide all consumers with fair* [standard form contracts]*."*[291]

Of course, this ability of some customers to negotiate also comes as a result of their own bargaining power, which demonstrates that their potential as parts of an "informed

---

[290] CRUZ, R. T. & HINCK, J. J., 1995, supra note 266, pp. 671–672.
[291] BECHER, S. I., 2008, supra note 199, p. 747.

minority" is nonexistent. This issue also manifests itself in business dealings; in the carriage of goods by sea, for example, an oil company or an important producer of certain types of cargo might be able to change the terms of the contract governing the carriage, while a merchant that rarely ships anything would just be stuck with the printed terms of the ruling booking note or bill of lading. The modifications obtained by the "powerful" adhering party would thus not benefit those who lack that bargaining power, since they will not represent the needs of the "weak."[292]

Similarly, ex post differentiation by the seller is not only possible, but also quite common. "[S]*ellers can quite easily identify buyers who are assertive enough to insist upon the legitimacy of their complaints. In many cases, those consumers will be granted relief, either because sellers will aspire to minimize contact with 'troublemakers' or because sellers will fear undermining their reputations. By the same token, aggrieved consumers who are neither persistent nor assertive will bear the losses*."[293] This is also common practice in a business setting, where commercial solutions are often found for cases involving powerful disgruntled parties, even if their right of relief is questionable. As a rule, the seller will prefer to simply appease the more demanding or powerful parties, without any benefit being extended to those who are either too weak or ignorant to make their demands heard.

Dominant parties can also differentiate between their clients in regards to the terms of their contracts *after* the agreement has been made, even if no conflict has arisen. A recent example of this is that of the cloud-service Dropbox, which in March 2014 added a forced arbitration clause in their terms of service. Demonstrating their capacity to separate customers, Dropbox added the possibility to opt-out of the arbitration clause within 30 days of the acceptance of the Terms.[294] By including the possibility to opt-out, Dropbox differentiates between those customers who read (or at least somewhat care about) the terms, and those who do not, as a way to avoid problems with the more diligent ones.[295] A

---

[292] BARNHIZER uses e-commerce as a prime example of ex-ante differentiation, since sellers are able to use data-mining techniques in order to, for example "*identify consumers least likely to resist their marketing efforts, to design and market products most likely to entice the consumer into purchasing, and to lower the consumer's resistance to granting consent to a proffered transaction"* (BARNHIZER, D. D., 2006, supra note 253, p. 77). Thanks to this data acquisition, "*Internet sites engage in price discrimination based upon consumer profiles"* (ibid., p. 79).

[293] BECHER, S. I., 2008, supra note 199, pp. 747–748. The author then adds that *"this problem becomes even more evident in light of empirical data that suggests that standardized exculpatory terms may undermine consumers' motivation to insist upon their rights and seek compensation"*.

[294] The full terms are available at https://www.dropbox.com/terms2014 (accessed on September 11, 2014).

[295] In fairness, there have been some cases in which public backlash, initiated by the few who actually read the new terms of service of an online provider, lead to the company in question backtracking on their attempted changes. This was the case of Facebook in 2009 and General Mills in 2014, both of which had attempted to include mandatory arbitration provisions in their terms of service (CANIS, E., 'One Like Away: Mandatory Arbitration for Consumers', 2015, 26 *George Mason University Civil Rights Law Journal*, no. 1, p. 129).

similar provision appears in the terms of service of the US cable company Comcast, which also allows customers to opt-out of their arbitration clause.[296]

2.9 How the Duty to Read Can Backfire

The final criticism that can be leveled against the opportunity/duty to read doctrine in general, as well as to the idea of the informed minority, is that it creates a false image of fairness. Once we accept the idea that the weaker party had the opportunity to read the terms thoroughly before agreeing to them, and that these were in turn affected by the market (as shaped by the informed minority) then it is much easier for a court to dismiss any complaints regarding their fairness. As a consequence of accepting the duties of disclosure and readership, a court could easily reason that, after all, the adhering party could have simply shopped around or been more careful at the time of contracting. In this way, "[t]*erms that would otherwise be regarded as 'hidden' are no longer so, despite people's well-known propensity to sign such disclosures without reading them. Thus, an empty but formally correct disclosure can keep the contract from being unconscionable, however problematic its terms.*"[297] And so, the forced disclosure of the terms might actually backfire in its attempt to protect weaker parties,

> *"because it may not increase reading or shopping for terms or motivate businesses to draft reasonable ones, but instead, may make heretofore suspect terms more likely enforceable.* [...] [T]*he only effects of the proposal may be to insulate businesses from claims of procedural unconscionability and to create a safe harbor for businesses to draft suspect terms."*[298]

In other words, once contractual terms in a contract of adhesion are covered under this cloak of apparent fairness, it is easier to just dismiss complaints against them as merely coming from a negligent party that should have contracted better. In the end, therefore, this doctrine can only really benefit the dominant parties, since disclosing the terms is virtually free for them, even though they can reap enormous benefits by placing their contracts in a "safe harbor," free from attacks based on unfairness. As WOODWARD has pointed out:

> *"If virtually no one was reading the terms, then asking vendors to disclose more in order to obtain a safe harbor of enforceability is a senseless sunk cost. Vendors might*

---

[296] The full terms of service are available at http://www.comcast.com/Corporate/Customers/Policies/SubscriberAgreement.html (accessed on September 11, 2014).

[297] BEN-SHAHAR, O. & SCHNEIDER, C. E., 2010, supra note 222, p. 739.

[298] HILLMAN, R. A., 2006, supra note 182, p. 839.

> *well comply to enter the safe harbor, but consumer decisions—the reason for requiring disclosure in the first place—would be no more robust with or without disclosures."*[299]

As we will soon see, courts will often analyze the unconscionability of a given term or contract based on the term or the contract as a whole being both procedurally and substantially unconscionable.[300] As HILLMAN explains, referring to the application of the doctrine in the United States:

> *"Most cases entertaining an unconscionability or related claim* [...] *look for both procedural and substantive unconscionability. Procedural unconscionability involves the manner in which the contract was made and regulates situations resembling, among other things, duress, misrepresentation, or, most important here, an unfair presentation of the terms. Although contract law generally does not evaluate the adequacy of an exchange, substantive unconscionability focuses on whether the exchange is grossly imbalanced. Many courts apply a sliding scale to the unconscionability inquiry whereby 'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'"*[301]

What the forced disclosure of terms produces, therefore, is an *appearance* of "procedural conscionability," as it creates the impression that the adhering party was properly informed. As a result, "[p]*erhaps marginal terms, insufficiently outlandish to motivate a court to strike them on substantive unconscionability grounds alone, will be enforceable"* precisely because they were disclosed and are supposed to have been read by the adhering party.[302] This, of course, despite the fact that, as we have seen, readership is minimal, comprehension is lacking, and reading is, in and of itself, often irrational.

This situation also responds to a rather interesting psychological phenomenon, as empirical studies show that people will systematically fail to read the terms of their contracts, will deem them unfair, but will still lay blame on those who in turn failed to read *their* contracts. For example, in one experiment,

---

[299] WOODWARD JR, W. J., 2015, supra note 134, p. 926.

[300] *See* Chapters III-V.

[301] HILLMAN, R. A., 2006, supra note 182, p. 853.

[302] ibid., p. 853. MAROTTA-WURGLER has also argued that firms that opt to disclose their terms will also normally make them even worse for their clients. As she noted after several companies commenced a more expansive disclosure of their terms,

> *"firms that chose to increase their contract accessibility did not, on average, change their contract in a way that made it easier for consumers to read or understand and did not change the substance of their terms in a buyer- friendly direction. If anything, increases in disclosure may have allowed firms to put forth more restrictive contracts and, at the same time, enforce them more effectively."*

MAROTTA-WURGLER, F., 2015, supra note 224, p. 65.

> *"respondents clearly believed that using fine print to impose fees on consumers is inappropriate—subjects overwhelmingly reported that companies should find other ways to inform consumers about fees and many subjects thought that hidden fees should be banned altogether. And subjects were sensitive to the reality of consumer contracting, indicating that it is somewhat unreasonable to expect a consumer to read 15 pages of boilerplate. The puzzle, then, is that these beliefs seem entirely disconnected from subjects' equally strong feelings that the non-reading consumer consented to the contract and bears the blame for the resulting transactional harm."*[303]

Furthering the psychological puzzle posed by boilerplate contracts, evidence shows that most people consider that they are very likely to both read and understand a contract, much more so than the average person.[304] This represents a problem because, at has been mentioned before, it makes it much easier for the courts, and society in general, to hold someone bound to otherwise unfair boilerplate terms, since that is usually done from the comfortable position of "it would not have happened to me".[305]

The flawed understanding of the contract terms, the resulting frustration, and the increased expectation of the contracting process being as fast as possible, has created a vicious circle. As SCHMITZ explains:

> *"On the one hand, consumers admit that they have no interest in reading form contracts, enjoy the convenience and efficiency of form contracting, and routinely accept forms 'dressed up' as deals without stopping to read or question their content. On the other hand, consumers are often frustrated with the effectively nonnegotiable nature of these contracts and complain that they lack the requisite*

---

[303] WILKINSON - RYAN, T., 2014, supra note 199, p. 1765. The author puts forward the idea that this "blame" is the result of the "just world hypothesis," and according to which most people will blame victims for their own problems, as the opposite would threaten their world view. Blame can also be laid on the lack of seriousness with which parties often face contracts of adhesion, something that is particularly true in the case of consumers. As PRESTON notes, consumers "*are largely unaware of the legal consequences of their actions, have given up trying to resist, or believe that somewhere there must be a form of justice that will prevent the actual enforcement of the more egregious clauses*" (PRESTON, C. B., 'Please Note: You Have Waived Everything: Can Notice Redeem Online Contracts', 2014, 64 *American University Law Review*, no. 3, p. 539).

[304] WILKINSON - RYAN, T., 2014, supra note 199, p. 1773.

[305] WOODWARD references this as one of the biggest societal problems in regards to boilerplate. He argues that a true cultural shift is required, so that *"consumers are taught not to 'blame themselves' when liability is imposed through a form they did not agree to."* This, he argues, would be the first step towards true reform (WOODWARD JR, W. J., 2015, supra note 134, p. 936). While WOODWARD's ideas might appear too ethereal for some, they are quite reasonable. Every attorney has encountered clients, whether they be consumers or commercial parties, who thought that the fact that they signed a form meant that, automatically, everything in it must be enforceable. Education aimed at teaching that form contracts are not inherently enforceable, and that "escape valves" do exist, could prove to be useful as a way to create an incentive for weaker parties to demand better terms via litigation.

> *time or understanding to read or negotiate companies' impenetrable purchase terms. Consumers then use this frustration to justify their lack of contract vigilance, which, in turn, gives companies more leeway in crafting contracts to their advantage. Some companies misuse this power to impose unfair contracts, but consumers also bear some responsibility for allowing companies to run roughshod over their rights."*[306]

What might be the last nail in the coffin of the opportunity to read doctrine is simply that knowing what one is signing means nothing if signing is the only option. Even in that fantasy world in which a party is fully aware of what the contract says, and for some miraculous reason actually understands all of it, this will not help her if she cannot negotiate over the terms, or if there are no other parties with whom to contract under better conditions. In other words, simply informing someone that she is about to agree to draconian terms does nothing to change their draconian character. As KNAPP has pointed out:

> *"Anyone with the slightest knowledge of today's world knows that most mass-transaction contracting takes place in an environment in which it is clear that, except for a few 'dickered' terms, bargaining is neither expected nor permitted, and even reading the relevant documents is implicitly discouraged. Imposing a general 'duty to read' is one thing; imposing such a duty in circumstances where we know it cannot or will not be performed is Catch-22 with a vengeance."*[307]

2.10 Bargaining Power and its Effects on Contracts

Since we know that most people are aware of the fact that boilerplate will usually be unfair to them, and that it will rarely benefit both parties equally, it is worth asking why they agree to sign. After all, if staunch defenders of economic liberalism are to be believed, weaker parties could always just be more diligent, shop around and find alternatives. Of course, as we have seen, these possibilities are more theoretical than real, and weak parties often find themselves in an inescapable situation, unable to find real alternatives. Both in a consumer setting, as well as in the business world, the problem stems from unequal bargaining power.[308]

Despite the relevance that has been given to bargaining power disparities in the enforceability of contracts, a fixed and clear definition seems to have escaped both the

---

[306] SCHMITZ, A. J., 'Pizza-Box Contracts: True Tales of Consumer Contracting Culture', 2010, 45 *Wake Forest Law Review*, no. 3, pp. 864–865.
[307] KNAPP, C. L., 'Taking Contracts Private: The Quiet Revolution in Contract Law', 2002, 71 *Fordham Law Review,* p. 770.
[308] For stylistic reasons, "bargaining power" and "market power" will be used indistinctively, and should be considered as equivalent, unless the context in which they are employed implies otherwise.

doctrine and the judicature.[309] In America, for example, *"*[h]*undreds of decisions discuss bargaining power, but not one provides a robust description of the term. Only a handful even attempt to explain why the parties' bargaining power should affect the enforceability of their contract."*[310] At most, there have been attempts to identify some factors that might come into play in a contract, and which might be a sign of a disparity in the bargaining power of the parties. In the United States, for example, court decisions have sometimes equated this disparity in the power of the parties *"with the unavailability of alternative counter-parties, sometimes with the status or organizational form of the 'powerful' and the 'weak,' and sometimes with the parties' actual or presumed wealth."*[311]

The uncertainty is not helped by the fact that definitions of the term often end up being the product of circular logic, arguing that the party with the strongest bargaining power is the one that obtains the largest benefits from the resulting agreement, which in turn was the result of her strong bargaining power, as demonstrated by the fact that she obtained the largest benefit, etc.[312] These difficulties have made some authors argue that bargaining power should not be used at all as a legal criterion in the analysis of contracts. HELVESTON and JACOBS, for example, have argued that the idea of "bargaining power" serves very little purpose, since it lacks a coherent and unified definition or a way to adequately measure it. These are two problems that, in their view, have no clear solution:

> *"While the meaning of bargaining power has been assumed rather than defined, the meaning of the term's modifier-most commonly, 'superior'- has been ignored. The concept of bargaining power, as developed in the courts and commentary, rests not on a simple inequality of interparty power, but on a 'grossly disproportionate'*

---

[309] CHOI, A. & TRIANTIS, G., 'The Effect of Bargaining Power on Contract Design', 2012, 98 *Virginia Law Review*, no. 8, p. 1674 ("[a]*lthough bargaining power is often cited as a critical determinant of contractual terms, neither the meaning of power nor the path of its influence is very clear*").

[310] BARNHIZER, D. D., 2005, supra note 159, p. 168. *See* also HELVESTON, M. N. & JACOBS, M. S., 'The Incoherent Role of Bargaining Power in Contract Law', 2014, 49 *Wake Forest Law Review*, no. 4, pp. 1021–1022 (explaining that even though there are "[h]*undreds of decisions discuss bargaining power* […] *not one provides a robust description of the term. Only a handful even attempt to explain why the parties' bargaining power should affect the enforceability of their contract*") and KENNEDY, D., 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power', 1981, 41 *Maryland Law Review*, no. 4, p. 614 (arguing that the term bargaining power has been used "*in dozens (perhaps hundreds) of judicial opinions as though it quite fully explained disallowing contract language so as to restore the background regime, or interpolating a term the parties most definitely did not agree to*"). English Courts also seem to use "bargaining power", and the inequality thereof, as terms that either cannot be defined, or which simply do not warrant definition. *See*, for example, *Six Continents Hotels Inc. v Event Hotels GmbH* [2006] EWHC, 2317, and *John Michael Lapthorne v Eurofi* [2001] EWCA Civ, 993.

[311] HELVESTON, M. N. & JACOBS, M. S., 2014, supra note 310, pp. 1018–1019. For the, allegedly, first reference to bargaining power as a justification to regulate the relation between employers and employees, *See* BARNHIZER, D. D., 'Power, Inequality and the Bargain: The Role of Bargaining Power in the Law of Contract-Symposium Introduction', 2006, 2006 *Michigan State Law Review*, no. 4, p. 841.

[312] CHOI, A. & TRIANTIS, G., 2012, supra note 309, p. 1674.

> *mismatch. Descriptors such as 'superior,' 'overwhelming,' and 'substantial,' among others, suggest the nature of the disparity that animates the application of the doctrine. The use of those adjectives, however, rests inevitably on the idea that power disparities are susceptible to measurement and comparison. Without a means of measurement, courts cannot objectively determine when an unacceptable power imbalance is present. No judicial or scholarly discussion of bargaining power, however, has suggested a coherent method-or any method for that matter-for identifying and assessing this critical fact."*[313]

In lieu of an all-encompassing definition authors like CHOI and TRIANTIS have opted instead for enumerating certain elements that present themselves in situations in which bargaining power disparities exist, with one of the parties being in a considerably superior position.

a. Demand and Supply Conditions: If the demand for a certain product is on the rise, the provider will be in a much stronger position than those seeking to obtain it.
b. Market Concentration: In a market where the supply is concentrated in one or few providers, they will be in an advantageous position.
c. Information advantages: The party that knows more about the other party, about the product, or about itself, without disclosing this to the other party, has the ability to obtain a much larger benefit from the contract.
d. Patience and risk aversion: Parties who are in an advantageous position are often able to spend a longer time negotiating a contract, or waiting for a better opportunity, free from the pressures that might affect a weaker party. A weak party will often find itself in dire need of contracting, in order to stay in business or to obtain a necessary product.
e. Negotiating tactics: An experienced party will be able to turn the tables of the negotiation in its favor, while a naive or novice contractual player will be unable or incapable of doing so.

Regardless of the difficulties defining the term, "bargaining power" has been usually understood as referring to the ability of a party to impose his or her terms when negotiating with another.[314] From that perspective, bargaining power could be defined as merely *"the capability of the bargainers to favorably reframe or change the bargaining relationships, to win accommodations from the other, and to influence the outcome of a negotiation."*[315] Under that light, when we speak of contracts of adhesion the party with

---

[313] HELVESTON, M. N. & JACOBS, M. S., 2014, supra note 310, p. 1019.
[314] This seems to be the position of BARNHIZER, who defines it as "*the ability to obtain preferred terms in the parties' bargain*", although noting the near impossibility of defining "power" (BARNHIZER, D. D., 2005, supra note 159, p. 168).
[315] YAN, A. & GRAY, B., 'Negotiating Control and Achieving Performance in International Joint Ventures: A Conceptual Model', 2001, 7 *Journal of International Management*, no. 4, p. 299.

the most bargaining power will be the one dictating the terms of the agreement, while the weaker party will be the one agreeing to those terms, often in a "take it or leave it" basis.[316]

In consumer law, the role of bargaining power is fairly obvious and straightforward. In a market where there are many consumers and only a few providers, the individual power of any single consumer is considerably smaller than that of the provider, as losing a single customer will not represent a big loss for the latter. As a consequence of this, providers are able to dictate the terms of the agreements, and consumers are forced to take them. This situation is, of course, exacerbated when we remember that some contractual terms (such as exclusion of liability for certain type of damages, and choice of court agreements) are ubiquitous among virtually all market participants, and so the ability of any consumer to just shop around for better terms simply does not exist.[317]

Although at first it might seem like this is an issue that is mostly, if not exclusively, relevant in consumer contracts, this is not the case. Indeed, business dealings are not exempt from serious disparities in bargaining power, or of its possible abuses. After all, there is a big difference between contracts concluded between businesses of similar size, and those concluded between a behemoth corporation and any of its individual providers or clients.

A good case study on the effects of unequal bargaining power in a business setting comes from the history of the regulations of the carriage of goods by sea, both in a domestic as well as in an international sphere. In late 19th Century, sea carriers possessed a

---

[316] CHOI, A. & TRIANTIS, G., 2012, supra note 309, p. 1667 (arguing that the bargaining power of the parties "*affects the terms of their deal*"). Aware of this issue, and with a touch of dramatism, RADIN has opted to do away with the "contract" word altogether when referring to contracts of adhesion, speaking instead of *"boilerplate rights deletion schemes"* (cited in WOODWARD JR, W. J., 2015, supra note 134, p. 933).

[317] As BECHER argued, *"*[I]*f all contracts (in a given field of commerce) are basically the same, buyers will have no incentive to read SFCs* [Standard Form Contracts]. *Under these circumstances, consumer cannot realize any private gain from the costly process of becoming informed"*(BECHER, S. I., 2008, supra note 199, p. 742). THAL recognizes two ways in which what he calls contractual "exploitation" can happen as a result of bargaining power disparities. First, it can occur in the case of monopolization or cartelization (when a party has such a strong bargaining position in the market that no other party can even approach her bargaining strength) and, second, second, when one of the parties is in such a weak position that the possibility for abuse exists for that reason alone. He then adds that

> *"for the most part, the policy issues which underlie the problem of inequality of bargaining power are the same whether the inequality is due to strength or weakness. However, when considering whether there is a gross inequality of bargaining power due to one party's excessive strength, the focus of the inquiry must extend beyond the transaction in question, since the real issue is whether the market is fair (contestable). This is not the case with inequality due to one party's weakness, since the contestability of the market is not relevant to the fairness of the transaction."*

THAL, S. N., 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness', 1988, 8 *Oxford Journal of Legal Studies,* p. 29.

tremendous amount of market power, thanks to which they were able to insert wide and all-embracing exclusion clauses in their contracts.

> *"Carriers were exempted from liability for loss or damage from perils of the sea, decay, strikes, deviation to unseaworthy ships and their own negligence. The exclusion clauses operated totally in the carrier's favour and the goods were carried entirely at the merchant's risk. Judges in Britain, following the tenor set by the laissez faire philosophy, were sympathetic to such clauses. And of course, Britain, a nation with huge maritime interests, had a lot to gain with the increase in the volume of ocean traffic."*[318]

The obvious state of defenselessness in which these clauses placed the weaker parties quickly motivated countries with cargo interests to demand some sort of protective reform. Because of the abuses that came as a result of these clauses, "*it was felt that an international convention was required to redress the imbalance caused by the laissez faire philosophy*" in the maritime carriage.[319] This lead to the enactment of both domestic and international norms aimed at restoring some semblance of balance to these contractual relations.

Regardless of whether the disparities in bargaining power appear in a business or in a consumer context, it seems clear that they are an inherent part of free market economics, and that no amount of regulation can put an end to them. As a matter of fact, the mere existence of a difference between the bargaining powers of the parties should not be considered as inherently wrong, or as a problem in the market. As THAL notes, "*a party cannot call the inequality of bargaining power doctrine into aid merely because he or she is an inferior bargaining position. For the doctrine to be relevant, it is essential that the inequality arise*[s] *because of unusual weakness of bargaining power on one side of the transaction*."[320] Of course, then the issue becomes determining what type of inequalities or weaknesses should be addressed by the legal system.

It is important to understand, and this cannot be stressed enough, that a completely healthy market would still allow some players to acquire more and more power as they grow, and to be in a better position compared to that of their contracting parties. It is not correct, therefore, to suggest that disparities in bargaining power are necessarily a sign of

---

[318] CARR, I. & STONE, P., *International Trade Law*, 2014, 5th ed., Routledge-Cavendish, p. 229. *See* also SOOKSRIPAISARNKIT, P., 'Enhancing of Carriers' Liabilities in the Rotterdam Rules—Too Expensive Costs for Navigational Safety?', 2014, 8 *The International Journal on Marine Navigation and Safety of Sea Transportation*, no. 2, p. 314 ("*Ship-owners had a relatively stronger bargaining power. They had a practice of inserting exclusion clauses into bills of lading exempting their own liability for negligence. Courts in different jurisdictions reacted differently to such a contractual provision. In the United Kingdom where ship-owning interests were influential, the validity of such clause was upheld*").

[319] CARR, I. & STONE, P., 2014, supra note 318, p. 230.

[320] THAL, S. N., 1988, supra note 317, p. 30.

market failures or inefficiencies.[321] This caveat notwithstanding, however, the law has often taken a rather critical approach towards these disparities. In general, the view has been that if the powerful can dictate the terms that the weak must abide by, then they will almost certainly take advantage of them, making the resulting contract an agreement in name only. As HELVESTON and JACOBS note:

> *"Usually the powerful are corporations, whose wealth and power dwarf those of their counter-parties, typically consumers of limited means and limited experience with the contracting process. Contracts formed under these circumstances strike many as not only intuitively unfair but as a problem that merits judicial resolution."*[322]

The risks associated with bargaining power disparities and abuses are such that measures aimed at preventing such abuses often occupy an important place in the legal system. A very good example of how serious this concern can be seen in the Constitution of Colombia, where preventing abuses of bargaining power is established as a fundamental role of the State. Indeed, as Paragraph 4 of Article 333 establishes:

> *"The State, mandated by law, will prevent that economic liberty is obstructed or restricted, and will avoid or control any abuse that people or companies might make of their dominant position in the national market."*[323]

The challenge for the legislature and the courts to regulate the way in which bargaining power disparities affect agreements has been a difficult one, since they must find a balance between two competing, yet complementing, aims.

> *"On the one hand, it must not restrict the legitimate exercise of an individual's freedom to enter into such agreements as he chooses; but on the other it must be vigilant to ensure that an apparent agreement is the product of a genuine exercise of that freedom. The former of these two aims is a matter of substantive freedom; that is to say, freedom to bind oneself to any legitimate substantive set of terms. The latter is concerned with the procedural propriety of the process leading to a given set of substantive terms. On the face of it, these two aims do not compete; rather, they complement one another. But in practice there is a great range of situations for which the principle of substantive freedom and the principle of procedural rectitude are apt to encroach on one another."*[324]

---

[321] MORANT, B. D., 2003, supra note 126, p. 258 ("*power disparity alone does not justify intervention*").

[322] HELVESTON, M. N. & JACOBS, M. S., 2014, supra note 310, p. 1017.

[323] The original text in Spanish establishes:
> *"El Estado, por mandato de la ley, impedirá que se obstruya o se restrinja la libertad económica y evitará o controlará cualquier abuso que personas o empresas hagan de su posición dominante en el mercado nacional."*

[324] CARR, C., 'Inequality of Bargaining Power', 1975, 38 *The Modern Law Review*, no. 4, p. 463.

A contractual system in which the law fails to distinguish between negotiated and non-negotiated clauses *"is contradictory to a system reliant on consent and personal autonomy"*.[325] Contracts are no less than privately-created laws, and failure to recognize them as such, particularly when no real consent has been given by one of the parties, can have dire consequences.

> *"Those who are subject to private laws without their consent need the protection which only judicial review can provide, and judicial review is not likely to be forthcoming unless private lawmaking is recognized as lawmaking. A law made by one private person for another, without the other's consent – a standard form sought to be enforced against a person who had no reasonable opportunity to read it, for example- should be subjected to judicial review by virtue of the same authority as a court has for enforcing it in the first place."*[326]

On the one hand, nobody could possibly argue that all contracts of adhesion are inherently wrong and that therefore they should be subjected to judicial review; on the other, however, it should also be kept in mind that, as we have seen, many contractual situations are "contractual" in name only. Indeed, it is often the case that one of the parties to a contract will limit her actions to merely agreeing with the terms presented to her, unaware of their intricacies and consequences, unable to modify anything, and not in a position to find any real alternatives. The different ways in which such situations have been addressed require closer scrutiny.

[325] BARNHIZER, D. D., 2006, supra note 311, p. 844.
[326] SLAWSON, W. D., 1971, supra note 190, p. 538.

Chapter 3
Repairing Contractual Imbalances

> *"The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at the least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free.* […] *The principle of freedom cannot require that he should be free not to be free"*
>
> John Stewart Mills, On Liberty.[327]

3.1 Introduction

As we have seen in the preceding chapters, contract law is based on two elements. On the one hand, the obligation of the parties to comply with their agreements and, on other, the freedom of those same parties to determine the content of their own obligations. Despite the importance of these two elements, they are not absolute. Indeed, limits are established based on society's values, due to both moral considerations (ideas as to what is and is not "fair"), as well as due to the recognition of the limits of understanding and behavior.

As we move towards the acceptance and enforcement of certain clauses, particularly those relating to forum selection, it is essential to first understand how and why certain terms might not be acceptable. As this and the following chapters will show, there are no universal solutions, no "one-size-fits-all" methods to determine in advance what clauses can be used, or to deter the use of unfair clauses altogether. Still, despite the plethora of systems and methods used to tackle unfairness, some commonalities do exist.

[327] MILL, J. S., *On Liberty*, 1869, Longmans, Green, Reader, and Dyer, pp. 184–185

The common element that, as we will see, is inherent to all regulations of contractual imbalances is bargaining power. Indeed, different legal systems, belonging to different legal families, all seem to recognize that a balance in bargaining power is an essential element of a truly free contractual system. It is precisely when bargaining power differences have given way to gross imbalances in the resulting contractual relation that the State interferes in the aims of restoring justice and balance.

3.2 Bargaining Power Disparities and Contractual Fairness

At the core of the issue of regulating bargaining power disparities and contractual (un)fairness always lies a single question: Why should we regulate? It certainly seems wrong, at least in principle, that some people or companies, who are perfectly capable of conducting their own business dealings, should be somehow relieved of their obligations, simply because they are not altogether happy with the outcome of their deal, and allege some sort of unfairness. After all, as US Supreme Court Justice Joseph STORY said, representing classical contract theory, as well as capitalist free market economics:

> "[E]*very person who is not from his peculiar condition or circumstances under disability is entitled to dispose of his property in such a manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable or otherwise, are considerations not for courts of justice but for the party himself to deliberate upon.*"[328]

Critics of regulatory efforts on this subject have also pointed out that employing bargaining power as a measure of fairness is in itself unfair. They base this on the fact that bargaining power allows the courts to discriminate between contracts containing the same terms, but which are concluded by different people. Because of this, some parties will find themselves relieved of the same terms with which other parties will have to comply. As HELVESTON and JACOBS argue:

> *"The bargaining-power doctrine is unique in promoting the differential treatment of contracts whose terms are alike but whose signatories differ. Contract law, and general notions of fairness, would normally favor treating similar contracts similarly. The bargaining-power doctrine is therefore ultimately and unfortunately exceptional, affording different treatment to similar contracts solely on the basis that some arose from the use of an unspecified, and unspecifiable, power imbalance between the relevant parties.*

[328] Cited in EDWARDS, C., 2008, supra note 120, p. 656.

> *Taken together, these flaws constitute an implicit admission that the bargaining power construct is too plastic to serve contract law well. Any legal doctrine whose most basic terms remain undefined is apt to produce confusion, uncertainty, and unfairness. The bargaining-power doctrine has produced all three. Moreover, these problems will endure for as long as the concept continues to occupy a role in contract law. There is no way to define substantial bargaining-power usefully, no workable proxy for identifying the 'powerful,' no good justification for preventing the 'strong' from contracting on terms available to the 'weaker,' and thus no way to justify the continued use of the construct."*[329]

The topic of fairness and unfairness in contract law has always been, and will probably continue to be, hotly contested. A case can certainly be made that the courts have no place in policing as ethereal and nebulous matters as "fairness" in private dealings. After all, it is often impossible to determine what can or cannot be considered "fair", and thus such endeavors would have a negative impact on the law's ability to provide certainty and predictability to human relations.[330] As some have argued, in the end, *"all values are purely subjective, and if the two parties are content with their bargain at the time it is made, there is no basis on which it might be said that a contract is unfair"*.[331] In other words, the law should not protect those who, when looking back on their agreements, wish they had acted differently, if at the time of contracting they were completely satisfied with them. An overreaching approach with the aims of ensuring "fairness" would remove the idea of personal responsibility from contractual relations, as negligent parties would know that they could always rely on the courts to assist them afterwards, creating an incentive for the parties to act less diligently than they otherwise would.[332] The concern obviously exists that that this would allow the courts to act as paternalistic authorities, policing human kindness.

Judicial intervention in matters of contractual fairness goes against classic contract theory, as well as the *laissez faire* understanding of free market economics. Indeed, within these philosophies the role of the courts is seen as limited to their duty to act *"as detached umpires or referees, doing no more than to see that the rules of the game* [are] *observed and*

---

[329] HELVESTON, M. N. & JACOBS, M. S., 2014, supra note 310, p. 1020.

[330] EDWARDS, C., 2008, supra note 120, p. 656 ("[e]*xcept in extraordinary circumstances, courts* [have] *avoided scrutiny of contract equities on the grounds that efforts to achieve justice in individual cases limited freedom of contract and fostered uncertainty that promises would be kept*").

[331] SMITH, S. A. & ATIYAH, P. S., 2006, supra note 113, p. 297.

[332] As it was stated in the 1986 Canadian unconscionability case of *DeWolfe v. Mansour*, this doctrine is not intended to "*open the door for anyone to enter a binding agreement, obtain its advantages, while never intended to perform his obligations an later attempt to use the court to have the contract held unenforceable against him, provided he could show he was under some pressure to cause him to enter the agreement*" (Cited in ENMAN, S. R., 'Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law', 1987, 16 *Anglo-American Law Review*, no. 3, p. 212).

refusing to intervene affirmatively to see that justice or anything of sort [is] *done"*.[333] Any intervention aimed at fixing "unfair" bargains thus represents a challenge to our traditional understanding of contractual relations, as it assumes that contract law is (or should be) a set of principles limiting *"the ability to enter into certain types of contract,"* while the courts are expected to not only enforce contracts, but also *"to ensure that a minimum degree of fairness is observed"*.[334]

Although nowadays *laissez-faire* contractual theories are largely relegated to the pages of history, there is still a significant number of authors, judges and organizations who advocate this libertarian understanding of freedom of contract, arguing that regulatory attempts are an inherent threat to individual freedom[335]. They argue that one of the first functions of the law is to guarantee each individual a certain sphere within which they can operate freely, *"without having to justify themselves to the state or to third parties: if one individual is entitled to do within the confines of the tort law what he pleases with what he owns, then two individuals who operate with those same constraints should have the same right with respect to their mutual affairs against the rest of the world."*[336] Following this, they insist that *"government regulation, which establishes the boundary between the use and misuse of bargaining power, is detrimental to individual and community prosperity."*[337]

While paying attention to these libertarian ideas might seem only useful for philosophical discussions, it should be remembered that party autonomy, the ability of a person to define the content of his legal relations with other individuals, is a fundamental value. It appears in this manner in, for example, the German Constitution, the Federal Constitution of the United States of America, and the European Convention on Human Rights, among others. As such, any regulation that affects it could, in principle, be

---

[333] EDWARDS, C., 2008, supra note 120, p. 656.

[334] THAL, S. N., 1988, supra note 317, p. 21.

[335] Back in 1933 COHEN explained this problem as the result of an ideological struggle against absolutist powers, and which, ironically enough, being fought by resorting to an absolute idea:

> *"In the fierce fight against the numerous irrational, tyrannical, and oppressive restraints, men jump to the conclusion that the absence of all restraint is a good in itself and indeed the one absolute good in the political field. The error of this cult of freedom is of the same logical type as that of the tradition which it opposes. The latter argues that since our natural impulses are not free from bad consequences, therefore they are absolutely bad and must be made powerless by checks and balances or some other device. Both sets of arguments jump from the perception of what is evil under certain conditions to the affirmation of an untenable absolute."*

COHEN, M. R., 1933, supra note 16, p. 559.

[336] EPSTEIN, R. A., 'Unconscionability: A Critical Reappraisal', 1975, 18 *Journal of Law and Economics*, no. 2, pp. 293–294.

[337] EDWARDS, C., 2008, supra note 120, p. 660.

considered a violation of a human right, a difficulty that is only exacerbated by the supremacy of constitutional guarantees over other type of regulations.[338]

Without prejudice to these caveats in regards to contractual regulations, it is undeniable that the majority opinion seems to be that regulation is necessary, and that, in practice, freedom of contract is not absolute.[339] *"The total 'hands off' policy with respect to economic matters is regarded as incorrect in most political discussions almost as a matter of course, and the same view is taken, moreover, toward a more subtle form of laissez-faire that views all government interference in economic matters as an evil until shown to be good."*[340]

Clearly, in order to ensure freedom of contract and individual liberty, some modicum of balance and fairness must exist in the market, and it is the role of the regulators to ensure that it stays that way. If we look at the European Community, for example, it is undeniable that freedom of contract occupies an important place among its fundamental core values; at the same time, however, the Community acknowledges that "*the public interest places limits on private parties' freedom to arrange their interrelations as they wish. Freedom of contract is not absolute but can be restricted in light of the values upheld in a society.*"[341]

---

[338] A somewhat different view is presented by KERBER and VANBERG, who argue that "*party autonomy depends on legal rules and thus cannot be a fundamental right a priori*" because "*though party autonomy indicates, in principle freedom from outside control, privately arranged relations have legal relevancy only because the law recognizes them*" (in KERBER, W. & VANBERG, V., *Constitutional Aspects of Party Autonomy and Its Limits: The Perspective of Constitutional Economics*, in Grundmann, S. et al. (eds.), *Party Autonomy and the Role of Information in the Internal Market*, 2001, p. 42). In our view, this is a nonsensical, illogical and dangerous statement that, if taken to its logical conclusion, makes every fundamental right subservient to the will of the State. Every single one of our human rights and liberties depends on the existence of a regulatory system created to recognize it and protect it, and yet nobody in his or her right mind would argue that, therefore, they "cannot be a fundamental right a priori". The existence of a right to private property, for example, depends on a legal system that demarcates the boundaries of the objects of ownership and recognizes the ability of individuals to hold dominion over them; our right not to be detained unlawfully depends on the existence of a judicial system capable of handling Habeas Corpus pleas; our right to not be tortured depends on a legal system that defines torture and thus forbids certain practices; etc. What these authors therefore seem to argue is the indefensible position that human rights do not precede the State, but vice versa.

[339] *See*, e.g. NAUDE, T., 'Unfair Contract Terms Legislation: The Implications of Why We Need it For Its Formulation and Application', 2006, 17 *Stellenbosch Law Review*, no. 3, p. 361 ("[l]*egislative control over unfair contract terms is regarded in many countries as an essential tool in the law's response to the abuses attendant upon the use of non-negotiated or standard contract terms*") and HUEBNER, C. A., 'Compulsory Arbitration of Labor Disputes', 1946, 30 *Journal of the American Judicature Society*, no. 4, p. 128 ([a]*ll decisions of the United States Supreme Court have held that the right to freedom of contract is not absolute, but is always subject to reasonable restraints*").

[340] EPSTEIN, R. A., 1975, supra note 336, p. 294.

[341] MAK, C., 'The One and the Many: Translating Insights from Constitutional Pluralism to European Contract Law Theory', 2013, 21 *European Review of Private Law*, no. 5, p. 1190.

3.3 Bargaining Power Before the Courts

Beyond the arguments that can be made for and against regulation from the standpoint of free market economics, there is another important difficulty regarding the issue of contractual fairness. The fact of the matter is that there seems to be very little coherence when it comes to defining some of the essential elements required for this analysis and, as such, any regulatory attempt faces an uphill battle.

Perhaps the most fundamental problem associated with the analysis of bargaining power is that it is often impossible to determine exactly *what* is being analyzed, and what degree of relevance should be given to it. After all, once it is acknowledged that the relative power of the parties will never be exactly the same, that even in a perfectly competitive market some market players will acquire more power than others, and that the use of boilerplate terms is not in and of itself a sign of unfairness, then finding a criterion through which to analyze the fairness and the real extent of the "free will" of the parties becomes extremely important. As one US Court noted, recognizing that differences of power are inherent to commerce:

> *"Law in its sanctions is not coextensive with morality. It cannot undertake to put all parties to every contract on an equality as to knowledge, experience, skill and shrewdness."*[342]

Acknowledging these difficulties in regulating bargaining power, courts have, in general, been reluctant to rely on bargaining power disparities alone to review contractual agreements. American courts, for example, have restricted

> *"explicit analyses of bargaining power asymmetries to the periphery of contract law. For example, the legal doctrine appears primarily as one element of the standard for unconscionability and adhesion contracts, and courts occasionally cite it as a reason for refusing to enforce private agreements that are objectionable for reasons of public policy. Courts rarely overturn contracts on the basis of these doctrines explicitly employing inequality of bargaining power as an element, and inequality of bargaining power alone is not a sufficient justification for judicial intervention into contract disputes."*[343]

---

[342] *Goodwin v. Agassiz* [1933], 186 NE, 359-365, p. 363

[343] BARNHIZER, D. D., 2005, supra note 159, p. 144. A similar situation has arisen in Australia, where the mere differences in the bargaining power of the parties has been held as insufficient grounds to review the contract. In a 1983 unconscionability case, for example, the High Court of Australia stated that although the parties

> *"did not meet on equal terms* [...] *that circumstance alone does not call for the intervention of equity, ... A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the other party was placed."*

Similarly, English courts have also refused to recognize inequalities in the bargaining power of the parties as the sole basis for judicial review of contracts. In general, judges have considered that such criterion would be "*unworkable*."[344]

On this matter, Lord DENNING's position on the 1974 English Court of Appeal case of *Lloyd's Bank Ltd. v. Bundy* is worthy of consideration, even if his attempts to create a general doctrine of bargaining power as a basis for contractual review failed to be accepted by the judicature. The facts of the case were rather simple:

> *"The plaintiff ('the bank')* [...] *alleged that the defendant had on four occasions* [...] *charged his farm by way of legal mortgage as security for monies which he covenanted to repay the bank; and that on three occasions, most recently December 17, 1969 (on this last occasion jointly and severally with his son) he had guaranteed up to £ 11,000 the debts owed to the bank by his son's company (MJB Plant Hire). On December 10, 1970,* [...] *the bank required of the defendant payment of £ 11,000 owing to the bank by the company (which had gone into receivership in May of that year), but the defendant refused or neglected to pay. The bank accordingly sought to exercise its rights as mortgagee* [...] *to sell the property, and required the defendant by notice to vacate the farm by January 31, 1972. The defendant did not do so, and the bank now sought to have him evicted.*
>
> *In his defense the defendant claimed in part that* [...] *he had been induced to execute the last charge while under the influence of the bank's agent, Mr. Head, manager of the plaintiff's local branch. The defendant counterclaimed for an order setting aside the legal charge [...] and for an injunction restraining the bank from selling the property.*
>
> *The critical events were those of December 17, 1969, when the assistant manager of the plaintiff's Salisbury branch met with the defendant. Mr. Head had with him completed forms of guarantee and charge, requiring only the defendant's signature. The new guarantee and charge would bring the father's liability to £ 11,000. Lord Denning described the events of that day:*
>
> *'Mr. Head produced the forms that had already been filled in. The father signed them and Mr. Head witnessed them there and then. On this occasion, Mr. Head, unlike Mr. Bennett [Head's predecessor as assistant manager], did not leave the forms with the father; nor did the father have any independent advice.'"*[345]

Cited in ENMAN, S. R., 1987, supra note 332, p. 200.

[344] BARNHIZER, D. D., 2005, supra note 159, p. 145

[345] SLAYTON, P., 'The Unequal Bargain Doctrine: Lord Denning in Lloyds Bank v. Bundy', 1976, 22 *McGill Law Journal,* pp. 96–97.

As Mr. Head explicitly admitted under cross-examination, Mr. Bundy had "*relied on* [...him] *implicitly to advise him about the transaction as Bank Manager*."[346] More importantly, Mr. Bundy had been placed in a very difficult situation, since

> "[h]*e was faced by three persons anxious for him to sign. There was his son Michael, the overdraft of whose company had been* [...] *escalating rapidly; whose influence over his father was observed by the judge - and can hardly not have been realised by the bank; and whose ability to overcome the difficulties of his company was plainly doubtful, indeed its troubles were known to Mr. Head to be 'deep-seated.' There was Mr. Head, on behalf of the bank, coming with the documents designed to protect the bank's interest already substantially made out and in his pocket. There was Michael's wife asking Mr. Head to help her husband.*
>
> *The documents Mr. Bundy was being asked to sign could result, if the company's troubles continued, in Mr. Bundy's sole asset being sold, the proceeds all going to the bank, and his being left penniless in his old age. That he could thus be rendered penniless was known to the bank - and in particular to Mr. Head. That the company might come to a bad end quite soon with these results was not exactly difficult to deduce."*[347]

Writing the majority opinion, Sir Eric SACHS took a rather moderate approach, allowing the appeal based on the breach of fiduciary duty that existed from the bank towards Mr. Bundy.[348] The bank, despite knowing that the company belonging to Mr. Bundy's son would almost certainly go under, had insisted Mr. Bundy signed the guarantee, aware of the fact that this was his only asset, and that he would most likely end up losing it. This represented a breach of the fiduciary duty. As Sir SACHS explained:

> *"The situation was thus one which to any reasonably sensible person, who gave it but a moment's thought, cried aloud Mr. Bundy's need for careful independent advice. Over and above the need any man has for counsel when asked to risk his last penny on even an apparently reasonable project, was the need here for informed advice as to whether there was any real chance of the company's affairs becoming viable if the documents were signed. If not, there arose questions such as, what is the use of taking the risk of becoming penniless without benefiting anyone but the bank? Is it not better both for you and your son that you, at any rate, should still have some money when the crash comes? Should not the bank at least bind itself to hold its hand for some given period? The answers to such questions could only be given in the light of a worthwhile appraisement of the company's affairs - without which Mr.*

[346] *Lloyd's Bank Ltd. v. Bundy* [1975] QB, 326, p. 343.
[347] ibid., p. 345.
[348] CARR, C., 1975, supra note 324, pp. 465–466.

> *Bundy could not come to an informed judgment as to the wisdom of what he was doing*
>
> *No such advice to get an independent opinion was given; on the contrary, Mr. Head chose to give his own views on the company's affairs."*[349]

While Lord DENNING, the Master of the Rolls, agreed with Lord SACHS that the Appeal should be allowed, he came to this decision through a different approach. He first stated that although, as a general principle, "[n]*o bargain will be upset which is the result of the ordinary interplay of forces,"* the law establishes some exceptions to that rule.[350] In his view, at their core, the exceptional cases in which courts have the ability to set aside contracts are all based on inequalities in the bargaining power of the parties.[351] Lord DENNING reached his conclusion after looking at what he considered were five distinct categories of situations in which the law allows the courts to set aside valid contracts based on bargaining power disparities. These were "*duress of goods (to which he adds cases of colore officii), unconscionable transaction, undue influence, undue pressure (an example being 'where one party stipulates for an unfair advantage to which the other has no option but to submit'* [...]*) and salvage agreements."*[352] As Lord DENNING himself stated:

> *"Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal."*[353]

---

[349] *Lloyd's Bank Ltd. v. Bundy* [1975], p. 345. *See* also SLAYTON, P., 1976, supra note 345, p. 98.
[350] *Lloyd's Bank Ltd. v. Bundy* [1975], p. 336.
[351] TREBILCOCK, M. J., 1976, supra note 289, p. 359.
[352] SLAYTON, P., 1976, supra note 345, p. 99.
[353] *Lloyd's Bank Ltd. v. Bundy* [1975], p. 339

What Lord DENNING attempted to establish was nothing short of ambitious.[354] Wary of contracts in which the stronger party is allowed to, as he said in this case, *"push the weak to the wall"*, he aimed to establish a general doctrine based on the inequality of bargaining power.[355] This doctrine would have allowed this sole consideration, as long as the resulting bargain was unfair, to become a sufficient basis for the judicial review of a contract.[356] Although Lord DENNING referenced the lack of independent advice that had existed in the case at hand, the doctrine that he was hoping to create was to be wider than that, protecting the weaker party's vulnerabilities beyond supposed breaches of fiduciary duty. He knew that *"in extreme cases, neither independent advice nor an understanding of the transaction by the weaker party will save it from attack."*[357] His attempt, although influential to a degree, did not succeed. [358]

---

[354] Although Lord DENNING is credited with giving new life to the idea of an all-encompassing doctrine, it is important to note that he was by no means the first to do so. As a matter of fact, cases going as far back as the late 18th century had attempted similar feats. As GREENFIELD and OSBORN noted, *"in one of the earliest authorities, Kenyon MR stated* [in a 1787 case] *that: 'I lay great stress upon the situation of the parties to [the bargain], and the persons who compose the drama', before proceeding to note that cases involving infants and guardians: 'all proceed on the same general principle, and establish this, that if the party is in a situation in which he is not a free agent and is not equal to protecting himself, this court will protect him'"* (GREENFIELD, S. & OSBORN, G., 'Unconscionability and Contract: The Creeping Shoots of Bundy', 1992, 7 *Denning Law Journal,* p. 65).

[355] *Lloyd's Bank Ltd. v. Bundy* [1975], p. 337. *See* also PIERS, M., 2011, supra note 131, p. 132 ("*Lord Denning attempted to introduce a general doctrine of inequality of bargaining power*").

[356] A big part of Lord DENNING's judicial career seems to have been centered around repairing what he perceived as inequalities in the Common Law. This behavior, and in which he demonstrated a "*willingness to override precedent to do what he saw as justice*", earned him the moniker of "*the people's judge*" (DYER, C., March 6, 1999, 'Lord Denning, Controversial 'People's Judge', Dies Aged 100', <http://www.theguardian.com/uk/1999/mar/06/claredyer1> (last visited 20 October 2014)). In 1983, in the case of *George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd*., reflecting on the issue of contractual fairness, he remarked that:

> *"None of you nowadays will remember the trouble we had - when I was called to the Bar - with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices* [...] *He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of 'freedom of contract.'* [...] *No freedom for the little man who took the ticket or order form or invoice. The big concern said, 'Take it or leave it.' The little man had no option but to take it."*

Cited in D'AGOSTINO, E., 2014, supra note 138, p. 5.

[357] CARR, C., 1975, supra note 324, pp. 464–465.

[358] Writing in 1984, LITTLEWOOD spoke of the general landscape for DENNING's doctrines in rather grim terms, saying that his judgment "*has received no elaboration, little support, and much criticism* [...] *His dicta have certainly not grown into a comprehensive body of law, and it seems unlikely that they will do so"* (LITTLEWOOD, M., 'Freedom From Contract: Economic Duress and Unconscionability', 1984, 5 *Auckland University Law Review,* p. 165). Still, although DENNING's general doctrine did not succeed in England, it did greatly influence other Common Law jurisdictions, such as Canada and Australia. As CHEW explained,

> *"In Canada, Lord Denning's doctrine has been accepted as a confirmation of established principles. The Canadian authorities state that to find an unconscientious dealing there must be an inequality of bargaining power caused by the weaker party's disadvantage, combined with an 'improvident exchange' or 'proof of substantial unfairness of the bargain obtained by the stronger'. There is no requirement of any knowing or conscious exploitation of disadvantage. Under the 'unconscionability' rubric, relief is afforded*

Despite the good intentions of their supporters, it is easy to understand the reticence of both English and American courts to use inequalities of bargaining power as all-encompassing doctrines for contractual review. Since the law is supposed to give some modicum of stability and predictability to human relations, adding a concept that, as we have seen, is sometimes too nebulous to be practical, might prove to be counterproductive in tackling the issue of contractual unfairness. Due to the inability to clearly define bargaining power, as well as to determine the situations in which a real disparity can be said to exist, in the end courts would have too much leeway to review otherwise valid contracts, which would undoubtedly result in wholly unjust measures and severely damage legal certainty. As the Privy Council stated in *Pao On v. Lau Yiu Long*, such a doctrine *"would render the law uncertain"*.[359] In general, accepting a wide application of Lord DENNING's doctrine might result in the rise of a "*benevolent giant.*"[360]

Indeed, in *Pao On v. Lau Yiu Long* Lord SCARMAN was very categorical in his rejection of a general rule for voiding a contract based on the unfair use of a dominant bargaining position. Criticizing the doctrine, he stated that

> "[Lord DENNING's] *conclusion is that where businessmen are negotiating at arm's length it is unnecessary for the achievement of justice, and unhelpful in the development of the law, to invoke such a rule of public policy. It would also create unacceptable anomaly. It is unnecessary because justice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress.* [...]
>
> *Such a rule of public policy as is now being considered would be unhelpful because it would render the law uncertain. It would become a question of fact and degree to determine in each case whether there had been, short of duress, an unfair use of a strong bargaining position."*[361]

Lord SCARMAN would go on to repeat this sentiment in the 1985 case of *National Westminster Bank v. Morgan*. There he explained that the desire for a general bargaining power doctrine

---

> *indiscriminately where there is a disparity of contractual values resulting from misrepresentation, undue influence or pressure, judgment at time of contracting or even a simple lack of information or sound judgment at the time of contracting."*

CHEW, C., 'Common Law and Equitable Aspects of Unjust Banking Contracts: A Legal Analysis', 2014, 29 *Journal of International Banking Law and Regulation*, no. 4, pp. 250–251. *See*, also, generally, ENMAN, S. R., 1987, supra note 332.

[359] Quoted in THAL, S. N., 1988, supra note 317, p. 24).

[360] CARR, C., 1975, supra note 324, p. 466.

[361] *Pao On v. Lau Yiu Long*, 1980 AC, 614–635, p. 634. *See* also ALIAS, S. A. et al., 2012, supra note 125, pp. 333–334 (arguing that, generally, SCARMAN failed to address several important points raised by DENNING, citing legislation that did not quite tackle the issue of bargaining power disparities).

> *"is not justified, nor is it either necessary or desirable. It causes the court to embark on a task of assessing fairness for which it is ill-equipped, overlooks the value of the different elements that rightly have been held on highest authority to be the basis of relief in cases of duress, salvage agreements, unconscionable bargains and other cases that Lord Denning seeks to amalgamate and attempts a task that, if it is to be attempted at all, is more appropriate for the legislature with the assistance of the Law Commission."*[362]

What is more, Lord SCARMAN even went on to add that, in the field of contracts, he questioned

> *"whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task - and it is essentially a legislative task - of enacting such restrictions upon freedom of contract as are in its judgment necessary to relieve against the mischief* [...] *I doubt whether the courts should assume the burden of formulating further restrictions."*[363]

3.4 Bargaining Power & Contractual Review

While it is clear that bargaining power disparities has not been successful in establishing itself as a standalone criterion for contractual review, they still occupy an important place in legal doctrine.[364] Instead, bargaining power is just one of the elements that need to be considered regarding the validity of an agreement, when analyzing, among others, issues of unconscionability, duress, undue influence, contractual interpretation, good faith, and even public policy.

Even in this restricted sphere, however, we still face another problem with bargaining power, as courts find themselves needing to measure this elusive concept. Even though several decisions make references to, for example, *"superior"*, *"overwhelming"*, *"overweening"* and *"substantial"* disparities in bargaining power, there has been a failure to

---

[362] *National Westminster Bank v Morgan* [1985] AC, 686–708, p. 698.

[363] ibid., p. 708.

[364] In this matter it is important to make a distinction between Civil Law and Common Law systems. The use of bargaining power as a standalone criterion does not seem to have ever been an option in the Civil Law systems, perhaps due to the lower amount of leeway that judges have when applying the law, which prevents the sort of "creativity" exhibited by DENNING. Although this, of course, does not change the fact that bargaining power disparities have been the motivation behind some rules and regulations (e.g. *laesio enormis*, hardship, consumer and labor rules, etc.), their use as the sole *ratio decidendi* to hold a contract unenforceable appears impossible in this setting, unless express legislation allows for it.

create a system that allows for a coherent and definitive measurement of the level of the alleged disparity.[365]

In the very influential 1974 House of Lords case of *Schroeder Publishing v. Macaulay,* the issue of abusive terms resulting from overwhelming bargaining power came to the forefront. [366] In this case, a young songwriter had entered into an exclusive agreement with a music publishing company, in which the latter acquired the *ability* (not the obligation) to publish the artist's works for the duration of the contract. Since the company failed to publish any of his songs, and the exclusive contract prevented the songwriter from publishing with a different company, he sued the publisher seeking to be released from his contract. After the publisher prevailed in both the court of first instance and the Court of Appeal, the songwriter appealed to the House of Lords which, again, sided with the plaintiff.

In an attempt to determine when it is possible to assume that the bargaining power of one party threatens the fairness of the agreement, Lord DIPLOCK stated in this decision that, first, it was necessary to differentiate between two types of standard form contracts, as it is *there* that these disparities often manifest themselves. He argued that, on the one hand, there were some agreements that even though were based on boilerplate terms, *"have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade"* and regarding which there was a certain presumption as to the terms being fair and reasonable, as a result of having been agreed upon between parties "*whose bargaining power is fairly matched*".[367] Lord DIPLOCK distinguished these contracts from those in which this presumption of "balance" did not exist, referring mostly to consumer transactions, and which were *"the result of the concentration of particular kinds of business in relatively few hands"*.[368]

---

[365] Critics have argued that the reason why such a system does not exist is simply the consequence of it being downright impossible to measure bargaining power in any meaningful way. This would be demonstrated by the fact that *"no judicial or scholarly discussion of bargaining power* […] *has suggested a coherent method, or any method for that matter- for identifying and assessing"* the level of the disparities (HELVESTON, M. N. & JACOBS, M. S., 2014, supra note 310, p. 1019). Still, the lack of a clear criterion to define it has not deterred courts from using different adjectives to describe the perceived inequalities. In *Lloyds Bank v. Bundy*, for example, the Court spoke of the *"strong bargaining position"* of one of the parties; in *Courage v. Crehan*, the European Court of Justice referenced the party that is in a *"markedly weaker position"* (C-453/99*, Courage Ltd. v Crehan* [2001], 6314, p. 6325); the US Court of Appeals for the 9th Circuit, in *Nagrampa v. MailCoups,* spoke of *"overwhelming economic power"* and *"overwhelming bargaining power"* (*Nagrampa v. MailCoups, Inc.* [2006], 469 F. 3d, 1257, p. 1270); etc.

[366] *A. Schroeder Music Publishing Co. Ltd. v Macaulay* [1974], 1 WLR, 1308.

[367] ibid., p. 1316. *See* also TREBILCOCK, M. J., 1976, supra note 289, pp. 362–363.

[368] *A. Schroeder Music Publishing Co. Ltd. v Macaulay* [1974], p. 1316. In a later (and very similar) Court of Appeal case, and which expressly cited *Macaulay,* Lord DENNING granted relief to performers from the band *Fleetwood Mac*, who had been bound by a contract that was "*restrictive of trade*" (as opposed to "in restraint of trade") since "*it requires a man to give his services and wares to one person only for a long term of years to the exclusion of all others."*

> "[In this second category, the terms] *have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods and services, enables him to say 'If you want these goods and services at all, these are the only terms on which they are obtainable. Take it or leave it.'*
>
> *To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power."*[369]

Despite its clear desire to solve this conundrum, the *Macaulay* decision actually fell short of establishing a clear criterion, and opted instead to enumerate some "symptoms" of bargaining disparities. The problem with this approach is that it does not at all facilitate the job of those who analyze other cases, since the mere presence of the same "symptom" will not necessarily mean that the cause (i.e. the imbalance) is the same. And so, the tools for the differential diagnosis are still lost.

The case of boilerplate is a good example of the difficulties surrounding the "diagnosis" of serious imbalances. Even though contracts of adhesion are often seen as a telltale sign of bargaining power discrepancies, Lord DIPLOCK himself conceded that their use is fundamental for the economy, and that it would be foolish to assume that all of them could or should be potentially subjected to judicial scrutiny.[370] If anything, eliminating

---

(*Clifford Davis Management Ltd. v. WEA Records Ltd.* [1975], 1 WLR, 61–66, p. 64). In DENNING's view, this agreement had been the result of a grave "*inequality of bargaining power*" and, as such, it had to "*be set aside*"(ibid., pp. 65–66). For a commentary on the facts of this case in light of *Macaulay* and *Lloyd's v. Bundy, See* SLAYTON, P., 1976, supra note 345, pp. 100–101.

[369] *A. Schroeder Music Publishing Co. Ltd. v Macaulay* [1974], p. 1316.

[370] These considerations aside, authors often appear critical of, if not almost downright opposed to, contracts of adhesion, as if they were intrinsically evil, arguing, for example that "*generally,* [contracts of adhesion] *are imposed in an abusive manner to the consumer who, because of his weaker contractual position, cannot negotiate their essential terms*" (VIGURI PEREA, A., 'Los Contratos de Adhesión: Tendencias en la Evolución de la Protección del Consumidor en el Derecho Estadounidense', 1996, 12 *Revista Española de Estudios Norteamericanos,* p. 74). This position seems incorrect, since it overlooks that this type of agreements is essential for the economy, and considers them inherently *abusive*, instead of inherently *risky*. DAVIS, for example, notes how even though these contracts have *"inherent dangers,"* they have been recognized as *"a necessary and beneficial part of a functioning economy"* (DAVIS, N. J., 2007, supra note 232, p. 578). Another criticism that can be leveled against those who oppose, almost as a matter of principle, contracts of adhesion, is that such a position also goes, paradoxically, against basic considerations of freedom of contract. If contract law establishes that nobody, be it a consumer or a multinational entity, can be forced to negotiate against its will, *"then it must logically permit parties to adopt take-it-or-leave-it positions"* (HELVESTON, M. N. & JACOBS, M. S., 2014, supra note 310, pp. 1043–1044). In principle, there should not be anything intrinsically negative about a party that states, from the very beginning, that *those* are the only terms under which she is willing to contract. To hold the opposing view means that, somehow, the law should go against the freedom of contract of those parties that, for whatever reason, are deemed "powerful" in that specific bargain, as they would be forced to contract in terms they do not find agreeable.

boilerplate altogether, and forcing all parties to individually negotiate their contracts would only hurt the weaker parties, since they would have to bear the added transactional costs, not to mention the lengthy process that would be involved in every routine transactions.[371]

The use of boilerplate should not be seen as, necessarily, a consequence of "*the concentration of market power*," let alone as inherently abusive, but rather as merely a tool aimed at facilitating the conduct of the trade.[372] Thus, although it is clear that the existence of contracts of adhesion in a given market might serve as an indication of a *possible* bargaining power disparity, it would be ill-advised to consider it as abusive by its very nature. It is, therefore, an issue of inherent *risks*, and not so much of inherent wickedness. As GARDNER explained:

> *"Dangers are inherent in standardization … for it affords a means by which one party may impose terms on another unwitting or even unwilling party. Several circumstances facilitate this imposition. First, the party that proffers the form has had the advantage of time and expert advice in preparing it, almost inevitably producing a form slanted in its favor. Second, the other party is usually completely or at least relatively unfamiliar with the form and has scant opportunity to read it an*

---

[371] LAGUADO GIRALDO, C. A., 2003, supra note 205, p. 238 (arguing that *"it is undeniable that boilerplate save transactional costs, even for the weak party"*). *See* also WOODWARD JR, W. J., 2015, supra note 134, p. 923 ("[boilerplate contracts] *save the transaction costs of one-on-one contracting*"), and SCHMITZ, A. J., 2010, supra note 306, p. 864 ("[m]*any economists also assume that form contracts foster convenience and cost-savings that corporations may pass on to consumers through lower prices and better quality goods and services*"). Some authors put forward the argument that although in theory this reasoning might hold water, in reality it is *"entirely unclear whether merchants pass on to consumers alleged cost-savings from using these contracts."* Furthermore, they point out that the fact that "*these form contracts often are products of one-sided dealings and market failure"* might bring as a consequence that there is not an optimal allocation of resources as a result of the contract (SCHMITZ, A. J., 'Embracing Unconscionability's Safety Net Function', 2006, 58 *Alabama Law Review,* p. 76) meaning that any benefit obtained from the use of boilerplate would be offset by the added costs that come associated with it. There are authors who, within their critique of boilerplate, take a more nuanced view; SLAWSON, for example, while recognizing the risks that it poses, concedes that boilerplate is indeed useful in saving costs, as well as potentially more efficient for the buyer:

> *"First, the buyer of a non-standard form would normally have to pay the expenses of his own attorney in negotiating it, in addition to the extra costs of the seller. Second, whatever benefit the buyer could obtain from a seller by negotiating a nonstandard form could normally be obtained more easily and less expensively in other ways. If he wanted increased warranty protection, for example, a buyer could probably obtain the same protection less expensively by purchasing insurance to cover the risks which would be covered by an expanded warranty. Even more simply, he could just pay the extra unreimbursed repair costs himself."*

SLAWSON, W. D., 1971, supra note 190, p. 531.

Others, like DAVIS, see the use of certain boilerplate terms, such as arbitration and forum selection provisions, as providing "*important economic advantages,"* so that their elimination would have *"a significant negative effect on commerce"* (DAVIS, N. J., 2007, supra note 232, pp. 578–579).

[372] TREBILCOCK, M. J., 1976, supra note 289, p. 364.

> *opportunity often diminished by the use of fine print and convoluted clauses. Third, bargaining over terms of the form may not be between equals or, as is more often the case, there may be no possibility of bargaining at all. The form may be used by an enterprise with such disproportionately strong economic power that it simply dictates the terms. Or the form may be a take-it-or-leave-it proposition, often called a contract of adhesion, under which the only alternative to complete adherence is outright rejection."*[373]

Other apparent signs of disparity, like the existence of homogeneous contractual terms across the market, are not enough to assume abuse and unfairness.

> *"Even where all contracts are the same, in perfectly competitive markets where the product is homogeneous, commonality of terms is what one would expect to find (for example, the wheat market). Every supplier simply 'takes' his price and probably other terms from the market and is powerless to vary them. In a perfectly competitive market, with many sellers and many buyers each supplying or demanding too insignificant a share of total market output to influence terms, all participants, sellers and buyers, are necessarily confronted with a take-it-or-leave-it proposition. Thus uniformity of terms, standing alone, is ambiguous as between the presence or absence of competition."*[374]

It is also not enough to assume that there was some sort of improper behavior in the bargaining of the parties (or that there was no bargaining at all) simply because there is a disparity in the outcome of the contract. An outcome that *seems* unfair might just be the result that the parties wanted, or simply the consequence of the lack of diligence of one of them in an otherwise fair and balanced transaction. It would be a mistake to allow the State to act in a paternalistic manner and "rectify", "correct" or annul contracts that a party could have negotiated better, but failed to do so by his own negligence. The law should not attempt to protect people from their own negligence, as it would eradicate many of the incentives to act with due diligence. A balance must therefore be struck between the aims of the law to prevent abuses, and the need for personal responsibility in contractual relations.

A further difficulty comes from the impossibility of defining "unfairness" in a legal and generally all-encompassing manner. If anything, it seems more like a situation in which pre-established definitions might be counterproductive, with the better option being to define "unfairness" on a case-by-case basis. The truth is that "*it may not be possible to list exhaustively all the bargaining improprieties (justifications for intervention). In other words, it may well be that defining contractual unfairness is an evolutionary process, in the sense that*

---

[373] GARNER, B. A., *Black's Law Dictionary, 9th*, 2009, 9th edition, West Pub. Co., St. Paul, Minn., p. 366.
[374] TREBILCOCK, M. J., 1976, supra note 289, p. 365.

rules of bargaining will be formulated along the way in response to changing normative ideas."[375] It is indeed hard to imagine a definition, either by the legislature, the courts, or the scholarly literature, that would be wide enough to include all cases of unfairness, but that would also be, at the same time, restrictive enough to ensure that the normal disparities inherent to the market would not be labeled as unfair and thus hurt legitimate contractual transactions. As BARNHIZER notes:

> *"*[G]*iven the many different ways in which contract power may be abused, even the civilians have been forced to rely on broad, general and judicially administered standards of proper contract behaviour. All common law legislation that has tried to address the unconscionability issue widely has also come to appreciate the impossibility of doing anything other than telling the courts to get on with policing fairness on a case by case basis"*.[376]

And so, since there are no broad general standards to determine when and how bargaining power disparities unduly affected the transaction, *"contract doctrine seems to hold conflicting parallel views on the appropriate legal response to issues of power and its effects on the bargaining process"*.[377]

A case-by-case approach involves reviewing the terms of the contract (or the contract as a whole) in search for signs of inequality and, of course, abuse. This might be the only way in which bargaining power disparities could play a role in contractual enforcement, since general application of the doctrine seems otherwise impossible. And so, from this perspective, what courts would need to be on the lookout for are clauses that, *"against good faith, create against the consumer or the adhering party an important and unjustified imbalance in the contractual obligations."*[378] Short of listing clauses or terms that cannot be included in contracts, determining when a term produces an "important and unjustified imbalance" will also be dependent on the facts of the specific case.

3.5 Finding the Weak Parties

Even beyond the problems associated with defining "bargaining power", and determining when "unfairness" may or may not exist, further complications arise by the apparent inability that exists to accurately determine in advance what party, in any given contract, is the weak one. Since, as has been mentioned before, commonly "powerful" actions, like

---

[375] THAL, S. N., 1988, supra note 317, p. 26.
[376] REITER, B. J., 1981, supra note 97, p. 366.
[377] BARNHIZER, D. D., 2005, supra note 159, p. 150.
[378] ECHEVERRI SALAZAR, V. M., 'El Control a las Cláusulas Abusivas en los Contratos de Adhesión con Consumidores', 2011, 10 *Opinión Jurídica*, no. 20, p. 129. In the case of the United Kingdom, for example, where a general good faith duty does not exist, "fairness" or "equity" might serve the same purpose.

the use of standard forms and even the lack of substitute products and terms, cannot be necessarily understood as signs of being in a dominant position, it is evident that determining what party is "strong" and which one is "weak," is a difficult task.[379]

In their analysis to determine what party can be considered "weak", courts, legislators and commentators have often shown a tendency to limit any remedies aimed at restoring balance to consumer contracting (B2C or "business to consumer" contracts), leaving out agreements between companies or businesses (B2B or "business to business" contracts).[380] While, in principle, this might appear like a rational choice, it is actually the result of a mistaken understanding of the contracting process.

The idea that all businesses are somehow on a similar bargaining position, simply because they are businesses, is nonsensical. Just like two people can be in very different positions, based on social status, economic situation, education, etc., two businesses can also be in completely different situations as a result of, for example, the size of their market share or their trajectory in their respective trade. As was already illustrated by the history of the international regulation of the carriage of goods by sea, it will often happen that some market players in given sectors of the trade will be in a position to impose their will against the rest.

---

[379] On the issue of the use of standard terms and bargaining power, HESSELINK is clear in noting that "*the party using standard terms is not always the stronger party in the contractual relationship*" (HESSELINK, M. W., *Unfair Terms in Contracts Between Businesses*, in Schulze, R. & Stuyck, J. (eds.), *Towards a European Contract Law*, 2011, p. 133).

[380] ALIAS, S. A. et al., 2012, supra note 125, p. 333 ("[O]*ne of the common oversimplifications of the debate on modern contract law is to equate the need to protect the consumer with inequality of bargaining power*"). In the case of the European Union, although the Community regulation on unfair contractual terms does not generally extend its application to B2B contracts, giving priority to consumer protection, different Member States have chosen otherwise. In Germany, for example, this differentiation does not exist, as the German Standard Clauses Statute departs from this general tendency of excluding business contracts and actually applies its rules to *all* contracts (D'AGOSTINO, E., 2014, supra note 138, p. 10). At a European level, German law is at the forefront of protecting commercial parties, following the idea that, *"honest businesses (typically the small incumbent trader) should be protected against their less honest competitors and professional contract parties"* (STUYCK, J., *Do We Need 'Consumer Protection' for Small Businesses at the EU Level?*, in Purnhagen, K. & Rott, P. (eds.), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz*, 2014, p. 360). It should be noted that even though, by and large, Community regulations have focused on protecting consumers and not small businesses, there have been some regulatory works that attempted to tackle the unfairness and disparity that might arise in B2B contracts. For example, Directive 1986/653 *"On the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents"*, recognizes that even though in a commercial relation of agency both parties are businesses, the agent requires legal protection, due to the *"special asymmetry that affects the agent vis a vis the* [principal's] *business."* Similar considerations appear in Directive 2000/35 *"On Combating Late Payment in Commercial Transactions"*, which in nº7 of its preamble expressly mentions how "[h]*eavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones, as a result of excessive payment periods and late payment. Moreover, these problems are a major cause of insolvencies threatening the survival of businesses and result in numerous job losses"* (*See* ROPPO, V., 'Del Contrato con el Consumidor a los Contratos Asimétricos: Perspectivas del Derecho Contractual Europeo', 2011, 20 *Revista de Derecho Privado,* pp. 185–187).

> *"*[B]*eing in a weak bargaining position vis-à-vis the other party, agreeing to terms drawn up in advance by the party without being able to influence the content of those terms and, generally, to one-sided standard contracts is not a condition in which only consumers find themselves. Businesses come in all sizes and they do not contract exclusively within their own size group. Unequal bargaining is just as pervasively and structurally present in business to business contracting as it is in business to consumer contracting. And if it is a problem then it is no less so in B2B than in B2C. In other words, if the rationale is protection against abuse of bargaining power, then it is clear that this protection could (and indeed should, on account of the equality principle) extend also to businesses."*[381]

There is no question that considerations regarding unconscionability, unfair terms, bargaining power, and even good faith (in both the Civil and the Common Law), should be used differently depending on what party is being affected. At the same time, however, it is important that courts are not overzealous in their protection of consumers, so as to develop the false and dangerous idea that all businesses are made up of experienced and competent people that cannot be taken advantage of by others. While the difficulties surrounding bargaining power disparities (and their possible abuses) in merchant contracting illustrate the necessity to establish rules that are wide enough to benefit businesses, these rules would certainly need to be applied differently. It would be ill-advised if rules benefitting "weak" businesses were so wide so as to bring uncertainty to the marketplace and allow negligent or opportunistic players to void their contracts alleging unfairness (in whatever shape or form this claim might take). Furthermore, the standards at which the law should hold the parties to a business contract should be stricter than those used in regards to consumers, as at least *some* degree of preparedness and skill should be expected of them.

Recognizing that merchant parties can also be victims of bargaining power disparities while, at the same time, nuancing the application of the doctrine, is a position that has gained some traction in Europe. SCHÄFER and LEYENS, for example, in their economic analysis of the DCFR, recommend doing away with the distinction between the tests established for B2B and B2C contracts. This based on the fact that the effects of issues like information asymmetries are not limited to a consumer setting, and so there should be a uniform standard addressing them.[382] At the same time, however, they suggest that these protections should be limited to transactions under a certain financial threshold, since "*when the value of the contract becomes sufficiently important it also becomes rational to*

[381] HESSELINK, M. W., 2011, supra note 379, p. 132.
[382] ibid., p. 136.

invest in trying to understand the proposed standard terms and their implications, if necessary with professional help, even when the provisions deal with risks that are unlikely to occur."[383]

3.6 Tackling Unfairness

As the preceding paragraphs show, dealing with bargaining power disparities is not a simple task, since disparities may present themselves in a contract in many different ways. While some might be evident to the average observer, others might be cloaked in an appearance of equality, while a few might lie somewhere in between. As a result of this "unpredictability," different methods have been devised to solve the issue (and consequences) of contractual disparities and unfairness. These methods can, in general, be divided in three categories: administrative, legislative and judicial controls, whether performed *a priori* or *a posteriori*.[384]

Administrative controls exist when governmental organizations or entities are given the authority to police certain activities, usually because of the public interest that exists in their regard. Classic examples of such activities are the insurance and financial sectors which, for a number of reasons, are heavily regulated. When exercised *a priori*, these controls might require the regulated industries to first obtain an authorization from the regulators in order to use certain contracts (e.g. the terms and conditions offered to a party interested in obtaining a credit card), in order to prevent the inclusion of terms that might be deemed unfair. *A posteriori* controls, on the other hand, manifest themselves in sanctions (usually in the form of fines) being leveled against the regulated entity, when abuse has occurred.[385]

Judicial controls of contractual imbalances depend on the legal system under which they are employed. Although this might seem obvious, it is an important issue, as the way in which courts will act in regards to an unfair contract will be dramatically different whether we are in the presence of a Common Law or a Civil Law system. Although in both systems judicial controls will involve the application of the measures established in the laws, under Common Law systems judges will possess a wider gamut of tools through which to control the fairness of the agreement.[386] It is in this area of judicial controls,

---

[383] ibid., pp. 136–137.

[384] ECHEVERRI SALAZAR, V. M., 2011, supra note 378, p. 137. Although a cursory mention will made of administrative controls, we will place most of our focus on judicial and legislative controls, as they are much more closely related to the topic at hand. For some further insight on administrative controls, *See,* generally, KIMBALL, S. L. & PFENNIGSTORF, W., 'Administrative Control of the Terms of Insurance Contracts: A Comparative Study', 1965, 40 *Indiana Law Journal*, no. 2 and HONDIUS, E. H., 'Unfair Contract Terms: New Control Systems', 1978, 26 *The American Journal of Comparative Law*, no. 4.

[385] ECHEVERRI SALAZAR, V. M., 2011, supra note 378, p. 137.

[386] ibid., p. 138.

however, that all-encompassing doctrines like those of good faith in Civil Law and (some) Common Law systems, as well as the unconscionability doctrine in some Common Law jurisdictions, come into play. Then it will be the courts who will be given the task to determine whether the situations put before them are so unfair as to warrant interference.

Closely related to the judicial controls (since, in the end, courts will have to apply the law), legislative controls take many forms. A common method is the establishment of "black lists" enumerating terms that cannot be included in contracts (be it contracts in general or specific categories thereof) because, for example, they are deemed to go against public order or basic considerations of good faith. This is a very common control method that, in different degrees, has been very well received throughout comparative legislation, albeit usually (although not exclusively) related to consumer contracting.[387] So, for example, the European Union Directive 93/13/EEC ("*On Unfair Terms in Consumer Contracts*") establishes in its Annex a list of terms that cannot be included in a consumer contract; something similar happens in Section 309 of the German BGB, which enumerates standard business terms that are prohibited *"without the possibility of evaluation"*.[388] A similar method, albeit less common, is the establishment of "gray lists", in which case the terms that are establish in that list are not *per se* null and void, but are instead expected to be analyzed with certain suspicion by the courts that evaluate the contract. This is, for example, the case of the Section 308 of the German BGB, which enumerates terms that *might* be ineffective under certain circumstances ("*prohibited clauses with the possibility of evaluation"*).[389]

The problem with lists, whether they are black or gray, is that they also grant an opportunity for the dominant parties to analyze the banned terms, work around that prohibition and, in the end, obtain the same result. In order to close this loophole, legislators usually include an open-ended prohibition, empowering the courts to intervene when there is an apparent unfairness, even if the terms in question are not explicitly banned. The Chilean Consumer Protection Law, for example, establishes a general ban on terms that, *"against the general requirements of good faith, and on the basis of objective*

---

[387] MOMBERG URIBE, R., 'El Control de las Cláusulas Abusivas como Instrumento de Intervención Judicial en el Contrato', 2013, 26 *Revista de Derecho (Valdivia)*, no. 1, p. 12 (noting that legislative controls of abusive clauses have been incorporated, "*in some degree*", to most contemporary legislations).

[388] In German, "*Klauselverbote ohne Wertungsmöglichkeit.*" A similar approach was taken by the Chilean Consumer law (Law 19.496) which in Art. 16 also prohibits the inclusion of certain terms that are deemed abusive. It is important to remember that while lists of prohibited terms might be, for the most part, an issue related to consumer law, forbidden terms also exist in other areas of contract law. In the case of maritime law, for example, we only need to look at the Hague-Visby, Hamburg and Rotterdam Rules, to see the same phenomenon, when contractual terms that lower the liability of the carrier beyond the limits established by the respective convention are deemed null and void, precisely because of their abusive nature.

[389] In German, "*Klauselverbote mit Wertungsmöglichkeit.*"

parameters, create, against the consumer, an important imbalance in the rights and obligations of the parties derived from the contract."[390]

While, as we have seen, important differences exist between the way in which different legal systems tackle unfairness, the similarities are more numerous than the differences. Indeed, while some might recoil at the idea being put forward of there being a commonality between the treatments of *unconscionable* contracts in both Common and Civil Law systems, this is far from a novel idea. Already in 1969, for example, SQUILLANTE, put forward some of these similarities, arguing that they demonstrate that there is a unifying thread connecting the way in which both legal systems tackle unfairness.[391] He suggested that these similarities include:

1. Language: Although SQUILLANTE recognizes that the way in which the doctrines are referred to differ between systems ("unconscionability", "good morals", "public order", etc.), their *meaning* is the same.
2. Contractual Overreach: The courts react *"adversely to any contract that is overreaching, oppressive or so unfair as to shock the courts' consciences."*
3. Personal Responsibility: The remedies do not look to protect those who make bad bargains, but only those who were victims of their contractual parties.
4. Importance of the Transaction as a Whole: In order to assess whether a contract can be enforced, the courts must look at the totality of the transactions (as opposed to its individual parts, devoid of context).
5. Special Treatment of Special Contracts: Some contracts (e.g. labor, insurance, concessionaires of public services, and consumer contracts), by their very nature, are subjected to a higher level of scrutiny in order to assess their fairness. This due to the fact that they are inherently imbalanced.

---

[390] The original text of this norm, Article 16 (g) of the Consumer Protection Law, establishes:

> *"No producirán efecto alguno en los contratos de adhesión las cláusulas o estipulaciones que:*
> […]
> *(g) En contra de las exigencias de la buena fe, atendiendo para estos efectos a parámetros objetivos, causen en perjuicio del consumidor, un desequilibrio importante en los derechos y obligaciones que para las partes se deriven del contrato."*

It is worth mentioning that this norm basically echoes the definition of unfair terms established in EC Directive 93/13EEC, where they were defined as those that "*contrary to the requirement of good faith,* […cause] *a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*".

[391] SQUILLANTE, A. M., 'Unconscionability: French, German, Anglo-American Application', 1969, 34 *Albany Law Review,* p. 298. *See* also, BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, pp. 248–249 (citing SQUILLANTE's view favorably) and, generally, BAUDOUIN, J.-L., 'Oppressive and Unequal Contracts: The Unconscionability Problem in Louisiana and Comparative Law', 1985, 60 *Tulane Law Review*, no. 6, 1119–1134.

6. Unbargained-For Contracts: All systems adopt measures aimed at preventing the abuses that would come as a result of contracts in which there was no real bargain.
7. Grounds for Denying Enforcement: All systems, within their own doctrines, consider similar reasons to deny the enforcement or rescission or reformation of a contract for reasons of unfairness.
8. Reason of the doctrine: Unconscionability (or whatever name applies within the specific jurisdiction) resorts to reasons of "*fair play*" to justify its application.

SQUILLANTE's position, and with which we can readily agree, seems to be almost Shakespearean. It seems to be a case of, to paraphrase the English playwright, "unconscionability by any other name," as the remedies established under different systems are all manifestations of the same attempts by the legislator and the courts to prevent abuses.[392] While the methods may vary dramatically across jurisdictions and legal systems, their end goal, preventing abuses from those with more power (however this "power" is defined), is the common thread that binds them all together.

Since the full spectrum of the ways in which unconscionable contracts have been dealt with goes beyond the scope of this book, and in light of our focus on choices of court, our approach will be limited to those doctrines that have played a role in this field. Furthermore, as our study continues to enclose around maritime law, we will focus heavily on the Common Law, due to the undeniable importance that this system, *vis à vis* the Civil Law, possesses in maritime dispute resolution.

[392] On this issue, *See*, for example, BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, p. 244 (reviewing some similarities and differences between German and American provisions on unconscionability).

Chapter 4
Unconscionability in the Common Law

> *"We have had frequent occasion to consider the limitations of liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard."*
>
> Justice Charles Evan Hughes.[393]

4.1 Introduction

Beyond the well-known differences regarding the force of judicial precedent, the Common Law is also special in other ways. In the field of contract law, for example, the way in which this system looks at contractual noncompliance, as well as the options that a party possesses to escape from a bargain, differ significantly from those that we can find in Civil Law systems.

Having already reviewed the philosophical and doctrinal underpinnings of restricting contractual freedom to combat unfairness, we now place our focus on how this takes place in the Common Law. The leeway that Common Law courts possess has allowed them to create ad-hoc doctrines to tackle the issue of contractual unfairness, and which are unique to these systems. Although, as we have mentioned before, the underlying principles that form these doctrines might be akin to those behind Civilian doctrines, their operation can differ greatly.

[393] *Morehead v. New York ex rel. Tipaldo* [1936], 298 US, 587–636, p. 627 (dissenting).

4.2 Defining Unconscionability[394]

Despite being a term commonly used to refer to cases of unfairness in contractual relations, the meaning of unconscionability *"depends on the jurisdiction and the writer using it."*[395] Indeed, despite its use on both sides of the Atlantic (and elsewhere), both courts and commentators seem to agree that it is virtually impossible to put forward a precise and all-encompassing definition, opting instead to offer working definitions on a case-by-case basis.[396]

ATIYAH, acknowledging this problem, argued that while it is true that *"unconscionability does not have a fixed meaning in law"*, in a contractual context it is generally used to *"describe situations in which it is believed that although no duress or fraud took place, one contracting party took advantage or exploited the other"*.[397] Its underlying rationale, therefore, *"is not that the claimant's consent to the transaction has been vitiated,"* but rather that she was in a disadvantageous position, which allowed the other party to gain an unfair advantage.[398]

This is a doctrine that is intrinsically related to society's understanding of fairness and justice, establishing that oppressive bargains are completely undesirable and should be rejected.[399] Keeping these notions in mind, TEPPER offer offers a fairly complete definition, stating that

---

[394] Please note that within this section, unless otherwise stated, the terms "unconscionable" and "unconscionability" are being used in a strict sense, referring only to the common law doctrine of the same name, and *not* to refer to unfair contracts in general.

[395] ENMAN, S. R., 1987, supra note 332, p. 191 It is perhaps due this lack of definition (that some see as an asset) that BROWN, echoing the words of KNAP and CRYSTAL, calls it *"a pure abstraction, devoid of content." See* BROWN, E. L., 'The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic', 2000, 105 *Commercial Law Journal*, no. 3, p. 307

[396] MALLOR, J. P., 1986, supra note 101, p. 1065

[397] SMITH, S. A. & ATIYAH, P. S., 2006, supra note 113, p. 300. *See* also BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, p. 249 ("[t]*he courts have not succeeded in establishing a general formula or clear guidelines for applying the vague concept of unconscionability*) and MCLAUGHLIN, G. T., 'Unconscionability and Impracticability: Reflections on Two U.C.C. Indeterminacy Principles', 1992, 14 *Loyola of Los Angeles International and Comparative Law Journal*, no. 3, p. 439 (referring to unconscionability as *"essentially indeterminate in definition"*). This absence of a clear definition has more than a merely anecdotal importance, as it is actually part of the ammunition used to attack the doctrine, due to the lack of consistency that, allegedly, comes as a result. *See*, for example, NATION [III], G. A., 'Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured', 2005, 94 *Kentucky Law Journal,* p. 109 and accompanying footnotes.

[398] PHILLIPS, J., 2010, supra note 18, p. 845.

[399] Although recognizing the relation between the two, FREILICH and WEBB are quick to distinguish between unfairness and unconscionability, arguing that *"the definition of unconscionable has a higher threshold than the definition of unfair* [and so] *it will be harder to satisfy*" (FREILICH, A. & WEBB, E., 'Small Business - Forgotten and in Need of Protection from Unfairness', 2013, 37 *University of Western Australia Law Review*, no. 1, p. 145) In the

> *"an unconscionable contract is one that shocks public sensibilities and is unreasonably oppressive. Basically, such a contract results when the parties' bargaining positions are so unequal that the public is best protected by invalidating the contract, due to the oppressive and shocking nature of the bargain."*[400]

While critics see unconscionability as a tool abrogating freedom of contract, its supporters see it as a doctrine established to ensure that the contract is the result of a real bargaining, and that it reflects a true agreement between the parties.[401] As MEADOWS put it:

> *"Unconscionability is not intended to erase the doctrine of freedom of contract, but to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding, and the ability to negotiate in a meaningful fashion."*[402]

It is easy to understand why some oppose this doctrine that, perceiving it as so vague as to be unworkable. Based on the application of the unconscionability doctrine, a contract or a clause can be struck down, if it is demonstrated that "*one party has extracted an unfair bargain by taking advantage of the other's weakness*".[403] Clearly, this represents a threat for those who look at this issue from a *laissez-faire* perspective, viewing such a doctrine as a threat to contractual freedom. What is more, even those who look at this issue from a more nuanced perspective, can clearly see a danger in a doctrine that even its supporters

---

words of the Victorian Civil and Administrative Tribunal (Australia) in the 2009 case of *Hall v. Kennards Storage Management*:

> *"'Unconscionable' is a strong word. It is stronger than 'wrong' and stronger than 'unfair'. It connotes conduct of a kind that attracts moral obloquy or an adverse moral judgment."*

Cited in ibid., p. 145.

[400] TEPPER, P., *The Law of Contracts and the Uniform Commercial Code*, 2012, Second Edition, Cengage Learning, New York, p. 117 Some have argued that this lack of a precise definition is not a defect but a quality of the doctrine, since it gives it the necessary flexibility to adequately serve its role of *"protecting humanity's natural, or innate, sense of fairness."* From this perspective, *"unconscionability's resistance to a 'lawyer-like definition' is integral to its function in contract law"* (SCHMITZ, A. J., 2006, supra note 371, p. 74). In the words of EPSTEIN, *"*[o]*ne of the strengths of the unconscionability doctrine is its flexibility, an attribute much needed because it is difficult to identify in advance all of the kinds of situations to which it might in principle apply."* (EPSTEIN, R. A., 1975, supra note 336, p. 304).

[401] BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, p. 214.

[402] MEADOWS, R. L., 'Unconscionability as a Contract Policing Device for the Elder Client: How Useful Is It?', 2005, 38 *Akron Law Review*, no. 4, p. 744. Similarly, SPANOGLE argues that

> *"the unconscionability doctrine can strengthen the concept of 'freedom of contract' that implies the ability to codetermine the terms of a contract. Courts may now examine unbargained terms without disturbing those terms that have been codetermined, and unilaterally determined terms can be subjected to special scrutiny."*

SPANOGLE, J. A., 1969, supra note 212, pp. 935–936.

[403] SMITH, S. A. & ATIYAH, P. S., 2006, supra note 113, p. 308. *See* also NATION [III], G. A., 2005, supra note 397, p. 105 ("[t]*he doctrine of unconscionability concerns fairness. The doctrine can be used to refuse enforcement of all or part of an agreement that is deemed by a court to be sufficiently unfair as to be unconscionable*").

consider "undefinable," as such a defect (although some might call it an asset) would go against the goal of predictability that permeates our legal systems.

4.3 The Strange Case of Unconscionability in English Law

In the United Kingdom, the power of the courts to set aside unconscionable agreements or clauses has its historical origins in the equity jurisdiction of the Courts of Chancery.[404] Originally used to *"grant relief against harsh and unconscionable bargains extracted from expectant heirs and remaindermen,"* its origins can be traced back to the 17th Century.[405] Even though, in theory, the aim of this legal figure was to grant a remedy against oppressive bargains, its use was mostly restricted to protecting the estates of the nobilities, sometimes stretching its application so as to ensure that the nobles would retain their property.[406] It was only in the 18th Century, as the application of this doctrine became less restrictive in regards to its beneficiaries, that these courts started to regularly set aside contractual provisions that would somehow offend the court's sense of fairness.[407] This was particularly so in those cases in which the agreements had been entered into by poor and ignorant people who lacked independent advice and that, as a result, had agreed to unfair terms.[408]

---

[404] PHILLIPS, J., 2010, supra note 18, p. 840.

[405] ANGELO, A. & ELLINGER, E. P., 1992, supra note 176, p. 460. *See* also PAWLOWSKI, M., 'Unconscionability as a Unifying Concept in Equity', 2001, 16 *Denning Law Journal,* p. 80 ("*the jurisdiction to set aside unconscionable bargains was originally confined to reversioners and expectant heirs*").

[406] ANGELO, A. & ELLINGER, E. P., 1992, supra note 176, pp. 461–462 and ALIAS, S. A. et al., 2012, supra note 125, p. 334.

[407] BIGWOOD, R., 'Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing - Kiwi-Style', 2011, 42 *Victoria University of Wellington Law Review*, no. 1, p. 93 ("[a]*lthough this doctrine has its genesis in a protectionist jurisdiction concerned with a special class of case (catching bargains with expectant heirs, reversioners and remaindermen just of age), antipodean courts eventually came to view the older line of cases as establishing a principle of broader operation, applying potentially to a wide range of interactions*").

[408] SMITH, S. A. & ATIYAH, P. S., 2006, supra note 113, p. 309. Chancellors routinely refused to enforce grossly inadequate exchanges, applying the law in a way that would allow them to either set aside unfair provisions, or to interpret the contracts in a way that would render a more equitable result (SCHMITZ, A. J., 2006, supra note 371, p. 81). In *Aylesford v. Morris*, for example, Lord SELBOURNE, LC stated:

> "[I]*t is sufficient for the application of the principle, if the parties meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker; and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience and moral imbecility.*
>
> *In the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present* [...] *The victim comes to the snare* [... excluded] *from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, if he did not feel compelled to secrecy. He comes in the dark, and in fetters, without either the will or the power to take care*

Although it is hard to precisely pinpoint the beginnings of an all-encompassing concept of unconscionability in English law, the case of *Earl of Chesterfield v. Janssen* is commonly mentioned as one of the firsts that hinted at a definition of the doctrine.[409] In an often quoted dictum, and which has even been referenced by the Supreme Court of the United States, the Lord Chancellor stated that what the unconscionability doctrine aimed to prevent were those bargains that *"no man in his senses and not under delusion would make on the one hand, and* [...] *no honest and fair man would accept on the other*."[410] This would later be refined in decisions such as the 1787 case of *Evans v. Llewellin*, where the Court, without citing any authorities, stated that if a party *"is in a situation, in which he is not a free agent, and is not equal to protecting himself,"* then the Court will protect him.[411] As it was later stated in an 1818 case,

> *"a court of equity will inquire whether the parties really did meet on equal terms; and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the contract."*[412]

This broad rule was later dramatically restricted in the 1884 case of *Fry v. Lane*, where relief was established as being limited to those cases *"where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice"*.[413] The new and increased requirements established by this decision in order for the doctrine to operate, made it extremely hard to actually use unconscionability as a way to obtain relief. Indeed, as a result of the limitations imposed by *Fry. v. Lane*, and despite its early origins, the doctrine of unconscionability has not seen much development in English law, as its area of applicability has become too restricted. While it did go to inspire, *"some 90 years later,"* the attempts of Lord Denning to establish a general doctrine of bargaining power disparities in English law, as we have seen, he was unsuccessful.[414]

> *of himself and with nobody else to take care of him. Great Judges have said that there is a principle of public policy in restraining this."*

Earl of Aylesford v Morris [1873], 8 Ch. App., 484–499, pp. 491–492.

[409] *Earl of Chesterfield and Others Executors of John Spencer v Sir Abraham Janssen* [1751], 28 E.R., 82–102.

[410] ibid., p. 100. The Court also recognized that "*it is difficult to form any general rule, that can meet every case of this kind, that may happen*", adding that "*they must in general be governed by the circumstances in each case*" (ibid., p. 97). *See*, also SCHMITZ, A. J., 2006, supra note 371, p. 82. For the adoption of this understanding of unconscionability in US law, *See*, inter alia, the 1889 United States Supreme Court case of *Hume v. U.S.,* which expressly incorporates this definition, albeit by quoting Bouvier's Law Dictionary, which had itself quoted the English case (*Hume v. United States* [1889], 132 US, 406–415, p. 411).

[411] ENMAN, S. R., 1987, supra note 332, p. 193.

[412] WADDAMS, S., *Protection of weaker parties in English law*, in Kenny, M. et al. (eds.), *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable*, 2010, p. 33.

[413] *Fry v. Lane* [1888], 40 Ch. D., 312–325, p. 322 *See* also WADDAMS, S., 'Autonomy and Paternalism from a Common Law Perspective: Setting Aside Disadvantageous Transactions', 2010, 3 *Erasmus Law Review*, no. 2, p. 130.

[414] GREENFIELD, S. & OSBORN, G., 1992, supra note 354, p. 66. *See* also WADDAMS, S., 2010, supra note 412, p. 34.

As some authors have pointed out, *Fry v. Lane* moved the attention of the doctrine from the bargain itself to the internal feelings of the participants.

> *"This principle shows a shift in emphasis whereby it is not so much that there must be poverty and ignorance* [...] *but that there must be inequality between the parties (which arises out of such factors as the poverty and ignorance). Furthermore, for a contract entered into by such persons to be vitiated as an unconscientious or unconscionable bargain, there must be 'victimisation', 'which can consist of either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances'* [...] *in other words the court requires more than just an unfair bargain or unfair terms (the substantive unfairness) but more importantly, the taking advantage of the other's weakness is also required."*[415]

The restrictions established on the doctrine, together with its resulting limited application, have made some go as far as claiming that the doctrine of unconscionable contracts has itself become a "*living fossil*" in English law, since although it has not been expressly eliminated from the English legal tradition, it has not seen much use.[416] The reason for the troubled status of this doctrine is that English courts have, in general, proven to be very reluctant to go against the will of the parties under the excuse of seeking to restore balance or fairness.[417] Indeed, despite the already mentioned attempts by Lord DENNING, particularly in the case of *Lloyd's Bank v. Bundy*, the English judicature has been unwilling to go against the principles of freedom of contract in favor of these equitable doctrines.[418] As a matter of fact, even when the courts have seen it fit to set aside contracts for reasons of "fairness," they often appeal to some other reasons to

---

[415] ALIAS, S. A. et al., 2012, supra note 125, p. 335

[416] ENMAN, S. R., 1987, supra note 332, p. 194. *See* also ALIAS, S. A. et al., 2012, supra note 125, p. 334 ("*while the English courts have rarely been willing to apply such a doctrine outside a limited class of cases, they have also been unwilling to renounce it entirely*"), SPANOGLE, J. A., 1969, supra note 212, p. 931 ("*although an analogous doctrine* [to that of unconscionability in the US] *was known at common law, it was not extensively used*") and WADDAMS, S., 2010, supra note 412, p. 26 ("*Since the nineteenth century, writers on English contract law have emphasised the enforceability of contracts and have tended to marginalise the instances in which contracts have been set aside for unfairness*").

[417] PHILLIPS sees this as a result of the influence of classical contract theory in English law, resulting in a model of *"liberal individualism, with the parties entirely free to pursue their own interests*" (PHILLIPS, J., 2010, supra note 18, p. 837). *See* also PIERS, M., 2011, supra note 131, p. 132 ("*English courts, moreover, have been persistently reluctant to apply any kind of general principle of fairness. The English propensity to reject the use of general principles such as good faith is replicated in case law in which, once again the construction and use of other general theories is rejected*") and ANGELO, A. & ELLINGER, E. P., 1992, supra note 176, p. 466 (suggesting that the reason why the doctrine of unconscionability failed to take hold in England might be "*the reluctance of the courts and the legislature to depart in an open manner from the laissez faire concepts of contracts*").

[418] CHEW, C., 2014, supra note 358, p. 248 ("[t]*here is general agreement that there is no common law doctrine to support a review of unreasonable and unconscionable contracts."*).

justify the remedy, even straining the limits of other doctrines in order to *"avoid unconscionability or inequality of bargaining power if at all possible"*.[419]

Although English law might have, by and large, dropped the doctrine of unconscionability, other Commonwealth jurisdictions, like Australia, Canada and New Zealand, and which took the English precedents as a starting point, have gone beyond the English approach. Indeed, these nations have expanded the doctrine of unconscionability, reaching many more cases or situations than those that would have been covered under the umbrella of English law.[420] As ENMAN explains:

> *"Since Fry v. Lane in 1888, the equitable doctrines of unconscionability in England on the one hand and in Canada, Australia and New Zealand on the other, have grown radically different, certainly in practice if perhaps less so in theory. In England, the equitable doctrine has been virtually dead for almost a century. Neither Lloyd's Bank v. Bundy nor statutory enactments show any sign of rejuvenating it.* [...] *In the other three countries, the equitable doctrine has grown from its English and Irish roots and continues to thrive and expand, some would say like an octopus with ever further-reaching tentacles."*[421]

Although it is undeniable that during the 20th century there seemed to have been a move towards accepting unconscionability as a general principle (as demonstrated by cases such as *Lloyds Bank Ltd. v Bundy* and *Schroeder Music Publishing Co. v. Macaulay*), this move seems to have lost its momentum as the end of the century drew nearer, perhaps due to concerns that it would add uncertainty to legal relations.[422] After all, it was argued that while unconscionability *"may have an appealing 'natural justice' flavor, it is terribly uncertain*

---

[419] ENMAN, S. R., 1987, supra note 332, pp. 202–203.

[420] BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, pp. 240–241 (stating that Australia is "*at the forefront of unconscionability,"* having followed the American doctrine on the topic but taking *"a greater interest in ensuring fair contracts*").

[421] ENMAN, S. R., 1987, supra note 332, p. 217. In the case of Canada, for example, based on the 1978 case of *Harry v. Kreutziger* [1978] CanLII, 393, a doctrine was created based on which *"the single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded."* This represents a massive difference from the English standard as established in *Fry v. Lane*, which was set so high that it is practically impossible to be met, and which is has largely been blamed for "killing" the English doctrine of unconscionability (ENMAN, S. R., 1987, supra note 332, p. 198). In regards to Canada's lax standard, however, it is worth noting that *"the fear has been that unfettered power to set aside contracts for reasons of unfairness would be too broad, and various attempts have been made to restrain the practical operation of the doctrine"* (WADDAMS, S. M., 'Abusive or Unconscionable Clauses from a Common Law Perspective', 2010, 49 *The Canadian Business Law Journal*, no. 3, p. 385).

[422] As CHEW notes, this seems to be a perennial fear, since the doctrine of unconscionability "*is frequently characterised as inexact, full of uncertainty and incapable of consistent rationalisation and the cases flowing therefrom cannot therefore be that easily integrated*" (CHEW, C., 2014, supra note 358, p. 248. See also PHILLIPS, J., 2010, supra note 18, p. 846).

practice," as "*judges can radically differ on the implications to be drawn from an agreed set of facts.*"[423]

The problem with the criticisms laid against unconscionability due to its alleged uncertainty, is that they seem to establish a different standard for this doctrine, expecting a degree of certainty unheard of in other areas of the law.[424] Many essential parts of our legal system are based on relatively uncertain elements (e.g. how much pressure is required to consider duress strong enough to vitiate a contract) that only become precise enough to be workable once the judge makes a casuistic analysis. This flexibility is precisely what allows them to be useful to serve those that the doctrine aims to protect. This is particularly true in the case of unconscionability, which mostly becomes necessary because of *"the inflexibility of our inherited contract doctrines"*.[425]

> *"In any event the uncertain nature of the doctrine can be overstated since in time the courts delineate those circumstances and patterns of behaviour that invoke the doctrine and those that do not. The general principle therefore becomes refined by judicial decision making, which enables the prediction of outcomes (and the giving of proper legal advice) to become much easier."*[426]

It is worth noting that the fact that English courts do not favor the unconscionability doctrine should not, in any way, be construed as if that meant that there was some sort of Darwinian contracting theory in place. On the contrary, English courts readily acknowledge the existence of unfair situations in contracts, and recognize that some types of curtailments on freedom of contract are necessary. Because of this, and as it has already been mentioned, courts have resorted to other doctrines in order to ensure fairness, so as to avoid the difficulties inherent to unconscionability, simply by adopting and applying English law in a flexible manner. Indeed, as THAL notes,

> *"although English courts have rejected the inequality of bargaining power doctrine in name, they have not thereby rejected the notion that at least some minimal degree of fairness is required to establish the validity of a contract. In fact, considerations of fairness are essential to establish duress or undue influence, doctrines which are often seen as alternatives to the fairness-based doctrine of inequality of bargaining power."*[427]

---

[423] ENMAN, S. R., 1987, supra note 332, p. 192.
[424] NEUBORNE, B., 2015, supra note 100, p. 198.
[425] SPANOGLE, J. A., 1969, supra note 212, p. 933.
[426] PHILLIPS, J., 2010, supra note 18, p. 846.
[427] THAL, S. N., 1988, supra note 317, p. 33. Following the lead set by Lord DENNING in *Lloyd's Bank v Bundy*, some authors continue to argue that these other doctrines, which in the end also seek to protect one of the parties, are actually underpinned by the doctrine of unconscionability. *See*, for example, PHILLIPS, J., 2010, supra note 18, p. 840.

What is more, doctrines that are analogous to unconscionability have been used successfully in other areas of the law of contracts, such as restraint of trade and estoppel.[428] This clearly demonstrates that English law is by no means in the business of leaving weak parties hanging in the wind.

This practice of "creative interpretation" of the law has drawn some criticism, with some arguing that English courts actually apply the doctrine of unconscionability, but do so under different names.[429] Indeed, it has been argued, for example, that the rather creative use of doctrines dealings with consent and contractual interpretation, employed in the absence of a general unconscionability doctrine, contribute to the very uncertainty that the courts have tried to prevent, by rejecting this doctrine based on (un)fairness and (unequal) bargaining power.[430]

WADDAMS has argued that the "creative" analysis of consent to prevent the enforcement of unfair bargains is "*fictitious, artificial, and circular, and* [...] *distorts the concept of consent in cases where that concept is really needed, such as mistake.*"[431] This is true, since a person selling an item for a tenth of its price, or *"the accident victim who settles a claim for a small amount in cash,"* are well aware of what they are doing, even if their transactions are not particularly beneficial to them. It is a mistake, therefore, to try to protect them by arguing that theirs was not a real consent. Furthermore, looking at unconscionable bargains as devoid of consent, even when all the *"ordinary tests of assent, subjective and objective, are fully met,"* creates the problem of requiring the court to analyze what assent can be understood as "true assent" in those cases where a party might have been taken advantage of.[432] Clearly, this is the kind of casuistic and vague analysis that the detractors of the unconscionability doctrine were hoping to prevent.

These arguments do seem to hold water, and adopting an all-encompassing doctrine for unconscionable bargains would actually eliminate some of the uncertainty. This would be achieved by placing issues like undue influence and economic duress outside of the realm of vitiated consent (where they are awkwardly paired with the doctrines of fraud, mistake and misrepresentation), and would openly accept the influence of morality and fairness into the courts' decisions on contractual matters. This would grant a greater coherence to the contractual process, lower uncertainty, and increase predictability.

---

[428] ANGELO, A. & ELLINGER, E. P., 1992, supra note 176, p. 464

[429] PHILLIPS goes as far as saying that, at least in the case of economic duress, it is *"no more than the doctrine of unconscionability in disguise"* (PHILLIPS, J., 2010, supra note 18, p. 851).

[430] For this, as well as the influence that "fairness" has had on English courts (albeit under different names) in issues like forfeitures, penalties, deposits and exemption clauses, among others, *See*, generally, Waddams, S. M., 'Unconscionability in Contracts', 1976 *The Modern Law Review* 39, no. 4.

[431] WADDAMS, S., 2010, supra note 412, p. 36.

[432] ibid., p. 37.

4.4 Unconscionability in the United States (and elsewhere)

Unlike what happened in England, where the doctrine was, for the most part, scrapped altogether, in the United States unconscionability was much better received.[433] Starting with the 1870 Supreme Court case of *Scott v. United States*, American courts and legislatures have been considerably more open than their English counterparts to unconscionability.[434] Although in *Scott* the Supreme Court deemed a contract unenforceable because of mistake, it recognized that

> "[w]*here there is a written contract and a like misunderstanding is developed, a court of equity will refuse to execute it. If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages not according to its letter, but only such as he is equitably entitled to."* [435]

Although this decision did not base its refusal to enforce the contract on unconscionability, it did open the door to it. However, since the Court only mentioned it in passing, without applying it to the facts of the case, it did not establish a framework to guide its application.[436] Nevertheless, the Court did lay the groundwork for future decisions that aimed to protect weak parties from unfair bargains or, at the very least, showed that there was an underlying core set of values that the courts needed to acknowledge in order to avoid unfair results.

The values that American courts assumed underlined their law were better exposed in Justice FRANKFURTER's dissent in the 1942 Supreme Court case of *United States v. Bethlehem Steel Corporation*.[437] This was a case where the US government had contracted with Bethlehem Steel for the building of 13 ships during 1917 and 1918, when

> *"Germany's destructive warfare against our ocean shipping essential to the successful prosecution of the war made it necessary for the United States to build the greatest possible number of ships in the shortest possible time."*[438]

The United States' government argued that the contracts had been *"made under 'duress' and were 'unconscionable' as a matter of law*."[439] Although the government's position was

---

[433] It should be remembered that this "scrapping" was often just nominal since, as we have seen, the doctrine of unconscionability did play a role in certain parts of English legal doctrine. *See*, generally, Waddams, S. M., 'Unconscionability in Contracts', 1976, 39 *The Modern Law Review*, no. 4.
[434] *Scott v. United States* [1871], 79 US, 443–445, p. 445.
[435] COLBY, E., 'What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?', 2001, 34 *Connecticut Law Review*, no. 2, p. 629.
[436] ibid., p. 629.
[437] *United States v. Bethlehem Steel Corp.* [1942], 315 US, 289–342.
[438] ibid., p. 314.

not welcomed by the majority of the Justices of the Supreme Court, who reasoned that the government had other bargaining tools at its disposal at the time of negotiating the contract, it did leave some doors open. Justice FRANKFURTER expressed his displeasure in a powerful dissent, where he argued:

> *"Today it is held that because the circumstances of this case cannot be fitted into a neatly carved pigeonhole in the law of contracts, 'daylight robbery', exploitation of the 'necessities' of the country at war, must be consummated by this Court. It is said that familiar principles would be outraged if Bethlehem were denied recovery on these contracts. But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?"*
>
> *These principles are not foreign to the law of contracts. Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other. 'And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them."*[440]

It was not until the 1948 case of *Campbell Soup Co. v. Wentz*, before t the Court of Appeals for the Third Circuit, and the 1960 case of *Henningsen v. Bloomfield Motors, Inc.,* before the New Jersey Supreme Court, that the unconscionability doctrine received a more systematic analysis of its application.[441]

In *Campbell Soup Co. v. Wentz*, the Court recognized the element of oppression as part of the doctrine of unconscionability, arguing that the party with the most bargaining power in the transaction (in this case Campbell Soup, *vis à vis* two carrot farmers) was in a position to impose its will against the other. In a decision that some commentators have called *"almost moral in tone,"* and being *"more of a scolding than a piece of judicial writing,"* the Court noted that although the agreement in itself was not illegal, its unconscionable

---

[439] PARRISH, M. E., 'Justice Douglas and the Rosenberg Case: A Rejoinder', 1984, 70 *Cornell Law Review*, no. 6, p. 1055

[440] *United States v. Bethlehem Steel Corp.* [1942], p. 326.

[441] *See Campbell Soup Co. v. Wentz* [1948], 172 F. 2d, 80–84, and *Henningsen v. Bloomfield Motors, Inc.* [1960], 161 A. 2d, 69.

character prevented it from being enforceable by the courts.[442] Concisely, the Court stated that

> *"a party who has offered and succeeded in getting an agreement as tough as this one is, should not come to a chancellor and ask court help in the enforcement of its terms. That equity does not enforce unconscionable bargains is too well established to require elaborate citation."*[443]

The 1960 *Henningsen* decision dealt with the unfair surprise facet of unconscionability, after the Court reviewed a contract in which terms that excluded certain types of liability of the vendor, had been deliberately hidden from the purchaser. The Court considered this behavior on the part of the seller to be abhorrent, so much so that only *"the abandonment of all sense of justice"* would allow its enforcement in the terms demanded by the seller.[444] Demonstrating an acute awareness of the possible criticisms that could be leveled against this refusal to enforce unconscionable bargains, the Court reasoned that:

> *"In the modern consideration of problems such as this* [...] *judges are 'chancellors' and cannot fail to be influenced by any equitable doctrines that are available.* [...T]*here is sufficient flexibility in the concepts of fraud, duress, misrepresentation and undue influence, not to mention differences in economic bargaining power' to enable the courts to avoid enforcement of unconscionable provisions in long printed*

---

[442] COLBY, E., 2001, supra note 435, pp. 629–631.

[443] *Campbell Soup Co. v. Wentz* [1948], p. 83. *See* also COLBY, E., 2001, supra note 435, pp. 629–631.

[444] Although saying that there had been a conscious effort to hide the terms of the agreement is a serious accusation, the facts of the case leave little room for doubt. As the Court explained:

> *"The purchase order was a printed form of one page. On the front it contained blanks to be filled in with a description of the automobile to be sold, the various accessories to be included, and the details of the financing. [...] The type used in the printed parts of the form became smaller in size, different in style, and less readable toward the bottom where the line for the purchaser's signature was placed. The smallest type on the page appears in the two paragraphs, one of two and one-quarter lines and the second of one and one-half lines, on which great stress is laid by the defense in the case. These two paragraphs are the least legible and the most difficult to read in the instrument, but they are most important in the evaluation of the rights of the contesting parties.* ***They do not attract attention and there is nothing about the format which would draw the reader's eye to them. In fact, a studied and concentrated effort would have to be made to read them. De-emphasis seems the motive rather than emphasis.*** *More particularly, most of the printing in the body of the order appears to be 12 point block type, and easy to read. In the short paragraphs under discussion, however, the type appears to be six point script and the print is solid, that is, the lines are very close together.*
>
> [...]
>
> *The reverse side of the contract contains 8 1/2 inches of fine print. It is not as small, however, as the two critical paragraphs described above. The page is headed 'Conditions' and contains ten separate paragraphs consisting of 65 lines in all. The paragraphs do not have headnotes or margin notes denoting their particular subject, as in the case of the 'Owner Service Certificate' to be referred to later. In the seventh paragraph, about two-thirds of the way down the page, the warranty, which is the focal point of the case, is set forth."*

Henningsen v. Bloomfield Motors, Inc. [1960], pp. 365–367 (emphasis added).

> *standardized contracts. Freedom of contract is not such an immutable doctrine as to admit of no qualification in the area in which we are concerned. As Chief Justice Hughes said in his dissent in Morehead v. People of State of New York* [...]*:*
>
> *'We have had frequent occasion to consider the limitations on liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard.'"*[445]

Although the *Henningsen* decision was an important step in the history of the doctrine, it was not *creating* something. Indeed, by 1952 American law had already recognized the existence of unconscionability in the Uniform Commercial Code (UCC), a fact the *Henningsen* Court expressly referenced in its decision.[446] Under the heading "*Unconscionable Contract or Clause*," Section 2-302 of the UCC established two rules on unconscionability:

> *(1) If the court as a matter of law finds the contractor any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.*
>
> *(2) When it is claimed or appears to the court that the contractor any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.*

As it is evident from the wording of this provision, the UCC, like the American and English decisions that preceded it, did not even attempt to establish a clear-cut definition of unconscionability. What is more, as SPANOGLE notes, the UCC "*provides neither a definition of the term 'unconscionable' nor an elaboration of the conceptual framework of the doctrine,*" opting instead to describe "*the remedies available to a court once it has found an unconscionable contract or clause*".[447] Instead of an oversight, not giving a fixed definition

---

[445] ibid., pp. 388–389.

[446] It is worth noting that although, as we have seen, the roots of this Common Law doctrine are in the Courts of Equity, U.C.C. §2-302 was also influenced by German law. As MAXEINER notes, LLEWELLYN, the drafter of this provision, *"drew his inspiration* [...] *from the practice of controlling standard terms in Germany under the general clauses of the German Civil Code*" (MAXEINER, J. R., 2003, supra note 103, p. 116).

[447] SPANOGLE, J. A., 1969, supra note 212, p. 937. In his seminal work on the topic, LEFF is very critical of the approach taken by the UCC towards the concept of unconscionability, stating that *"if reading this section makes anything clear it is that reading this section alone makes nothing clear about the meaning of 'unconscionable' except*

this seems to have been a deliberate choice when the provision was drafted, opting instead to empower the courts to make case-by-case assessments on the basis of certain standards of measure.[448]

The lack of a definition seems to have been a deliberate decision, motivated by the concern that a rigid description would quickly make unconscionability "*become outmoded and inapplicable to future abuses*."[449] LLEWELYN, the drafter of UCC §2-302, would have therefore avoided a precise definition in order to keep the norm from becoming useless through savvy drafting of contracts. As SPANOGLE explains:

> *"Through the unconscionability doctrine, Llewellyn tried to inhibit the businessman or attorney from automatically asserting all conceivable rights in all transactions. Such a purpose requires that the doctrine be incapable of exact definition. If exact definition were possible, draftsmen could draft to the threshold of unconscionability, recreating the problem in a slightly different context, and defeating the purpose of the doctrine."*[450]

The Official Comment to this section of the UCC also avoids strict definitions. Instead, it refers to the balancing test that needs to be made by the courts in unconscionability cases, and to the governing principles that inform the provision:

> *"This section is intended to allow the court to pass judgment directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract* [...] *The principle is one of the prevention of oppression and unfair surprise* [...] *and not of disturbance of allocation of risks because of superior bargaining power."*[451]

In the absence of a clearly-defined legal meaning, the most quoted definition of unconscionability in American law seems to be that offered by Judge WRIGHT of the Court of Appeals of the D.C. Circuit in the *"groundbreaking"* 1965 case of *Williams v. Walker-*

---

perhaps that it is pejorative" (LEFF, A. A., 'Unconscionability and the Code. The Emperor's New Clause', 1967, 115 *University of Pennsylvania Law Review*, no. 4, p. 487).

[448] SPANOGLE, J. A., 1969, supra note 212, p. 937 ("[e]*ach case must be judged on its own particular facts; there is no exception to the hearing requirement once unconscionability is claimed*").

[449] FORT, J. C., 'Understanding Unconscionability: Defining the Principle', 1977, 9 *Loyola University of Chicago Law Journal*, no. 4, p. 766.

[450] SPANOGLE, J. A., 1969, supra note 212, p. 941.

[451] Quoted in ANGELO, A. & ELLINGER, E. P., 1992, supra note 176, p. 497.

Thomas Furniture Co.[452] There he described unconscionability as *"an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party"*.[453]

The plaintiff in the *Williams* case, Ora Lee Williams, was a single parent of seven children whose only income was a USD $218 monthly government stipend.[454] bought a stereo for USD $514.95 from the Walker-Thomas Furniture Company, to be paid in installments. Under the pre-printed terms of this contract, if Williams missed any payments, then the store would have the right to repossess the item. The terms further established, *"in very fine print,"* that payments of the installments would be credited on a pro-rata basis to all the outstanding debts that she already had with the store.[455] There was also a cross-collateralization provision, the purpose of which was extremely difficult to comprehend for someone with the background and educational level of the plaintiff. As KOROBKIN explains:

> *"The effect of the contract's 'cross-collateralization' provision was that none of William's purchases from Walker-Thomas Furniture would be paid in full until all were paid in full, and the store would retain title to all of the items purchased. The practical impact of this was that if Williams missed a payment Walker-Thomas would have the right to repossess all of the furniture it had sold her, even if the payments she had previously made totaled to an amount greater than the price of all of the items except for the most recently purchased one."*[456]

Since Williams soon defaulted on her payments, the company moved to repossess all the items that she had purchased from them. These amounted to a total of USD $1800, even though the balance that was left unpaid before she bought the stereo was only of USD $164.

Williams' lawyers argued that the clause used by the company was against public policy and unenforceable as a matter of law. Both the trial judge and the District of Columbia Court of Appeals were not moved by this argument, basing their decision on a classic understanding of contracts, based on which *"a voluntary agreement between competent*

---

[452] NEUBORNE, B., 2015, supra note 100, p. 197. *See* also FALLON, R. H., JR., 'Greatness in a Lower Federal Court Judge: The Case of J. Skelly Wright', 2015, 61 *Loyola Law Review*, no. 1, p. 51 (referring to this decision as *"a landmark in the law of contracts"*).
[453] *Williams v. Walker-Thomas Furniture Company* [1965], 350 F. 2d, 445, p. 449.
[454] NADLER, J., 'Unconscionability, Freedom, and the Portrait of a Lady', 2015, 27 *Yale Journal of Law & the Humanities*, no. 2, p. 217.
[455] ibid., p. 217.
[456] KOROBKIN, R. B., 2004, supra note 252, pp. 441–442. *See* also NEUBORNE, B., 2015, supra note 100, p. 197 (explaining how this decision prevented the enforcement of *"debt-acceleration clauses and predatory creditor remedies"*).

persons is sufficient to vary their interpersonal rights and duties."[457] To put it bluntly, the plaintiff should have been more careful when she signed her agreement and, absent any kind of fraud, mistake or duress, she could not expect the courts to set aside her contract.

It was only upon review of these decisions by the United States Court of Appeals for the D.C. Circuit that enforcement was denied. Here the Court disagreed with the basic idea that *"fraud, duress, and mistake exhaust the grounds for setting aside a bargain,"* arguing that unconscionability should also be part of that list of exceptions.[458]

Explaining the Court's decision, Judge WRIGHT stated:

> *"Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld."*[459]

As someone known for his devotion to social causes, Judge WRIGHT had an axe to grind with companies like that of the defendants. They represented a type of merchant whose core business was based on the exploitation of the poor and uneducated, enforcing onerous and patently unfair terms against them. Indeed, the practices of the defendant in this case had clearly been predatory in nature:

> *"The Walker-Thomas Furniture Company operated its business in a neighborhood where one quarter of the families lived in poverty. It operated by sending out aggressive door-to-door salesmen, who presented customers with the household items they badly needed and contracts with very small print. The salesman told the customer to 'just sign here' and did not point out the contract's lease and pro rata*

---

[457] NADLER, J., 2015, supra note 454, p. 217.
[458] ibid., p. 218.
[459] *Williams v. Walker-Thomas Furniture Company* [1965], pp. 449–450.

> *provisions or explain their meaning.* [It was] [d]*uring one of these salesman's visits,* [that] *Ora Williams signed a contract wherein she risked losing her family's basic household items in exchange for credit on the purchase of a stereo."*[460]

It is important to note that Judge WRIGHT's decision did not simply seek to protect someone from a bad bargain. The *Williams* case was not about a plaintiff whimsically trying to go back on her contracts because she had second thoughts about what she purchased. Instead it was about a plaintiff that risked losing all of her household necessities, including her bed and that of her children, their cookware, their washing machine, etc., as a result of a virtually hidden clause in a contract to purchase a stereo on credit.

> *"That is not simply a bad bargain the result of which is merely an unsatisfied personal preference or a frustrated subjective goal; Williams traded away the material conditions of human freedom, the material conditions of living a life she can regard as her own."*[461]

An interesting fact about the *Williams* case, and that further cemented the unconscionability doctrine within the American legal system, is that at the time that Williams signed her contract, the UCC had not yet been adopted by Congress. So, aware of the fact that the decision could not be based on the UCC, the Court used it not as the *ratio decidendi* for the case, but rather as an illustration of the existence of the doctrine of unconscionability in the Common Law. And so, the Court took great care in explaining that the adoption of the UCC did not mean that, prior to this adoption the Common Law of the District did not include such a rule. Instead, "[c]*ombining the recent passage of the UCC and the common law that it had just cited, the court held that, 'where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.'"*[462]

It is interesting to see how the English and the American systems took such different approaches towards the same doctrine, despite starting from the same precedents. While English Courts have all but killed the doctrine, American law has come to accept it as part of its body of laws, despite the controversy that has surrounded it since its very beginnings. A clear example of this acceptance in America involves the UCC itself, since even though §2-302 was met with quite a bit of skepticism and was *"initially regarded as one of the most controversial sections of a somewhat controversial codification, it has been adopted even by states which originally resisted it."*[463]

---

[460] NADLER, J., 2015, supra note 454, p. 244.
[461] ibid., p. 244.
[462] COLBY, E., 2001, supra note 435, p. 640.
[463] KNAPP, C. L., 'Unconscionability in American Contract Law: A Twenty-First Century Survey', 2013 *SSRN Electronic Journal,* p. 2.

Solid evidence of the acceptance of unconscionability in US law comes from the fact that the courts have actually gone beyond the original constraints of the doctrine, and expanded its reach. §2-302 is therefore accepted as a general clause *"essentially authorizing courts to review contract terms,"* not limited to specific contracts, despite being part of an article governing contracts of sale.[464] As a matter of fact, even though *"some decisions emphasized the limited applicability of section 2-302, it has nevertheless been used in transactions other than sales, such as guarantees, insurance contracts, and leases of chattels."*[465] It was this application "by analogy" that allowed this provision in particular, and the doctrine of unconscionability in general, to flourish and expand its reach in American contract law.

The doctrine, as well as its general application, was further cemented in American law by its inclusion in the 1979 Restatement (Second) of Contracts, which established:

> *"§ 208. Unconscionable Contract or Term*
>
> *If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."*[466]

Despite its original success, the doctrine would see a decline in importance as the 20th Century was coming to an end, as "*America's national mood shifted away from faith in governmental regulation of business and toward 'free market' principles, as proclaimed by* [...] *President Ronald Reagan*."[467] And so, up to the 1990's, the doctrine saw its application reduced, for the most part, to consumer contracts (although some cases did touch upon business transactions), and even receiving only marginal attention in that reduced sphere. What is more, as LONEGRASS has noted, for decades the story of this doctrine "*has been one of survival rather than of growth*," as its scope of application became increasingly restricted.[468] Interestingly, it was the application of the doctrine in the realm of

---

[464] MAXEINER, J. R., 2003, supra note 103, p. 118.

[465] ANGELO, A. & ELLINGER, E. P., 1992, supra note 176, p. 495. ANGELO and ELLINGER explain that the expansion was justified on the basis of pre-UCC case law that dealt with unconscionability in transactions other than contracts of sale. These cases were then used as the basis to allow the doctrine to go beyond the apparent confines established in the UCC. KNAPP goes on to add that some courts were also adamant to assert that *"the power to employ the notion of unconscionability* [w]*as a matter of general common law, not dependent on Article 2* [of the UCC] *or any other statute for authority*" (KNAPP, C. L., 2013, supra note 463, p. 2).

[466] Although restatements do not have the force of law, it should be remembered that *"they are considered authoritative"* (NATION [III], G. A., 2005, supra note 397, p. 107).

[467] KNAPP, C. L., 2013, supra note 463, p. 5.

[468] LONEGRASS, M., 2012, supra note 177, p. 52.

arbitration provisions that brought with it a renewed interest in the doctrine that led to its application in other fields.[469]

4.5 The Elements of Unconscionability

The *Williams* decisions and, arguably, the UCC before it, clarified what continues to be the conventional approach towards unconscionability under US law. This is particularly so in regards to the way in which courts must analyze the facts of the case in order to determine whether an unconscionable bargain, resorting to a two-tiered approach. As we have seen, Judge WRIGHT stated in his decision that unconscionability involves: (a) *"an absence of meaningful choice on the part of one of the parties"*, and (b) *"contract terms which are unreasonably favorable to the other party"*.[470] This division highlights the differences between unconscionability and other defenses such as fraud, duress, mistake, impossibility, or illegality, as they focus either on the contracting process *or* on the resulting contract or contractual terms, but not on both.[471] The distinctiveness of the unconscionability doctrine, therefore, comes from the fact that it devotes its attention to both the contracting process (the way in which the agreement was reached), as well as to the terms themselves.[472]

The analysis of unconscionability, particularly in American law (albeit not exclusively) is, as we have seen, characterized by the division of the doctrine in two separate aspects,

---

[469] *See* ibid., p. 53 ("[t]*he bulk of the reported decisions raising unconscionability, and the lion's share of those in which the claim is successful, address the unconscionability of arbitration clauses. However, unconscionability jurisprudence is not limited to arbitration clauses alone*"), DAVIS, N. J., 2007, supra note 232, p. 593 (stating that unconscionability is *"a viable way to prevent enforcement of an arbitration clause*), NEUBORNE, B., 2015, supra note 100, p. 198 ("[unconscionability] *is precisely how a few state courts have sought to deal with mandatory arbitration clauses*"), and KNAPP, C. L., 2013, supra note 463, p. 6 ("[b]*y the last decade of the Twentieth Century* […] *it was common to view the doctrine of unconscionability as being of marginal importance to American contract law generally.* […] *But in the early 1990's, development in an entirely different area of* [arbitration] *law had the somewhat surprising side-effect of reviving interest in the doctrine of unconscionability*").

[470] *Williams v. Walker-Thomas Furniture Company* [1965], p. 449.

[471] NATION [III], G. A., 2005, supra note 397, p. 110.

[472] While it is true that the UCC does not, in principle, include this distinction between a procedural element (the absence of choice) and a substantive element (terms that are unreasonably favorable to one party), it has been largely interpreted and applied in such way. Partly inspired by a seminal paper by LEFF on the topic, courts *"quickly developed a two-part analytical structure for the doctrine, which involves analysis of both 'procedural' and 'substantive' unconscionability'"* (LONEGRASS, M., 2012, supra note 177, p. 8). In LEFF's thorough and scathing analysis of UCC §2-302, he argued that "*the draftsmen* [of the UCC] *failed fully to appreciate the significance of the unconscionability concept's necessary procedure-substance dichotomy and that such failure is one of the primary reasons for section 2-302's final amorphous unintelligibility and its accompanying commentary's final irrelevance"* (LEFF, A. A., 1967, supra note 447, p. 488).

both of which must be taken into account when a contract is being analyzed.[473] On the one hand, there is the issue of the fairness (or lack thereof) of the way in which the parties arrived to their agreement (known as "procedural unconscionability") and, on the other, the issue of the fairness of the terms themselves (referred to as "substantive unconscionability"). This is a fundamental distinction, as it will often be the case that unfairness in only one of these prongs will not be sufficient to deem a contract unconscionable. So, for example, a contract that was fairly negotiated, but resulted in unfair terms for one of the parties, would not be ruled as unconscionable, because doing so would somehow remedy one of the parties' lack of diligence.[474] The opposite case would

---

[473] SCHMITZ criticizes this two-prong test of unconscionability, arguing that it demonstrates how the courts have become "*increasingly rigid*" in its application. This rigidity, the author argues, goes against unconscionability's reliance on *"context, common sense and conscience"* instead of "mathematical" norms and values (SCHMITZ, A. J., 2006, supra note 371, p. 75).

It is worth mentioning that the distinction between these two prongs of unconscionability is not inherently American. As Lord BRIGHTMAN of the Privy Council stated in *Hart v. O'Connor* (on appeal from New Zealand):

> *"If a contract is stigmatised as 'unfair', it may be unfair in one of two ways. It may be unfair by reason of the unfair manner in which it was brought into existence; a contract induced by undue influence is unfair in this sense. It will be convenient to call this "procedural unfairness." It may also, in some contexts, be described (accurately or inaccurately) as 'unfair' by reason of the fact that the terms of the contract are more favourable to one party than to the other. In order to distinguish this "unfairness" from procedural unfairness, it will be convenient to call it "contractual imbalance." The two concepts may overlap. Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of victimisation. Equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing."*

Hart v. O'Connor [1985], 1985 AC, 1000–1027, pp. 1017–1018.

[474] The concern about courts using unconscionability as a way to benefit parties who were not diligent at the time of negotiation, or who simply regret their actions, is all too common in the literature. In general, the fear of the critics is that *"the courts will use unconscionability to free parties from contract commitments regardless of whether the parties deliberately entered into the contract, or the agreement as a whole served the parties' interests at the time of contracting"* (SCHMITZ, A. J., 2006, supra note 371, p. 96). Indeed, unconscionability has often been seen as "*impermissibly paternalistic*," since it allegedly "*rescues responsible agents from the consequences of their own mistakes*" (NADLER, J., 2015, supra note 454, p. 213). Regarding the diligence of the parties at the time of contracting, ENMAN argues that perhaps the fact that English courts are unwilling to resort to the doctrine of unconscionability means that *"English consumers may realize that relief from contracts for unconscionability is rare and exercise greater care when negotiating contracts"*; in contrast, those consumers in jurisdictions where this relief is more readily available might *"have come to depend on obtaining relief from unconscionable bargains and* [have therefore become] *less vigilant in protecting themselves"* (ENMAN, S. R., 1987, supra note 332, p. 218). While theoretically sound, this line of reasoning seems incorrect. Although it is true that if consumers know that they can always obtain redress from the courts for less-than-favorable agreements they have much less of an incentive to be diligent, it is unlikely that legal understanding is as common as ENMAN seems to believe, nor that consumers would really see litigation (often long and costly) as a real alternative to simply being careful in their dealings. The idea that knowledge about the doctrine of unconscionability, let alone its application, is ubiquitous enough so as to have a noticeable effect in the behavior of consumers seems more like wishful thinking than anything else. Furthermore, many of the situations in consumer contracting where unconscionability arises are not precisely fertile ground for increased diligence, due to, for example, the inability of the consumers to read, not to mention understand, the boilerplate terms that they are expected to acquiesce to.

also be true, that is if a *prima facie* unfair negotiation leads to fair terms in the bargain, since it would be difficult for a party to demand the court sets aside the agreement if no unfair terms resulted from the negotiation.[475]

Despite the importance of this division, it is worth nothing that the separation between "procedural" and "substantive" unconscionability is often artificial, as there are many cases in which it is truly impossible to exactly determine what type of unconscionability exists. Although, of course, there are cases in which the unfairness of the bargain is so obvious (e.g. exploitation of a party in distress) that procedural unconscionability becomes evident, the alleged unfairness only becomes relevant once it is reflected in the terms of the contract (i.e. the "substantive" part). And so, both kinds of unconscionability *"usually go hand in hand;"* for example, *"the concept of unfair surprise implies the coexistence of procedural and substantive unfairness,"* etc.[476]

Finally, and before we delve into both facets of unconscionability, it should be noted that even though American law has more or less expressly accepted this distinction, it should not be seen as limited exclusively to America. Indeed, the distinction between substantive and procedural unconscionability is not really an American invention, but rather merely the consequence of our changing understanding of contracts. As we have already seen, classical contract theory was based on the assumption that the fact that the parties manifested their assent in a contract meant that this was really what they wanted. Taking that presumption of meaningful assent as a starting point, the law was only concerned with the way in which the agreement came to be, the *procedural* aspect of it, since the terms themselves, the *substantive* elements, were assumed to be fair and just. As the reality of contracting changed, however, it was realized that the substantive elements, just like the procedural ones, could and should be subjected to some degree of scrutiny.[477] From this perspective, even if a specific system does not expressly distinguish between

---

[475] KNAPP argues that even on their own, substantive and procedural unconscionability can serve as the basis to deem a contract (or a term) unenforceable. While in his assessment in regards to extreme cases of procedural unconscionability he correctly points at cases in which the unconscionability is such that it approaches cases of *"fraud, duress, or undue influence,"* (while recognizing that they are independent bases of contractual avoidance) his treatment of extreme substantive unconscionability is less than satisfying. There his examples refer to cases of illegal agreements, such as an employee agreeing to be paid less than the minimum wage or, even more bizarrely, a contract to sell a child or a minor "consenting" to sexual intercourse (the latter one being a particularly strange choice, as sexual consent, whether over or under the age of consent, has never been considered contractual in nature, and therefore its inclusion seems quite odd). In these cases a finding of unconscionability would be unnecessary, as the law directly and specifically deems them unenforceable, or downright criminal (KNAPP, C. L., 2013, supra note 463, pp. 15–16).

[476] MALLOR, J. P., 1986, supra note 101, p. 1073.

[477] FREILICH, A. & WEBB, E., 2013, supra note 399, p. 140.

procedural and substantive unconscionability, both elements will always play a role in a finding of unconscionability.[478]

4.6 Procedural Unconscionability

As its name implies, procedural unconscionability deals with the way in which the parties arrived to the terms that form their contract. It is closely related to the issue of the voluntary and knowing assent, as a procedurally unconscionable contract *"results in the surprise, oppression, or both of the weaker party."*[479]

According to BROWNE, procedural unconscionability can be the result of any of the following elements:

> *"(1) absence of meaningful choice; (2) superiority of bargaining power; (3) the fact that the contract is an adhesion contract; (4) unfair surprise; or (5) sharp practices and deception"*[480]

While thorough, BROWNE might actually be a bit overzealous in his approach. Indeed, as we have seen, neither superiority of bargaining power, nor the mere existence of a contract of adhesion can or should be considered as sufficient causes for setting a contract aside. Instead, more than being the result of *"any"* of the elements mentioned by BROWNE, it seems like it would be more accurate to say that a finding of procedural unconscionability would often involve a combination of them.

The above notwithstanding, there is certain agreement on the fact that procedural unconscionability manifests itself in, for example, the weaker party being unfairly surprised by contractual terms that "*hidden in fine print or obtuse language,"* or in situations where the weaker party was only able to obtain the goods or services if she agreed "*to the terms dictated by the stronger party."*[481] It deals with *how* the parties came to the agreement, taking into account the type of contract that was used, its nature, its language and

---

[478] *See*, for example, ibid., p. 149 ("[the new Australian Consumer Law] *is concerned with both procedural and substantive unconscionability*).

[479] NATION [III], G. A., 2005, supra note 397, p. 111. As SPANOGLE notes, defining "*oppression"* as a source of unconscionability is rather complex, as it often intersects with the issue of duress, something that adds to the confusion. The fundamental element of oppression, however, is the fact that while the party in question has *"the choice of contracting or not,* [she] *has no choice of the terms of the contract – the contract of adhesion,"* with this resulting in harsh terms imposed against the adhering party. Unlike oppression, "unfair surprise" is fairly easy to visualize, as it involves some sort of deception by the other contractual party. Examples of such behavior include hiding a particularly nefarious clause in a mass of fine print terms, or to phrase a term in a language that would be virtually incomprehensible for the layman reader (SPANOGLE, J. A., 1969, supra note 212, p. 944).

[480] BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, p. 222.

[481] NATION [III], G. A., 2005, supra note 397, p. 111.

wording, etc.[482] Due to its nature, this facet of unconscionability often presents the complication of overlapping with "*the traditional contract doctrines regarding formation of a contract and those that police agreements for fraud, duress, and the like*," and which also deal with how the parties achieve their (at least apparent) agreement.[483]

Unlike its substantive counterpart, the application of procedural unconscionability has been considerably less controversial. This due to the fact that it does not really seem to go against the fundamentals of freedom of contract and the related principles of free bargaining, as it does not aim to analyze the justice of the contract itself, as defined by its terms and its price. Instead, procedural unconscionability seeks to guarantee a fair bargaining process, by ensuring that both parties are acting in a way that allows their consent to be truly voluntary and informed. As the Indiana Supreme Court explained in *Weaver v. American Oil Company,* is about demonstrating that *"there was a real and voluntary meeting of the minds and not merely an objective meeting."*[484]

When seeking to determine whether procedural unconscionability existed, the courts must engage in an intensive analysis of the facts surrounding the contract, relating to both the personal situation of the parties, as well as to the contracting environment in which the contract was concluded. So, for example, in regards to their personal situation, *"the age, literacy, and business sophistication of the party claiming unconscionability,"* as well as his *"level of education and socioeconomic status"* will play a role in the court's assessment. Similarly, external factors, such as the merchant's *"use of pressure tactics to obtain hasty signatures and the presence of boilerplate language buried in small print"* will determine whether his will be seen as "good" or "bad" contractual behavior.[485] In an attempt to list the factors that should be considered to determine the existence of procedural unconscionability, the Kansas Supreme Court formulated, in *Willie v. Southwestern Bell Telephone Co.*, a test which, in regards to the procedural prong, said that courts should analyze

> *"whether the contract was a standard form, whether the clause at issue was boilerplate, whether the clause was hidden (nonconspicuous), whether the language used was incomprehensible to a layperson, whether there was inequality of*

[482] D'AGOSTINO, E., 2014, supra note 138, p. 11.
[483] MALLOR, J. P., 1986, supra note 101, p. 1072. EPSTEIN does not see this so much as a problem, but rather as the correct use of unconscionability, arguing that *"ideally, the unconscionability doctrine protects against fraud, duress and incompetence, without demanding specific proof of any of them."* EPSTEIN, R. A., 1975, supra note 336, p. 302.
[484] *Weaver v. American Oil Company* [1971], 276 NE 2d, 144–155, p. 148.
[485] LONEGRASS, M., 2012, supra note 177, p. 9.

> *bargaining power, and whether there was an exploitation of the 'underprivileged, unsophisticated, uneducated and the illiterate.'"*[486]

4.6.1 Economic Duress as Procedural Unconscionability

According to some critics, the application of the unconscionability doctrine should be limited, at least for the most part, to its procedural prong, leaving the "substantive" aspects aside. EPSTEIN, for example, argues that even though unconscionability is important in regards to the process of contract formation when it comes to issues of duress, fraud and undue influence, as well as in cases where one of the parties can be deemed as incompetent, it should go no further. He goes as far as arguing that using unconscionability to combat substantive unfairness would serve *"only to undercut the private right of contract in a manner that is apt to do more social harm than good"*.[487] Even when he addresses issues like duress and undue influence, EPSTEIN is very conservative in his application of unconscionability, clearly giving preponderance to freedom of contract over any consideration of fairness.

EPSTEIN is clear in his rejection of the unconscionability doctrine being applied in cases of economic duress, arguing that it goes against basic considerations of party autonomy.[488] To illustrate his reasoning, EPSTEIN puts forward an argument, in the form of a thought experiment:

> *"Suppose that B at the outset refuses to clean A's clothes unless A pays him $15, even when B's previous price had been $10. There is no doubt that A is worse off on account of B's decision to make a 'take it or leave it' offer, but it would be the gravest mistake to argue that B's conduct constitutes actionable duress because it puts A to an uncomfortable choice. Indeed the case is sharply distinguishable both from the threats or use of force* [(i.e. B forcing A's consent by those means)] *and from the duress of goods* [(i.e., in this example, B agreeing to clean A's clothes for $10, but then refusing to deliver them unless A pays $15)]. *In those two cases of duress, B put A to the choice between two of his entitlements. In this situation he only puts A to the choice between entitlement and desire, between A's money, which*

---

[486] *Wille v. Southwestern Bell Tel. Co.* [1976], 549 P. 2d, 755–765, pp. 758–759 *See* also DIMATTEO, L. A. & RICH, B. L., 'A Consent Theory of Unconscionability: An Empirical Study of Law in Action', 2005, 33 *Florida State University Law Review*, no. 4, p. 1076.

[487] EPSTEIN, R. A., 1975, supra note 336, p. 315.

[488] Due to its clear relation with the subject matter of this book, special attention will devoted to the topic of economic duress. Since the other topics addressed by EPSTEIN, despite their relevance, are not as closely related to this research (e.g. the procedural unconscionability that exists due to the lower mental competence of the contractual party) we direct the reader to EPSTEIN, R. A., 'Unconscionability: A Critical Reappraisal', 1975, 18 *Journal of Law and Economics*, no. 2, for a quick overview.

> *he owns, and B's services, which he desires. It is the very kind of choice involved in all exchanges. A could not complain if B decided not to make him any offer at all; why then is he entitled to complain if B decides to make him better off by now giving him a choice when before he had none? If A does not like B's offer, he can reject it; but to allow him to first accept the agreement and only thereafter to force B to work at a price which B finds unacceptable is to allow him to resort (with the aid of the state) to the very form of duress that on any theory is prohibited. There is no question of 'dictation' of terms where B refuses to accept the terms desired by A. There is every question of dictation where A can repudiate his agreement with B and hold B to one to which B did not consent; and that element of dictation remains even if A is but a poor individual and B is a large and powerful corporation. To allow that to take place is to indeed countenance an 'inequality of bargaining power' between A and B, with A having the legal advantage as he is given formal legal rights explicitly denied B. The question of duress is not that of the equality of bargaining power in a loose sense that refers to the wealth of the parties. It is the question of what means are permissible to achieve agreement."*[489]

EPSTEIN's argument, particularly in regards to a party's inability to *demand* service, *vis à vis* her right to demand better terms, appears to be convincing. Indeed, in principle, it does not seem to be right that the State should have the ability to force a party to conduct her businesses in any specific manner; and so, in the example above, it would not seem appropriate to force *B*, after the contract has been concluded, to receive a lower price than what she originally charged, and with which *A* agreed to, even if reluctantly. Despite this appearance of solidity, however, the strength of this argument is only skin-deep. Indeed, even if we set aside cases, like those of salvage, in which one of the parties is in such a dire need of assistance that she might as well be considered to be *forced* to agree to any terms placed in front of her, there is still plenty of space to accept economic duress as a valid example of procedural unconscionability.

Before dealing with EPSTEIN's examples and criticisms, some conceptual clarifications are in order. First, it is undisputed that the presence of duress vitiates the free assent that is essential for a contract to exist. Indeed, the Common Law has recognized for years that fear of mayhem, of imprisonment, of loss of life, of loss of limb, or of damage to a person's property, are sufficient to set a contract aside.[490] Although originally applied in a rather strict and limited fashion, a form of duress that affected the way in which a party agreed to certain terms, an *economic* duress, was gradually accepted. As a 1931 US Court of Claims case noted:

---

[489] ibid., p. 297.

[490] HARLEY, J. A., 'Economic Duress and Unconscionability: How Fair Must the Government Be', 1988, 18 *Public Contract Law Journal*, no. 1, p. 80.

> *"The rule as to duress, indicated by the trend of authorities, has receded from its ancient strictness and has been accepted in numerous instances wherein it appeared that the parties were not on equal terms and no alternative existed except to submit to an illegal exaction or suffer irreparable injury to business."*[491]

Following a 1953 decision of this same Court, the elements of economic duress have been fairly easy to enumerate: "*(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party.*"[492]

With the above elements in mind, three cases come to mind in which EPSTEIN's example can manifest itself. One of them deals with an indefensible, deliberate and discriminatory move on the part of the seller to damage the buyer, by arbitrarily charging him more than the rest; another, with a simple case of price-gouging, that is the deliberate attempt on the part of the seller to take advantage of a general disruption, as a way to profit from some form of catastrophe or disaster; finally, another case deals with seller's abuse of her position in the market or of the disadvantageous (albeit not catastrophic) position of the buyer. For the purpose of this analysis, and due to their connection with the topic at hand, we shall focus our attention only on the last two possibilities.

Based on EPSTEIN's views, restricting price gouging, as statutes in the United States and several other countries have done, would in itself be against freedom of contract, since it would affect a party's ability to simply establish whatever price she desires. This due to the fact that, unlike what happens in the case of salvage and other matters of exploitation of distress, the needs of the buyer are not desperate, even if they do represent a real necessity on his part. So, EPSTEIN's theory would actually deem this type of restrictions as unlawful.

Without even referring to the moral objections that might exist against those who would exploit human needs and suffering by means of price gouging, the problem with EPSTEIN's contention is that it is based on a flawed understanding of the market.[493] Indeed, if there

---

[491] Cited in ibid., pp. 81–82.

[492] Cited in ibid., p. 82.

[493] Plenty of ink has been spilled debating the merits and flaws of price gouging regulation, as well as of price gouging itself. Although regulations on price gouging do not necessarily deal with issues of unconscionability, the arguments seem to be, *mutatis mutandis*, perfectly applicable to the unconscionability doctrine in regards to economic duress. Supporters of the regulations, like those who argue in favor of preventing bargaining imbalances through the doctrine of unconscionability, argue that they are aimed at protecting abuses, in an attempt to protect and further some basic societal moral guidelines. "*Greed is a vice*", argue these supporters,

> *"a bad way of being, especially when it makes people oblivious to the suffering of others. More than a personal vice, it is at odds with civic virtue. In times of trouble, a good society pulls together. Rather than press for maximum advantage, people look out for one another. A society in which people exploit their neighbors for financial gain in times of crisis is not a good society. Excessive greed is therefore a vice that a good society should discourage if it can. Price-gouging laws cannot banish greed, but they can at least*

was in fact a case in which a seller could simply spike up the prices so that the next buyer in line would have to pay more than the previous one, we would be in the presence of a completely broken market, and in which the goals of efficiency would not be met. It is important to remember that in a competitive market sellers are not in a position to deliberately and arbitrarily modify their prices, since buyers would simply seek a different provider, meaning that the price-gouging seller would quickly go out of business. The fact that a market allows for price-gouging shows, in and of itself, that the market is not functioning in an effective fashion and that, therefore, allowing the terms obtained by means of "economic duress" to be enforced would actually protect and reinforce a dysfunctional economic system.

It is certainly not our contention that prices cannot or should not be raised in cases of necessity; on the contrary. In an emergency, the costs of any business are bound to increase, and it is understandable that those costs will be passed to the consumer. Holding the opposing view would in effect force businesses to work at a loss, perhaps even making it more efficient to simply remove themselves from the market than to participate in it with artificially low prices. It is obviously in society's best interest to keep markets functioning, and so forcefully maintaining prices low would go against such a goal. A business cannot be expected to operate as a charity, and holding any for-profit organization to such a standard would be foolish and ill-advised, since in its attempt to benefit some players in the market, the State would be simply transferring the hardship from the consumers to the businesses.

The role of the regulators is not, of course, to harm the businesses by forcing low prices in times of crisis, but rather to find a balance between the interests of both the businesses and of those affected by the catastrophes, and who would otherwise have to pay the gouged prices. Regulations, for example, that simply establish a cap on prices would not serve society's best interests, as they might force businesses to choose between closing down or running at a loss; a regulation, on the other hand, that prohibits arbitrary surges while, at the same time, allowing increased costs to be passed to the consumer, would prove to be more useful in its attempt to properly distribute the much-needed assets. This latter approach is the one taken, for example, in the California regulation on price gouging (Section 396 of the California Penal Code) which, although prohibits increases "*of more than 10 percent above the price charged* [...] *immediately prior to the proclamation of*

---

restrain its most brazen expression, and signal society's disapproval of it. By punishing greedy behavior rather than rewarding it, society affirms the civic virtue of shared sacrifice for the common good."

GIBERSON, M., 'The Problem with Price Gouging Laws', 2011, 34 *Regulation*, no. 1, p. 51.

In response to this vitriolic criticism, those who oppose this type of regulation argue that the good wishes on the part of the regulators do not change the fact that price caps cause more harm than good even in times of disaster, because they *"exacerbate the effects of natural disasters and tend to concentrate the harm in the location most directly hit by the disasters"* since businesses will not be willing to trade for low prices (ibid., p. 53).

[the] *emergency*", also establishes that "*a greater price increase is not unlawful if that person can prove that the increase in price was directly attributable to additional costs.*"

The criticisms against' EPSTEIN's position, however, do not need to be limited to extreme cases of distress and price gouging, and can also be applied to more traditional cases of so-called "economic duress." However, some qualifications need to be made regarding EPSTEIN's example in order to justify this extension. If *B*, a dry cleaner, is only one of many other providers, some of whom charge the same, some of whom charge more, and some of whom charge less, then we would not be in the presence of an unconscionable contract. If *A* could have simply walked down the street and found an alternative provider who better fit his budget, or could clean his own clothes himself, but still decided to contract with *B*, then setting aside the contract as unconscionable would negatively impact the freedom of choice and the free market, by protecting *A* from his own wrongdoing. The role of the courts is not, after all, to make sure that contractual parties are smart and wise parties. If, however, *B* is the only provider of the service, to the extent that, unlike in the previous example, it cannot even be performed by *A* himself, then the doctrine of unconscionability must come into play to repair the abuses in which *B* might have engaged.

With these caveats in mind, a case can be made that bargains that are based on the ability of the provider to impose whatever terms he desires on the buyer, should be considered unconscionable. What comes to mind in this respect are, of course, boilerplate agreements which, at least in principle, represent clear examples of a party's ability to impose her will. What is more, even though the doctrine of unconscionability is not at all restricted to these agreements, it is in regards to them that American courts have seen the greater part of its application.[494]

4.6.2 Boilerplate, Unfair Surprise and Unconscionability

As SCHMITZ, has noted, the use of unconscionability in regards to boilerplate agreements generally occurs

> *"when a party with disproportionate bargaining power over a contract partner takes advantage of that power imbalance. Such bargaining disparity often results in 'adhesion' or 'take-it-or-leave-it' contracts, especially in consumer and employment contexts involving agreements among parties with unmatched economic and informational resources.' These cases usually target form or standardized contracts, drafted by powerful parties to include pro-drafter terms that accepting parties may not understand or have the power to protest.' The procedural prong, therefore,*

[494] MAXEINER, J. R., 2003, supra note 103, p. 110.

> *comports with classical will theories of promise enforcement by considering whether a contract lacks true consent."*[495]

As the New Hampshire Supreme Court stated in a 2009 case, "*where there is a disparity in bargaining power, the plaintiff may not be deemed to have freely chosen to enter into the contract*".[496] Following this line of thought, if the party's choices were simply limited to either accept or reject the terms as presented, then procedural unconscionability might arise. In a similar fashion, a New York court considered that a contract is unenforceable when it was entered into by "*a party of little bargaining power, and hence little real choice*", as it is "*hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all of the terms*", particularly when they were drafted "*without discussion and with no opportunity* [...] *to participate in the wording of the contract terms*."[497]

The above-mentioned decisions notwithstanding, it is important to tread carefully when trying to equate adhesion contracts with procedural unconscionability. As it has been said before, it is simply impossible to adopt an "anti-adhesion" doctrine when it comes to contractual enforcement. By their very definition, contracts of adhesion are drafted by only one party, and presented to the other in a take-it-or-leave-it basis. If, as the New York court argued, we are to understand that it is *"hardly likely"* that consent exists in this type of form contracts, then truly the modern marketplace will come crashing down, as it is impossible to expect that there will always be individual negotiations, both in the case of B2B and B2C contracts.

These reservations have not stopped some authors who have argued that procedural unconscionability should be considered as already established by the *"existence of a consumer form contract of adhesion without requiring additional factual evidence relating to either the consumer's personal characteristics or the specifics of the contracting environment*."[498] Regrettably, there are no explanations as to how the courts and the legal system would deal with the countless contracts that are signed every day, and which would be considered prima facie unconscionable because there was no thorough negotiation of every individual term.

---

[495] SCHMITZ, A. J., 2006, supra note 371, pp. 91–92.

[496] *McGrath v. SNH Development, Inc.* [2009], 969 A. 2d, 392–399, p. 397, citing *Barnes v. NH Karting Association* [1986], p. 107.

[497] HELVESTON, M. N. & JACOBS, M. S., 2014, supra note 310, p. 1023. *See* also, generally, *Knudsen v. Lax* [2007], 17 Misc. 3d, 350–364.

[498] LONEGRASS, M., 2012, supra note 177, p. 59. The author goes on to explain that *"the availability of a meaningful opportunity to negotiate contract terms is therefore central to the procedural unconscionability analysis."* Similarly, KORNHAUSER argues that *"most clauses of standard form contracts are candidates for non-enforcement. Form clauses have not been dickered over and one party, generally the buyer, has little knowledge of their contents"* (KORNHAUSER, L. A., 'Unconscionability in Standard Forms', 1976, 64 *California Law Review*, no. 5, p. 1162).

While it is impossible to simply advocate for this "presumption" of unconscionability when there was a contract of adhesion, we do agree that they require closer scrutiny.[499] This is particularly so when cases of unfair surprise come into play, and which are precisely a manifestation of the possible abuses that can occur when one of the parties is able to impose her will.

Unfair surprise exists when the nondrafting party was unaware at the time of the contract that certain harsh and burdensome conditions existed in the agreement. As SHULKIN explains:

> *"Such unfair surprise may be created in two ways. First, the terms of the contract are drafted in language so complex that it is unreasonable to expect the nondrafting party to understand their meaning. Second, a clause of the contract is so inconspicuous that it is unreasonable to expect that the nondrafting party will read or comprehend it."*[500]

There are many reasons why it might be convenient to intervene when one of the parties is presented with unexpected terms. After all, as TREBILCOCK has noted,

> "[w]*here a contract is so worded or arranged that the supplier knows or should know that the other party does not understand its implications, and he knows or should know that the other party reasonably entertains other understandings as to its legal incidents, perhaps based on prevailing contractual practices elsewhere in the market, to allow him to sign the contract without correcting these misunderstandings is tantamount to misrepresentation and thus conducive to suboptimal allocative decisions."*[501]

---

[499] LONEGRASS argues in favor of actually inverting the burden of proof when it comes to form contracts, so as to start from the assumption that they are, at the very least, suspicious. She argues, although speaking about assessing unconscionability as a whole, that "t*he existence of a form contract of adhesion should 'tip the scale' significantly toward an overall finding of unconscionability provided that the offending provisions are found to be 'commercially unreasonable' in their onesidedness"* (LONEGRASS, M., 2012, supra note 177, p. 61).

[500] SHULKIN, M. B., 'Unconscionability--The Code, the Court and the Consumer', 1967, 9 *Boston College Industrial and Commercial Law Review,* p. 368. SPANOGLE offers a very clear illustration of "unfair surprise", highlighting the fact that it *"implies some sort of deception by artifice."* It is actually a fairly clear concept to visualize, often referring to situations like "[h]*iding a clause in a mass of fine print trivia,"* or phrasing the clause(s) *"in language that is incomprehensible to a layman or that diverts his attention from problems raised or rights lost"*. It focuses not so much n the source of this surprise, but rather on the *"effect of abuses on the non-drafting party, and upon the 'fairness' of whatever event caused the surprise."* As a result, *"the most productive criterion for determining whether the procedural abuse of surprise is present is the reasonableness of the non-drafting party's reaction to the clause, rather than the culpability of the drafting party."* This is an important issue, since it places the emphasis on the adhering party having been "unfairly surprised," as well as to the drafter taking an *"unfair advantage ,"* regardless of whether or not there was an active desire on the part of the drafter to achieve that result (SPANOGLE, J. A., 1969, supra note 212, p. 943).

[501] TREBILCOCK, M. J., 1976, supra note 289, pp. 370–371.

As it was mentioned in previous sections, readership of contracts of adhesion is rare. As a result of this, there is a certain presumption on the part of the adhering party that the terms put forward by the drafting party will not depart from basic notions of fairness and rationality. While it is impossible (as well as not recommended) to establish strict rules in regards to this issue, a case can be made that when the imposing party does move away from these basic presumptions, there is procedural unconscionability caused by this unfair surprise.

Following extensive case law on the matter, US courts usually ask three questions in order to determine whether the terms put forward by the drafter can be considered as manifestations of an unfair surprise.

> *"First, did the purchaser know that the clause existed? Second, had he known of its existence, could he have understood the legal effect of the words? And third, did reasonable alternatives to the contract exist?"*[502]

The problem with this enumeration, and which seems unavoidable, is that there can be situations in which all of these elements will be present, even though no finding of unconscionability should exist. A party can, rationally, choose not to read a contract which, due to his own educational background, contains terms he would not have understood even if he read them, without there being any other alternatives for him. While this should not be used as an argument against the application of this doctrine, it does highlight the importance of employing special care in the analysis of a given contractual situation.

4.7 Substantive Unconscionability

While procedural unconscionability deals with the bargaining "process," substantive unconscionability deals with the bargaining "outcome."[503] Put in a different way, while procedural unconscionability addresses the way in which the contract came into existence, substantive unconscionability deals with the content of the contract itself, seeking to prevent the enforcement of clauses (or whole contracts) that might be "*so one-sided* [as] *to be oppressive.*"[504]

Unlike procedural unconscionability, which can be more readily rationalized as a manifestation of the rules on meaningful assent, substantive unconscionability poses a larger problem. In this case the court is no longer paying attention at *how* the terms were agreed upon, but rather at *what* the terms are. *"Here, the inquiry is centered on whether the*

---

[502] KORNHAUSER, L. A., 1976, supra note 498, p. 1163.
[503] EISENBERG, M. A., 'The Bargain Principle and Its Limits', 1982, 95 *Harvard Law Review*, no. 4.
[504] D'AGOSTINO, E., 2014, supra note 138, p. 11.

allocation of risks in the contract or one of its terms is commercially unreasonable or unexpectedly one-sided".[505]

By its very nature, assessing the substantive unconscionability of a contract, or of its terms, represents a significant conundrum for the courts, which find themselves having to make a moral judgment on somebody else's bargain. Evidently, this seems to go against the ideas of individualism and self-reliance and which make up the doctrine of freedom of contract. It is precisely due to the application of these ideas that courts, when deciding whether a contract should be enforced,

> *"generally focus not on the content of the exchange regulated by the contract between the individuals but only upon the manner of formation. They typically begin by asking, "Did the parties agree?", and elaborate by inquiring into the existence of offer and acceptance. Further investigation centers upon the competence of the parties, the presence or absence of duress, the accuracy, materiality, and nature of representations made during the negotiations leading to the contract, the presence or absence of a fiduciary relationship between the parties, and the existence of consideration. What the parties agreed to matters almost not at all; enforceability rests upon the process leading to agreement."*[506]

This reluctance to accept the courts' intervention to determine issues as intangible as "fairness" and "balance" was better worded by ANSON, who stated that

> "[s]*o long as a man gets what he bargained for Courts of law will not ask what the value may be to him, or whether its value is in any way proportionate to his act or promise given in return. This would be 'the law making the bargain, instead of leaving the parties to make it.'"*[507]

When courts face issues of substantive unconscionability, they must analyze the values exchanged in the bargain, and determine whether the outcome was satisfactory or not, compared to an artificial "just" or "ideal" bargain. Of course, the problem here is that it is often difficult, if not impossible, to actually know what constitutes a "just term," let alone a "just price." The problem is further exacerbated when we take into consideration that, as EPSTEIN notes, in many cases, *"the clauses so attacked are, at the time of formation, arguably in the interest of both parties to the agreement."*[508]

---

[505] LONEGRASS, M., 2012, supra note 177, pp. 10–11. MALLOR argues that just like procedural unconscionability somehow overlaps with issues of knowing assent, the substantive prong *"bears some similarity to the exercise of courts' traditional power to withhold enforcement from contracts that violate public policy"* (MALLOR, J. P., 1986, supra note 101, pp. 1072–1073).

[506] KORNHAUSER, L. A., 1976, supra note 498, p. 1151.

[507] Cited in WADDAMS, S., *Principle and Policy in Contract Law: Competing or Complementary Concepts?*, 2011, Cambridge University Press, p. 100.

[508] EPSTEIN, R. A., 1975, supra note 336, p. 306.

Determining whether a contract is substantively unconscionable involves an analysis of the terms and conditions established in the agreement. Traditionally, this analysis has been conducted under a very strict standard, requiring the provisions to be of a kind that *"no man in his senses and not under delusion would make on the one hand, and no honest and fair man would accept on the other"*, as established over 250 years ago in the English case of *Earl of Chesterfield v. Jansen*."[509] This is a particularly strict standard, as it requires the provisions to be so extremely harsh, oppressive and unreasonable that they will shock the conscience of the court.

For obvious reasons, determining whether or not a contract is "substantively" unconscionable is much harder than assessing only its bargaining process. Defining the value of the exchange from the point of view of whether or not it is "fair" is often impossible. This is specially so because in the Common Law there is a widespread consensus that inadequacy of consideration is not, in itself, a defense to contractual obligations, so that *"if there is sufficient consideration to meet the test of contract formation, the contract must be enforceable"*.[510] To put it simply, the fact that the reciprocal obligations of the parties are not of the same value, does not, in and of itself, mean that the contract was unfair, nor does it allow the supposedly "underpaid" party to default on her obligations. As ATIYAH explained:

> *"It has for many years, even centuries, been part of the traditional dogma of contract law that the adequacy of the consideration is immaterial to the validity of a contract. It is for the parties to make their own bargain, not for the courts. Each party to a contract must himself decide how much the other's performance is worth to him, and then decide whether to enter into the contract, yea or nay. If the contract is concluded then it must be assumed that each party is content with his bargain, or he would not have made it. There is simply no room for any inquiry into the fairness of the exchange. If the parties knew what they were at, then the exchange must, by definition, be fair – or at least, it must be as fair as the law cares."*[511]

---

[509] *Earl of Chesterfield and Others Executors of John Spencer v Sir Abraham Janssen* [1751], p. 100; *See* also LONEGRASS, M., 2012, supra note 177, p. 11.

[510] WADDAMS, S. M., 2010, supra note 421, p. 379. As Sir Frederick POLLOCK wrote,

> "*a distinguishing mark of English jurisprudence that the amount of the consideration is not material.* [...] *It is accordingly treated as an elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration.*"

WADDAMS, S., 2010, supra note 412, p. 26.

[511] ATIYAH, P. S., 'Contract and Fair Exchange', 1985, 35 *University of Toronto Law Journal*, no. 1, p. 1. ATIYAH would also restate this point in his work *The Rise and Fall of Freedom of Contract*, where he argued:

> "[T]*he Court is the umpire to be appealed to when a foul is alleged, but the court has no substantive function beyond this. It is not the Court's business to ensure that the bargain is fair, or to see that one party does not take undue advantage of another, or impose unreasonable terms by virtue of superior bargaining position. Any superiority in bargaining power is itself a matter for the market to rectify."*

Quoted in PHILLIPS, J., 2010, supra note 18, p. 837.

This notion that mere imbalances in the consideration are not enough to void a contract has been a staple of the Common Law for several centuries. Already in 1790 English courts noted that *"under ordinary circumstances, even a considerable inadequacy of price will not invalidate a sale"*, although noting that *"the inadequacy may be so gross as, of itself, plainly demonstrate fraud"*.[512]

The philosophical underpinnings of this position towards substantive unconscionability can be better summarized in the words of HOBBES, who in his *Leviathan* put forward the idea that "*the value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contended to give."*[513] It is, in other words, not up to the courts or the law, to intervene and inquire as to the adequacy of the exchange; if the parties agreed to something, then we should assume that it is precisely what they wanted, regardless of whether we might disagree with their assessment.

Notwithstanding the above, although substantive unconscionability cannot be said to exist simply because of mere imbalances in the contractual outcome, "*gross disparity in the values exchanged may be an important factor in determining that a contract is unconscionable*."[514] Indeed, if a contract shows that one of the parties received a benefit that is so disproportionate to the service provided, then the contract should be, at the very least, seen with suspicion.

In general, there are two cate categories of cases that fall within the substantive unconscionability prong. These are cases on unfair prices, and cases on remedy-meddling.[515]

4.7.1 Unconscionable Prices

These are cases in which "*one party asserts that the price to be paid is grossly disproportionate to the cost or value of the good or service received in exchange*."[516]Although it was once largely restricted to cases in which consumers were taken advantage of by, for example, door-to-door salesmen, it is now well accepted as actually "*part of the basic foundation of contract law*."[517]

Despite being accepted in contractual doctrine, however, the unconscionability of the price represents one the most controversial issues that might be challenged on the basis

---

[512] *See* WADDAMS, S., 2010, supra note 413, p. 131, and WADDAMS, S. M., 2010, supra note 421, p. 379.
[513] HOBBES, T., 1839, supra note 96, p. 67.
[514] BRAUCHER, R., 'The Unconscionable Contract or Term', 1970, 31 *University of Pittsburgh Law Review*, no. 3, p. 339.
[515] BROWN, E. L., 2000, supra note 395, p. 299.
[516] DARR, F. P., 'Unconscionability and Price Fairness', 1994, 30 *Houston Law Review*, no. 5, p. 1820.
[517] ibid., p. 1822.

of "fairness." Indeed, the price of a contract is, without a doubt, a salient term, perhaps the most salient term of all. While a party might be able to argue that she was unfairly surprised by a forum selection clause buried deep into a long boilerplate agreement, or that she could not have been expected to understand a complex system to calculate liability that actually leaves her without recourse, she would be hard pressed to argue that she was not aware of how much she was supposed to pay. Some authors have explained this apparent defect in the doctrine by arguing that an excessive price is in and of itself "*an indication of defects in the bargaining process.*"[518] On the basis of this idea, the party arguing that the agreement is unconscionable for excessive price would, in reality, be arguing that the way in which this price was agreed upon was unfair.

The enforcement of agreements in which there is a disparity in the consideration is a demonstration of the commitment of the courts to the free market, as they have traditionally shied away from reviewing the adequacy of consideration, arguing that it *"not only impractical, but* [also] *dangerous"*.[519] It has often been argued that, outside of monopolies, parties who are not satisfied with a certain price can simply walk away and not contract, which in the end would force the other to either lower the prices or go out of business. The problem with this perception, however, is that it overlooks market failures that although may not rise to the level of monopolies, might still impact a party's ability to make correct decisions. A party, for example, might not have the necessary information required to accurately assess the real value of the service or product being received (and the price of the information gathering process might be excessive in and of itself) and is thus left at the mercy (for lack of a better word) of the seller.

While, as we have seen, an excessive price can sometimes be considered as a sufficient basis for a finding of substantive unconscionability, the uncertainty surrounding its application comes as a result of the difficulties inherent to determining what is "excessive." Indeed, courts have been unable to establish a unique system by which to determine when a price can be considered excessive, with some resorting to the level of profit that it reports to the seller, others to the price in relation to other providers of the same item, or even to the economic status of the purchaser himself.[520]

This lack of consistency is a serious issue, as it makes it impossible to have a clear idea of what can reasonably be understood as "excessive." As NATION has documented, uniformity is lacking in both the case law and the doctrine, with different courts and different authors establishing different criteria to determine exactly "how much is too much".

---

[518] NATION [III], G. A., 2005, supra note 397, p. 114. Using an excessive price (or another unconscionable term) as an indication of an unfair bargaining process is not without its problems, as some argue that it blurs the lines between the prongs of unconscionability and creates confusion.
[519] DAWSON, J. P., 1937, supra note 129, p. 346.
[520] BROWN, E. L., 2000, supra note 395, p. 301.

"Courts [...] *have been inconsistent in setting a standard for when a price becomes unconscionably excessive. Some courts have found that an excessive mark up results in substantive unconscionability. Other courts have found a conscionably excessive price to be substantively unconscionable if the contract price is higher than those charged by other merchants for the same or similar goods. Other courts focus on whether the price returns too great a profit to the seller. In addition, a price might be considered exorbitant in part because of the economic status of the purchaser.*

Commentators also have been inconsistent in setting a standard for an unconscionable price. Some suggest that a substantively unconscionable price results when the seller engages in price discrimination. An argument may be made that charging a different price based solely on the identity of the buyer with no cost justification is always unconscionable. Others suggest that an unconscionably excessive price can only be determined by comparing the contract price to some reference price. One commentator suggests that it is necessary to find a sufficient disparity (possibly two to one) between the price charged by the seller and the average of all retail prices charged for like goods in the community in which the consumer resides. Commentators also imply that an excessive price is 'two or three times greater than at least one other available price-in the low income neighborhood or elsewhere.' Yet another commentator suggests a three-prong test consisting of a price significantly in excess of a reference price (substantive prong), contracting process problems resulting in overreaching (procedural prong), and the inability of the market to enforce a fair price (a third requirement, market failure)."[521]

---

[521] NATION [III], G. A., 2005, supra note 397, pp. 114–115 NATION puts forward a compelling argument that, in America, charges for medical services are often unconscionable, particularly in the case of the uninsured, who are the victims of price discrimination, paying much larger fees than those of insured patients. He explains that, in a nutshell, insurance companies reimburse hospitals only a percentage of the "*real costs*" that they charge the patients; this creates an incentive to bloat the prices so as to obtain a larger reimbursement, a practice that evidently hurts the uninsured, who are then faced with the full (bloated) price. In his scathing criticism of this situation, he argues that:

> *"The basic unfairness is patent; there is no good reason why one patient should be expected to pay two or more times the amount paid by other patients for the same goods and services provided by the same hospital. Additionally, the uninsured should not be forced to compensate hospitals for losses incurred as a result of federal requirements and contracts with insurers. The uninsured should also not be burdened with the obligation of paying exorbitant charges resulting from the hospital's desire to maximize reimbursement from third-party payors. The contention that the principle of freedom of contract gives a hospital the right to unilaterally set a price for its services that bears no relation to either the cost of the goods or services or to the amount customarily paid for such goods or services is untenable. The fact that an uninsured patient has signed a hospital admission form that says he agrees to pay the hospital's 'full charges' does not change the unfairness of hospital pricing. Given the circumstances of hospital admissions, the nature of medical services, and the inflated level of 'full charges,' the argument that the patient's express agreement to pay the hospital's 'full charges' should be enforced is grossly unfair and places form over substance. It is just this sort of grossly unfair result that the doctrine of unconscionability prevents and, in so doing, strengthens the principle of freedom of contract."*

4.7.2 Remedy-Meddling

In these cases, one of the parties has *"unduly enlarged his own remedies, unduly restricted the consumer's remedies, or both."* [522] For example, excessive exculpatory clauses by which one of the parties is free from all liability (or limits it excessively), or terms that limit the ability of one party to obtain redress would, certainly, fall within this category.

Courts have always looked with suspicion at disclaimers of liability. If nothing else, there is something that appears as inherently unjust about a contract by which a party is able to severely limit, or downright disclaim, his liability. If we look at the UCC, for example, exclusions of liability, with the exception of liability arising from consequential damages, are not permissible. What is more, although *limitations* of liability are allowed, these must be *"reasonable"* and not *"unconscionable,"* requiring "*'at least minimum adequate remedies' and/or 'a fair quantum of remedy.'*" [523] The Code, therefore, worries that allowing limitations of liability to exist without check would lead to the weaker party being left unprotected.

Terms by which one of the parties severely limits the ability of the other to actually obtain redress can sometimes also be deemed substantially unconscionable. This is the case, for example, with forum selection clauses and arbitration agreements contained in a contract, as they *might* (although definitely not always) represent a limitation of such magnitude that they would, for all practical purposes, deprive the weaker party of her day in court. This issue will be dealt with elsewhere.[524]

4.8 Assessing Unconscionability

The first difficulty associated with the process of assessing whether or not a specific transaction is unconscionable, deals with the very philosophy of our free market system. After all, it is precisely the fact that unconscionability deals with "fairness" and "balance" in contracting that has made it a perennially controversial doctrine. Any reference to natural law or to moral precepts is, undoubtedly, tricky, since concepts of "right" and "wrong", "fairness" and "unfairness", etc., are all wide enough to allow reasonable people to disagree on their precise content. While for some this lack of a unifying definition might justify eliminating them altogether from the legal system, due to their inherent

---

ibid., pp. 123–124.

[522] BROWN, E. L., 2000, supra note 395, p. 302 Although BROWN, quoting HAWKLAND, uses the term "consumer", there is no reason why this should be restricted to consumer contracting. On the contrary, as we have seen, the doctrine of unconscionability (and, therefore, the parts of which it is made) is not restricted to such contracts and is perfectly applicable, *mutatis mutandis*, in a commercial setting.

[523] ELLINGHAUS, M. P., 'In Defense of Unconscionability', 1969, 78 *The Yale Law Journal*, no. 5, p. 794.

[524] *See* Chapters VI, VII and VIII.

unpredictability and malleability, a case can be made that the fact that they are adaptive and flexible actually enhances their usefulness for the courts in their attempts at achieving justice. If nothing else, the fact that the lack of a clear definition has not hindered their power, their familiarity or their popular acceptance, gives *"credence to unconscionability's legitimacy as a reasonable contract defense. Unconscionability's protection of these conventions helps stabilize contract law by enhancing its reputation as 'fair' law worthy of public obedience."*[525]

Still, and for obvious reasons, there is some skepticism surrounding a doctrine that, prima facie, might pose a threat to the certainty that is supposed to come from the legal system. Contract law has as one of its aims giving human relations a certain degree of predictability, and so allowing courts to engage in a subjective assessment of what the parties *may or may not* have *really* wanted at the time of contracting, clearly appears to go against that goal.

Furthermore, unconscionability's intervention in the market represents a type of paternalism that many see as infringing on an individual's right to pursue his own self-interest without extrinsic notions of justice acting as an obstacle.[526] Critics are concerned that this type of paternalistic policies, which might even go against the express will of the parties as manifested in their contracts, violate their individual liberties. Furthermore, critics also point out that this intervention, in addition to allegedly hindering freedom of contract, would *"unduly interfere with* [the] *fluidity and innovation of a market economy"*, as merchants, concerned about the courts' *"unpredictable determinations of unconscionability*" may simply opt to *"avoid transactions with those likely to assert unconscionability claims."*[527] As we have seen, English courts have essentially echoed these concerns, prioritizing certainty in order to avoid "*opening the floodgates of discretion*", and thus threaten the stability and predictability of legal relations.[528]

At this point we should note that calling unconscionability "paternalistic" is not something done only by critics of the doctrine. On the contrary:

---

[525] SCHMITZ, A. J., 2006, supra note 371, p. 79.
[526] ibid., p. 96 .
[527] ibid., p. 97.
[528] CAPPER, D., *Protection of the Vulnerable in Financial Transactions: What the Common Law Vitiating Factors Can Do For You*, in Kenny, M. et al. (eds.), *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable*, 2010, p. 182. Prophets of doom abound in regards to unconscionability, with some authors, reminding us of Chicken Little wailing that the sky was falling, predicting (of course, wrongly) "*that the application of the principles of unconscionability will fundamentally undermine the sanctity of contract, permitting the unscrupulous to escape from an improvident bargain*" (PHILLIPS, J., 2010, supra note 18, p. 846). As SCHMITZ notes, there is *"no empirical support"* for the fear that unconscionability is used by the courts to free negligent or reckless parties (SCHMITZ, A. J., 2006, supra note 371, p. 96).

> *"*[A]*lthough the unconscionability doctrine is quite controversial, its characterization as paternalist is not. Indeed, the unconscionability doctrine is commonly cited to exemplify paternalism in the law. Rather than wrangle over the accuracy of this characterization, disputants over the unconscionability doctrine tend to contest whether 'paternalism' is universally and properly a term of derogation. For* [its] *supporters* [...] *some well-exercised paternalism is acceptable and desirable; for its opponents,* [...] *this label suffices to close the case against the unconscionability doctrine."*[529]

Indeed, the paternalism involved in unconscionability is, for some, in itself a big and unsurmountable problem. In a recent scathing criticism of the doctrine, KLOCK argued that:

> *"Unconscionability* [...] *is indeed inconsistent with fundamental contract theory. Basic contract theory requires only competent parties making an agreement with bilateral consideration to make an enforceable contract. The consideration can be as nominal as a peppercorn for the agreement to be legally enforceable. Courts do not inquire into the distribution of benefits between the parties. This legal fact is deeply rooted in a strong faith in the efficiency of free markets. Individuals do not voluntarily enter into agreements that they expect to make them worse off than before the agreement. If the agreement was made voluntarily, everyone is presumed to have been made better off by the agreement. This presumption can be justified by economic thought which, given a few simple axioms, demonstrates that markets will channel resources to their most valued use and maximize society's wealth when all market participants are permitted to freely make their own decisions. Government intervention cannot improve the allocation of resources and can even impede it. Unconscionability is an inherently paternalistic doctrine that is intended to protect individuals from the consequences of their own decisions and allows them to avoid detrimental terms."*[530]

In the end, as it is the case in every instance of state's intervention in private affairs, this is an issue inherently related to political and philosophical theories regarding the role of the State. Thus, in this case, *"the most fundamental question is essentially moral: is it*

---

[529] SHIFFRIN, S. V., 'Paternalism, Unconscionability Doctrine, and Accommodation', 2000, 29 *Philosophy & Public Affairs*, no. 3, pp. 205–206. Similarly, MORANT refers to unconscionability as *"the most notorious"* of *"all paternalistic remedies"* (MORANT, B. D., 2003, supra note 126, p. 260). BROWNE and BIKSACKY take exception at referring to unconscionability as "paternalistic." They argue that paternalism, by its very nature, involves the State acting against the protected party's will (e.g. drug prohibition) and so the fact that here one of the parties is expressly opposing the enforcement of a contract or term means that it cannot be paternalistic. They base this idea on the fact that *"the relevant agent actively endorses the supposedly paternalistic conduct"* (BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, pp. 226–227).

[530] KLOCK, M., 'Unconscionability and Price Discrimination', 2001, 69 *Tennessee Law Review*, no. 2, pp. 343–344.

legitimate for a court to set aside a contract merely because it is unconscionable?"[531] The answer to this question is deeply related to our understanding and acceptance of "paternalism" and state intervention, and whether we see this as an affront to our liberties or as an essential and necessary part of living in a civilized society. As one author noted:

> *"More and more, it is becoming apparent in the field of economics and political science that one of the great contentious issues of modern times is whether the State should intervene to regulate certain aspects of our daily lives; and if it should, to what extent such intervention should be carried. In other words the line between the provinces of State activity and individual enterprise is indistinct."*[532]

As explained by MARNEFFE, it is a matter of differentiating among different ways in which the State might intervene, and perhaps even changing the way we see the role of the State itself:

> *"Paternalism seems repugnant because it seems infantilizing. In limiting our liberty for our own good, it seems that the government treats us like children or that it impedes our development into fully mature adults, but there is no reason to think this is true of every paternalistic policy. Some liberties have a special value in symbolizing the status of adulthood within our society, the freedom to marry, for example. Having this freedom also provides an important kind of control over the shape and direction of our lives, and creates important opportunities for deliberation and choice. So it makes sense to think the government would treat us like children if it were to make our marital decisions for us. Not every liberty, though, has this kind of significance: the freedom to drive without a seatbelt does not. So there is little reason to think that every paternalistic policy is infantilizing in this way"*.[533]

This situation is further complicated by the fact that neither the commentators nor the courts can agree on a way to define fairness, let alone measure it, or to assess unconscionability in a prima facie manner.[534] The impossibility to create clear standards of behavior that would allow a party to know in advance whether her actions could be

---

[531] SMITH, S. A. & ATIYAH, P. S., 2006, supra note 113, p. 311.

[532] HUGHES PARRY, D., 1959, supra note 13, p. 73.

[533] MARNEFFE, P. de, 'Avoiding Paternalism', 2006, 34 *Philosophy & Public Affairs*, no. 1, p. 68. Following a similar line, MORANT considers that *"despite its potential for inefficiency, paternalism, if judiciously administered, has a place in contract law."* He bases this proposal on the fact that when the parties' bargaining positions are very disparate, the possibility of *"dubious assent to unduly burdensome terms"* morally justifies a measured intervention by the State (MORANT, B. D., 2003, supra note 126, pp. 258–259).

[534] While at first the criticism that we should not allow judges to decide on matters as ethereal as those of "fairness" seems rational, as that would empower them to base their decisions on their own particular visions of justice (or, as LEFF stated, in whatever makes their *"pulses race or their cheeks redden"*), this is not necessarily so. We already grant judges the right to decide on issues just as ethereal (e.g. "malice," "reasonableness" and "good faith") and apparently no social cataclysms have come as a result. For LEFF's comments on the lack of specificity, *See* LEFF, A. A., 1967, supra note 447, p. 516.

considered unconscionable (e.g. the type of wording and disclosure of terms) casts some doubts as to how useful it is to advocate the use of this doctrine. While it is true that the fears that once existed about unconscionability going out of control and allowing absolute discretion have proven, to a large extent, to have been unfounded, this says nothing as to how useful it is for merchants who are drafting their agreements. The existence of different views towards the same doctrine, and which go all over the political and economic spectrum (from libertarianism to statism) have meant that, for example, while some authors argue that unconscionability has no place in contract law and that therefore boilerplate contracts should, for the most part, be left alone, others go as far as arguing that all contracts of adhesion should be seen by the courts as procedurally unconscionable.[535]

In an attempt to balance both positions, that is the fear of excessive state intervention and the demands for a safety net, the majority of US courts have adopted a very rigid standard to determine when a contract is unconscionable.[536] Under this approach to unconscionability, and which has been followed by the majority of American courts, strong evidence of the existence of both prongs of unconscionability, substantive and procedural, is required to deem a contract (or a term) unconscionable. [537] This was the position put forward by, for example, the Superior Court of New Jersey in the 2002 case of *Sitogum Holdings, Inc. v. Ropes,* where the Court ruled that:

> *"For the most part, the unconscionability cases follow Williams v. Walker-Thomas and look for two factors: (1) unfairness in the formation of the contract, and (2)*

---

[535] HELVESTON, M. N. & JACOBS, M. S., 2014, supra note 310, p. 20. In regards to libertarianism and unconscionability, some have argued that the latter should not actually be seen as inherently incompatible with the former. BROWNE and BIKSACKY, for example, argue that since both classical and libertarian contract theory are "*built around the foundational assumption of the existence of a meaningful choice*," unconscionability should be seen as ensuring the existence of this choice (BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, p. 214).

[536] Although BROWN recognizes that the majority view is that both prongs are necessary, he sees the lack of total harmony in the case law as one of the reasons why the doctrine should be dropped altogether (BROWN, E. L., 2000, supra note 395, pp. 303–304). The rigidity with which American courts analyze claims of unconscionability cannot be overstated. As MAXEINER notes:

> *"Unconscionability* […] *has proven to be a hard standard to meet: only a small handful of cases-according to one count, just fourteen in one ten-year period-did. Judge Posner noted some years ago that Indiana was 'so unfriendly to the defense of unconscionability' that in more than twenty years there was only one reported case where it was accepted: a clause, untitled, in fine print, whereby a high school drop-out guaranteed a multinational oil company against the consequences of its own negligence."*

MAXEINER, J. R., 2003, supra note 103, p. 121.

[537] LONEGRASS, M., 2012, supra note 177- Although plenty of credit is given to professor ANDREW LEFF for this two-prong approach, emanating from his criticism of §2-302 of the UCC, it also has its roots in the *Williams* decision, which seems to establish a requirement of both *"absence of meaningful choice"* for one party, and of terms which are *"unreasonably favorable"* to the other (*Williams v. Walker-Thomas Furniture Company* [1965], p. 449). For LEFF'S article *See* LEFF, A. A., 1967, supra note 447.

> *excessively disproportionate terms. Professor Leff labelled these two elements as "procedural" and "substantive" unconscionability."*[538]

This traditional approach has been the object of some criticism, with its formalism often being deemed as contrary to the goal of ensuring fairness in contracting.[539] Critics argue that this approach establishes a standard that is so hard to meet that many contracts that should be deemed unconscionable will still be enforced. This is particularly so in the case of boilerplate contracts, where the courts have, by and large, accepted their efficacy and enforceability despite the well-known lack of readership and/or understanding. Because of this, even if there is a gross imbalance in the terms of the contract, the fact that boilerplate (despite not being read or understood) is considered completely valid and enforceable, would mean that the aggrieved party would not be able to avoid its enforcement.

As a result of these criticisms, an alternative method, based on a "sliding scale" approach, has been put forward by both scholars as well as an increasing number of courts in the United States.[540] Under this method, while both procedural and substantive unconscionability are still required, *"strong evidence of both prongs is no longer required to justify relief;"* instead, the larger the quantum of one of the prongs, the smaller the quantum that is required of the other.[541] This approach, based on a sort of "set-off" between both kinds of unconscionability, has allowed courts to relax the standard of proof used in unconscionability cases, often (albeit not always) giving priority to the fairness of the terms themselves, and considerably less to how these terms were agreed upon.[542] The problem is, of course, that there is little to no clarity as to the ratios of

---

[538] *Sitogum Holdings, Inc. v. Ropes* [2002], 800 A. 2d, 915, p. 921. The Court goes on to add that although this analysis represents the position of most courts, "[o]*ther courts have been satisfied merely by proof of substantive unconscionability, i.e., an excessively disproportionate exchange of material promises* […] *Still other courts have determined that the two elements need not have equal effect but work together, creating a 'sliding scale' of unconscionability*" (ibid., p. 921).

[539] LONEGRASS, M., 2012, supra note 177, p. 55.

[540] *See*, for example, the 1983 case of *New York v. Wolowitz*, where judge GIBBONS stated

> *"In determining the conscionability of a contract, no set weight is to be given any one factor; each case must be decided on its own facts […]However, in general,* ***it can be said that procedural and substantive unconscionability operate on a 'sliding scale'****; the more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated and vice versa"*

State v. Wolowitz [1983], 96 AD 2d, 47–81, p. 68 (emphasis added).

[541] LONEGRASS, M., 2012, supra note 177, p. 12. The Missouri Court of Appeals, in *Funding Systems Leas. Corp. v. King Louie Intern., Inc.* [1979], 597 SW 2d, 624, p. 634, referencing the work of SPANOGLE, defined this sliding-scale approach as:

> *"*[A] *balancing between the substantive and procedural aspects, and that if there exists gross procedural unconscionability then not much be needed by way of substantive unconscionability, and that the same 'sliding scale' be applied if there be great substantive unconscionability but little procedural unconscionability."*

[542] KNAPP, C. L., 2013, supra note 463.

procedural *vis à vis* substantive unconscionability that should exist in a given case so as to allow for the application of the doctrine.[543]

In a recent case, the California Supreme Court, citing previous authorities, justified this sliding-scale approach arguing that:

> *"The prevailing view is that* [procedural and substantive unconscionability] *must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.'* [...] *But they need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa."*[544]

There have also been some cases, although they remain in the minority, in which courts have rejected the two-prong approach, and actually deemed a contract or a term unenforceable *"based entirely on only one of the two prongs, with little or no attention paid to the other."*[545] While this clearly represents a significantly more liberal approach to unconscionability, and might itself be a response to the perceived narrowness with which it has been historically applied, it is not without its flaws. For starters, deeming a contract unenforceable *only* because of procedural problems, without there being any actual unfairness in its clauses or, vice versa, unbalanced clauses in an otherwise fairly agreed upon contract, raises the question as to why should the courts intervene. In the end, it goes back to the argument as to what should be the role of the courts in regards to fairness, particularly when they seem to be acting in a way that either goes against the express will of the parties (when there was no substantive unconscionability to speak of) or protecting them from their own negligence (when there was no procedural impropriety). Aware of these limitations, and particularly in regards to the presence of only substantive unconscionability, the minority of courts that have adopted this single-

---

[543] BROWN, E. L., 2000, supra note 395, p. 306. To an extent, LONEGRASS dismisses these concerns, arguing that the sliding-scale approach would actually increase certainty and predictability, by deemphasizing the two prongs individually and emphasizing the substance of the provisions (LONEGRASS, M., 2012, supra note 177, p. 55).

[544] *Armendariz v. Foundation Health Psychcare* [2000], 99 Cal. Rptr. 2d., 745–778, pp. 767–768. In a more recent case, the Supreme Court of Appeals of West Virginia, in *Brown ex rel. Brown v. Genesis Healthcare* [2011], 724 SE 2d, 250–299, p. 289, expressly incorporated the rationale put forward in *Armendariz*, ruling that:

> *"We perceive that a contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa."*

[545] KNAPP, C. L., 2013, supra note 463

prong approach have not really done away with the two-prong approach altogether, and still require some modicum of "the other" unconscionability, even if only in small doses.[546] A similar logic might explain why courts have, for the most part, been very reluctant (if not downright opposed) to invalidate a contract based on procedural unconscionability alone, since such an outcome would be hard to justify when the "weak" party actually suffered no damages.[547]

The rationale behind those who advocate a finding of unconscionability based only on the presence of substantive unconscionability is grounded on the requirements of true and knowing assent. On the basis of a rather paternalistic and moralistic view, they argue that a gross disparity between the rights and obligations created by the contract, with its terms and conditions being extremely one-sided, serves as an indication of a lack of consent. In other words, they argue that if the afflicted party had really understood what she was agreeing to, then she would not have given her assent.[548] Already in 1931, in the case of *Peacock Hotel, Inc. v. Shipman*, the Florida Supreme Court confirmed this idea that even when a party had acted negligently, a court could refuse to enforce the contract if it gave the other an unfair advantage. The Court ruled that:

> *"It seems to be established by the authorities that where it is perfectly plain to the court that one party has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable to permit him to enforce, that a*

---

[546] LONEGRASS, M., 2012, supra note 177, p. 21 LONEGRASS cites, among others, the case of *Toker v. Perl* [1968], 103 N.J. Super., 500–504 as an example of a case in which unconscionability was based in "excessive pricing" alone. This is an interesting example, because it highlights the often difficult task of differentiating between issues affecting meaningful assent and procedural unconscionability. In its decision, the Court based its finding of unconscionability exclusively on the price of the product sold to the defendants (qualified as "*exorbitant*" by the Court), and considered that the way in which consent was obtained was by means of fraud, and not procedural unconscionability; in this way, the course refused to enforce the contract *"because it was procured by fraud and is unconscionable."* The facts of the case make it clear that the plaintiffs acted in a deceitful way, not explaining clearly to the defendants exactly what they were acquiring (they were lead to believe that their contract for a one-month food plan included a free freezer, whereas they were actually buying one in installments), and apparently even presenting the contract in a way that hid its terms ("[t]*he forms were placed before defendant, one on top of the other, leaving visible only the signature line on the lower two forms. The top page was the food plan contract*." The *hidden* pages were a financing application and an installment contract for the freezer). While the facts of the case made it clear that the seller had acted in a fraudulent fashion, the case law on procedural unconscionability is such that it is not hard to imagine other courts deeming said fraud simply as a procedurally unconscionable behavior.

[547] LONEGRASS, M., 2012, supra note 177, p. 21. This was the situation in *Leos v. Darden Restaurants Inc.*, a labor dispute where the California Court of Appeals declared an arbitration provision to be enforceable, despite being procedurally unconscionable. The Court reasoned that since the provision was not substantively unconscionable, it was therefore enforceable (*Leos v. Darden Restaurants, Inc.* [2013], 217 Cal. App. 4th, 473–497). Although a petition for review by the plaintiff was later granted by the California Supreme Court in *Leos v. Darden Restaurants*, 307 P. 3d, 878, no records exist of further proceedings.

[548] LONEGRASS, M., 2012, supra note 177, pp. 22–23.

> *court of equity will not hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness."*[549]

Under this approach the courts assume the role of protectors of the parties who, in the courts' own opinion, did not know any better at the time and were actually taken advantage of. The Florida Supreme Court was rather straightforward in its appeal to paternalism, quoting the words of Justice Root in the 1906 Washington Supreme Court case of *Stone v. Moody*:

> *"It is well known that many good people and people of average or greater intelligence are sometimes duped and misled by the skill, cleverness, and artifices of those who are adepts in the matter of deceiving their fellow men; and courts should not throw about schemers of this kind a protection that will tend to encourage the practice of their arts. Such people should not find encouragement in the thought that, by keeping their machinations within the letter of the law, they may find sanction for their practices and reap the reward of their craftiness. To the victim it is of little import whether his property is taken from him by a bold and forcible robbery or by an ingenious and unsuspected deception. The injury to him is the same; and the evil effect of court decisions which permit the wrongdoer to enjoy the fruits of his chicanery is of no small import when viewed from the standpoint of public policy. It is not the function of courts to make contracts for parties, or to relieve them from the effects of bad bargains. But where the simplicity and credulity of people are taken advantage of by the shrewdness, overreaching and misrepresentation of those with whom they are dealing, and they are thereby induced to do unwittingly something the effect of which they do not intend, foresee, or comprehend, and which, if permitted to culminate, would be shocking to equity and good conscience, we think a court of equity may with propriety interpose."*[550]

The argument put forward by the Court is certainly not without merits. There is something intrinsically wrong about allowing a shrewd party to take advantage of those in a weaker position, safe in the knowledge that as long as he follows the letter (albeit not the spirit) of the law, he will be allowed to get away with it. The problem, however, is that it is difficult to determine when *this* type of protection should operate, and when the *caveat emptor* approach should take over.[551]

---

[549] *Peacock Hotel, Inc. v. Shipman* [1931], 103 Fla., 633–642, p. 637.
[550] Quoted in ibid., p. 637-638.
[551] Interestingly, *Peacock Hotel* is actually a considered an example of the *caveat emptor* approach. Even though the Court went out of its way to declare that unfair bargains would not be enforced as a matter of equity, it distinguished those situations from the case at hand, where it blamed the plaintiffs for their lack of diligence. *See* NICHOLS, C. L., 'Misrepresentation: Can A Vendee Rely on a Vendor's Representations?', 1979, 9 *Stetson Law Review*, p. 506.

Critics of the doctrine under which substantive unconscionability alone is enough to prevent enforcement argue that it goes against the principles of self-reliance that form our economic and political system, since *"courts should not engage in any assessment of the substantive fairness of freely negotiated contracts."*[552] Indeed, as the California Supreme Court put it in *Gentry v. Superior Court*, procedural unconscionability, at least *some* degree of it, must exist to justify the intervention:

> *"*[A] *conclusion that a contract contains no element of procedural unconscionability is tantamount to saying that, no matter how one-sided the contract terms, a court will not disturb the contract because of its confidence that the contract was negotiated or chosen freely, that the party subject to a seemingly one-sided term is presumed to have obtained some advantage from conceding the term or that, if one party negotiated poorly, it is not the court's place to rectify these kinds of errors or asymmetries."*[553]

The Washington Supreme Court, on the other hand, has followed a different approach. The Court stated that unconscionability alone is indeed a sufficient basis for denying the enforcement of a contract. As the Court categorically stated in a recent case:

> *"In some instances, individual contractual provisions may be so one-sided and harsh as to render them substantively unconscionable despite the fact that the circumstances surrounding the parties' agreement to the contract do not support a finding of procedural unconscionability* [...] *Accordingly, we now hold that substantive unconscionability alone can support a finding of unconscionability."*[554]

Similarly, the Supreme Court of Hawaii ruled in a 2014 case that "*one-sidedness alone can render an agreement unconscionable."* [555] Recognizing that its opinion was not anonymously accepted in the case law, the Court also stated that:

> *"Although some courts have concluded that '[t]o be unenforceable, a contract must be both procedurally and substantively unconscionable,'* [...] *most authorities have recognized that, in at least some cases, substantive unconscionability, without more, can render an agreement unenforceable.* [...] *Indeed, the courts of this state have recognized that, under certain circumstances, an impermissibly one-sided agreement may be unconscionable even if there is no unfair surprise."*[556]

Critics of this single-prong approach have also argued that basing the relief on substantive unconscionability alone is not *really* a single prong approach. They argue that,

---

[552] LONEGRASS, M., 2012, supra note 177, p. 24.
[553] Cited in ibid., p. 24.
[554] *Adler v. Fred Lind Manor* [2004], 103 P. 3d, 773–791, p. 782.
[555] *Balogh v. Balogh* [2014], 332 P. 3d, 631–661, p. 644.
[556] ibid., p. 643.

by using the imbalances in the terms of the contract as an indication of lack of knowing assent, what courts supportive of this theory are doing is to simply infer the existence of procedural unconscionability.[557] It seems to be, therefore, simply an extension of the sliding scale rule for unconscionability, and based on which a gross level of substantive unconscionability leads to a presumption of the procedural prong.

4.9 Unconscionability and Bargaining Power

Regardless of whether we opt for a single or double-pronged approach, or whether we opt for a sliding-scale rule, a further complication in the assessment of unconscionability comes from its close relation to the doctrine of superiority of bargaining power. Their close proximity is such that, in fact, they are often analyzed together, as both deal with the imposition of one party's will over the other and, at least in theory, aim to prevent abuses of the strong against the weak.[558] As the New York Court of Appeals stated in *Rowe v. Great Atlantic & Pacific Tea Co.*,

> *"There exists an unavoidable tension between the concept of freedom to contract, which has long been basic to our socioeconomic system, and the equally fundamental belief that an enlightened society must to some extent protect its members from the potentially harsh effects of an unchecked free market system. Thus, rightly or wrongly, society has chosen to intervene in various ways in the dealings between private parties.* [...] [T]*he law has developed the concept of unconscionability so as to prevent the unjust enforcement of onerous contractual terms which one party is*

[557] As part of his criticism of the doctrine, BROWN sees the possibility of a court using substantive unconscionability to imply the existence of the procedural prong as simply adding *"to the confusion in this area"* (BROWN, E. L., 2000, supra note 395, p. 305).

[558] The New York Supreme Court, for example, in *Jones v. Star Credit Corp* [1969], 59 Misc. 2d, 189–193, p. 191, referred to this close connection stating:

> *"The law is beginning to fight back against those who once took advantage of the poor and illiterate without risk of either exposure or interference. From the common-law doctrine of intrinsic fraud we have, over the years, developed common and statutory law which tells not only the buyer but also the seller to beware. This body of laws recognizes the importance of a free enterprise system but at the same time will provide the legal armor to protect and safeguard the prospective victim from the harshness of an unconscionable contract."*

As HELVESTON and JACOBS noted, "*while courts have not linked bargaining power differences directly to substantive unconscionability, 'large' disparities have influenced their reasoning* [...] *Because courts view many of the factors that contribute to power disparities as indicia of procedural deficiencies, large differences in bargaining power have led them to invalidate contracts or terms that might otherwise have been enforced*" (Helveston, M. N. & Jacobs, M. S., 2014, supra note 310, pp. 15–16).

> *able to impose under the other because of a significant disparity in bargaining power."*[559]

Similarly, the seminal Australian High Court case of *Commercial Bank of Australia v. Amadio*, expressly referred to bargaining power disparities as an element of unconscionability:

> *"The jurisdiction* [to grant relief against unconscionable dealings] *is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable."*[560]

One of the problems arising form unconscionability's relation to the doctrine of bargaining power is determining what parties can be considered "strong" and "weak" in any given contract. This is a problem that, as we have seen, seems to permeate not just unconscionability but all of the matters related to bargaining power disparities and contractual fairness. This is caused by the fact that it is virtually impossible to create clear categories of "weak" and "strong" parties, in light of the many changes that society experiences in its makeup, not to mention the unique characteristics of any single transaction. There was a time, for example, when women were part of what some have called "presumed sillies" in the eyes of the courts (together with, among others, farmers, heirs, sailors and orphans) and, therefore, would be benefited by the doctrine of unconscionability based, in part, by their indisputably lower position in society.[561] Nowadays, of course, thanks to the improvement of the position of women in the western

---

[559] *Rowe v. Great Atlantic & Pacific Tea Co.* [1978], 46 NY 2d, 62–73, p. 68.

[560] Cited in THAMPAPILLAI, D. & TAN, V. et al., *Australian Commercial Law*, 2015, Cambridge University Press, Melbourne, Australia, p. 438. As PHILLIPS notes, the Court made a rather poor choice of words, since *"special disadvantage"* would have been more appropriate than the chosen *"special disability,"* as the former is considerably wider (PHILLIPS, J., 2010, supra note 18, p. 841).

[561] LEFF, A. A., 1967, supra note 447, pp. 531–532. Other categories of people benefitted by the doctrine included "*the old, the young, the ignorant, the necessitous, the illiterate, the improvident, the drunken, the naive and the sick, all on one side of the transaction, with the sharp and hard on the other."* KNAPP points that, starting in the 1960's, American courts often resorted to the doctrine of unconscionability to restore the imbalances present in consumer contracts where one of the parties was a *"bargaining disadvantage in the transaction at issue. Some were persons of limited education and/or economic means; some were members of minority groups often subject to invidious discrimination in American society; some were immigrants or first generation Americans who could read or perhaps even speak English with difficulty or not at all"* (KNAPP, C. L., 2013, supra note 463, p. 3).

world, it would be ridiculous to argue that, like true damsels in distress, they need the courts to protect them from this once (wrongly) presumed silliness.[562]

Because of this difficulty in "calculating" each party's power, courts have resorted to stereotyping parties based on certain common characteristics. So, for example, courts have looked at "*whether the parties belong to certain groups or possess certain qualities, including their economic role (employer/employee, seller/consumer, and corporation/individual), wealth, level of education, and business sophistication, among others. While many courts supplement their initial categorizations with individualized information, some have based their assessments exclusively on a party's membership in the relevant group.*"[563] Clearly, this is not an ideal solution, and the difficulties associated have been recognized by the courts. The High Court of Australia, for example, in the 1956 case of *Blomley v. Ryan*, stated that

> *"The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is*

---

[562] Italian courts have taken a strange approach towards women's standing in contracts, by declaring void "*spouses' agreements in contemplation of divorce*", deeming them void due to reasons of being against public policy, expressing *their "concern or even distrust for wives' ability to identify and fulfil their own good."* Strangely enough, the enforcement of those agreements would often *benefit* the wives, and so these are cases in which the good intention of the courts has been misplaced and actually did more harm than good (MARELLA, M. R., 'The Old and the New Limits to Freedom of Contract in Europe', 2006, 2 *European Review of Contract Law*, no. 2, p. 264). In a similar fashion, Australian law contains a provision granting married women "*a prima facie right to have her guarantee of her husband's debts set aside if the guarantee has been procured by her husband."* Understandably, this vestigial provision of less civilized times has been the object of strong criticism, not only because it gives married women an unjustifiable advantage *vis à vis* her husbands, but also because it stigmatizes married women as less able than men to understand contractual guarantees (PHILLIPS, J., 2010, supra note 18, pp. 843–845). Also in regards to women's contractual abilities, for a very interesting reflection on undue influence, unconscionability and duress affecting Muslim women in American courts, *See,* generally, BLENKHORN, L. E., 'Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women', 2002, 76 *Southern California Law Review*, no. 1.

[563] HELVESTON, M. N. & JACOBS, M. S., 2014, supra note 310, p. 13. Of course, grouping people into categories in regards to their contractual ability is often risky; *"*[f]*irst, it is difficult, if not impossible, to assert that the persons who fall into any or all of these classes are not in general competent to fend for themselves in most market situations. They are not infants, impressionable heirs, or gullible prisoners of war. Second, the subject matter of the transactions is for the most part consumer goods that are sold in generally competitive markets, and not interests in trust funds or real estate difficult to value even under the best circumstances. The costs of setting these transactions aside, moreover, are apt to be quite great, for it will be more expensive for the members of the 'protected' class to contract on their own behalf within a complex web of legal rules. In addition, there will no doubt be both opportunity and inventive for many to take advantage of the rights conferred upon them by law to manipulate the system to their own advantage"* (EPSTEIN, R. A., 1975, supra note 336, pp. 304–305).

> *necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other."*[564]

The problems inherent to *measuring* the bargaining power of the parties are exacerbated by the fact that, in any given contract, the parties are bound to have different degrees of power. Contracts in which both parties possess the exact degree of power are, in all likelihood, nonexistent. Once this is taken into account, we are forced to concede that stereotyping contractual parties based on their belonging to certain categories, as imprecise as this method may be, might be the only way to apply and enforce the rules on unconscionability. Having said that, however, these categorizations do pose the threat that they will excuse a party from fulfilling her contract, even when the "strong" party acted in a fully permissible way, and will thus give her a benefit that is not granted to others. For example, a merchant that uses the exact same form contract in every transaction, will find that it will only be enforceable against *some* of the parties with which he contracted, while in other cases the individual characteristics of the other party, and which are not attributable to the merchant, will prevent such enforcement.[565]

In principle, a different outcome depending on the individual "weaker" party certainly seems to go against basic considerations of fairness, as only some will be bound by equally draconian terms.[566] Because of this, courts have taken these issues into consideration and, as a rule, do not consider the mere inequality of bargaining power as sufficient grounds to trigger unconscionability. As the Court of Appeals for the Eight Circuit ruled in a recent case:

> *"It is not enough to assert that one party was less sophisticated than the other. There must be some evidence that the party holding the superior bargaining power exerted that power in overreaching the less sophisticated party by, for example, engaging in fraud or coercion or by insisting on an unconscionable clause."*[567]

As it is well known, a category that has been often considered "weak", and for good reason, is that of consumers.[568] The reasons for this special treatment are many. As BARNES explained:

---

[564] *Blomley v Ryan*, 99 CLR, 362, p. 405.
[565] *See* §3.2.1 supra.
[566] HELVESTON, M. N. & JACOBS, M. S., 2014, supra note 310, p. 1020.
[567] *Sander v. Alexander Richardson Investments* [2003], 334 F. 3d, 712–721, p. 720.
[568] For the purposes of this work we are using a rather broad definition of consumer contracts, applying such designation to those contracts where goods or services are provided by a party (the merchant) operating in a business capacity to a party (the consumer) acting in a private (i.e. non-business) capacity.
Since the study of unconscionability has, traditionally, been largely focused on consumer contracting, we will only briefly refer to these contracts. First, we feel that due to the overwhelming amount of material that already covers unconscionability in consumer contracting, our analysis would mostly appear redundant; second, since the core of this work will deal with bargaining power disparities between parties in commercial contracts, and their

> *"When consumers enter into transactions with commercial enterprises, they almost invariably do so through the use of standard form contracts. The disparity in bargaining power between consumers and commercial enterprises is generally complete and absolute. Consumers are typically not able to negotiate the individual terms of form contracts, and so they cannot dicker with the company over onerous terms such as liability limitations, warranty exclusions, and the like. Consumers would, in most instances, not be able to understand the various legal issues at stake even if they had the bargaining power necessary to seek more favorable contractual terms at the time of contract formation."*[569]

As adhesion contracts, consumer transactions are generally understood to be one-sided, establishing terms that are much more favorable to the drafting party (the merchant) than to the consumer. Because of this unequal and unbalanced relation, it has been a matter of public policy to establish rules that protect the consumers and prevent abuses on the part of the businesses with which they contract. In addition to specific regulations seeking to prevent abuses against consumers, courts have also resorted to the doctrine of unconscionability in order to further this protection.[570] In light of this, *"consumers, particularly low income consumers, have been the most frequent beneficiaries of the doctrine of unconscionability"*, and courts seem to apply this doctrine "*most aggressively*" in order to protect them.[571]

A perhaps unintended effect of prioritizing the application of the doctrine of unconscionability to consumers, is that courts and scholars have traditionally left commercial contracts outside the reach of unconscionability. Indeed, as the Supreme Court of North Dakota stated in *Ray Farmers Union Elevator Co. v. Weyrauch*:

---

manifestation in choice of court agreements, we feel that analyzing "commercial unconscionability" is much more relevant and useful.

[569] BARNES, W. R., 'Social Media and the Rise in Consumer Bargaining Power', 2011, 14 *University of Pennsylvania Journal of Business Law*, no. 3, p. 661.

[570] For an interesting, and occasionally depressing, review of the application of the doctrine of unconscionability in regards to consumers contracts featuring elderly parties that were taken advantage of by merchants, *See,* generally, MEADOWS, R. L., 'Unconscionability as a Contract Policing Device for the Elder Client: How Useful Is It?', 2005, 38 *Akron Law Review*, no. 4, 741–758. Particularly depressing among the cases she references is that of *Bennett v. Bailey* [1980], 597 SW 2d, 532–535., where the plaintiff, an elderly woman, was the victim of practices that preyed on her lack of *"knowledge, ability, experience or capacity*" (p. 535) in order to get her to sign for unreasonably expensive dance lessons.

[571] MALLOR, J. P., 1986, supra note 101, p. 1066. It should be kept in mind that unconscionability is not to be seen as an ideal solution for consumers. On the one hand, few consumers, on an individual basis, will be able to embark in the potentially crippling venture of suing a merchant; this is perhaps why, in general, legislatures have been so adamant in creating mandatory rules for consumer contracts, since it establishes a clearer playing field in which litigation only becomes the last resource. Additionally, even in those cases in which consumers do litigate, unconscionability is rarely successful, *"since it only avoids enforcements of contracts found to be 'extraordinarily unfair'"* (*See* D'AGOSTINO, E., 2014, supra note 138, p. 108).

> *"Although courts have been receptive to pleas of unconscionability raised by consumers, they have been reluctant to do so in commercial transactions."*[572]

As a matter of fact, it is precisely that "*an unconscionable clause was inserted in a merchant form contract in a merchant-consumer transaction that has been a common factor in successful unconscionability cases*."[573] In other words, courts have traditionally reasoned that clauses that might have been considered fear if used between merchants, are considered arbitrary or draconian when present in a consumer setting. As JORDAN notes:

> *"Courts have thus far proceeded with caution in upsetting commercial arrangements as unconscionable. Some have hesitated to undertake the wide-ranging inquiry into commercial practice and needs mandated by the [Uniform Commercial] Code, suggesting that the task is more properly one for the legislature.* ***Courts have also stressed the danger of second-guessing knowledgeable commercial negotiators whose assessment of the fairness of the forms they sign is probably as accurate as that of even the most conscientious jurist, who has struggled to understand the commercial context.*** *Hence, except in the consumer setting, where practices clearly bordering on fraud or true duress create special problems, courts have generally permitted businessmen to enforce even form contracts. Indeed, in those rare cases in which unconscionability has been found in merchant-to-merchant transactions, commentators have not hesitated to criticize the results as economically dysfunctional and unwise."*[574]

The reasoning behind this approach to unconscionability is fairly easy to understand. The view is that the fact that commercial parties are, precisely, *commercial parties,* means that the weaknesses that the unconscionability doctrine is aimed to account for simply do not exist in any significant way. Some courts have accepted this rationale in full, reasoning that commercial parties are not in the weak position required to invoke the protections of the unconscionability doctrine. [575] The US Court of Appeals for the 7th Circuit, for example, in *We Care Hair Development, Inc. v. Engen*, rejected that an arbitration clause inserted in a franchise agreement was unconscionable, arguing that the plaintiffs were "*not vulnerable consumers or helpless workers,"* but rather *"business people who bought a franchise."*[576]

---

[572] *Ray Farmers Union Elevator Co. v. Weyrauch* [1975], 238 N.W., 47–52, p. 50.
[573] DIMATTEO, L. A. & RICH, B. L., 2005, supra note 486, p. 1077.
[574] JORDAN, E. R., 'Unconscionability at the Gas Station', 1977, 62 *Minnesota Law Review,* p. 816 (emphasis added).
[575] MORANT, B. D., 2003, supra note 126, p. 237 ("*Contractual equity* […]*can be quite limited, particularly for small businesses. Rules that offer possible relief from inequitable bargains apply more readily to consumers rather than business entities"*).
[576] *We Care Hair Development, Inc. v. Engen* [1999], 180 F. 3d, 838, p. 843. This consideration not only goes against the common sense understanding that commercial parties are also susceptible of being the victims of

The idea that commercial parties cannot be the victims of unconscionable terms is, of course, mistaken. Indeed, as several authors and courts have conceded,

> *"although unconscionability is applied most often and most aggressively to protect consumers, the doctrine is by no means applicable only to consumers.* […] *The mere fact that a contract is formed between two commercial parties does not insulate that contract from a judicial intervention on the ground of unconscionability"*.[577]

This reluctance, and occasionally outright refusal, to allow the doctrine of unconscionability to benefit merchants is shortsighted, and grounded on outdated and false suppositions. It is based on the idea that the fact that a party is a merchant somehow means that they are automatically free from the biases, cognitive limitations and shortcomings that affect consumers. As FREILICH and WEBB explain,

> *"businesses tend to be perceived as well-resourced and advised commercial entities. Their common commercial character binds them, regardless of the business's size or the education and experience of the proprietors. Being regarded as commercial 'players', it is assumed that the protections available to consumers are unnecessary."*[578]

This idea starts from the assumption that all commercial parties are the same (or, at the very least, that they are all on a similar level) and that therefore they are all able to thoroughly plan and negotiate their contracts, to dicker over every single term, and to make their interests manifest themselves in the final agreement.[579] There is, in other words, a pervasive (and pernicious) "*belief that the optimistic assumptions of classical contract law are accurate in contracts between merchants: that in the merchant-to-merchant contract experienced, knowledgeable parties deal on an equal basis, with each party having the ability to codetermine contract terms and to shop around for more suitable deals."*[580] As a result of this apparent lack of protection (or, at least, the reluctance to grant it to them) small businesses end up needing to resort to "*self-help*" mechanisms, adopting *"strategies that*

---

unconscionable bargains, but also against the UCC itself. Indeed, as GOLDBERG notes, *"of the ten illustrative cases cited in the official comment to section 2-302, a majority involve merchant-merchant transactions*" (GOLDBERG, S., 'Unconscionability in a Commercial Setting: The Assessment of Risk in a Contract to Build Nuclear Reactors', 1982, 58 *Washington Law Review*, no. 5, p. 348).

[577] MALLOR, J. P., 1986, supra note 101, p. 1066.

[578] FREILICH, A. & WEBB, E., 2013, supra note 399, pp. 134–135.

[579] As D'AGOSTINO explains, the traditional view seems to be that while in B2C contracts "the nondrafter party is not involved in a job transaction and is presumed not to have enough knowledge to read and understand every clause included into the contract," in B2B contracts "both parties are 'professional' and therefore fully informed of any aspect of the transaction they are involved into" (D'AGOSTINO, E., 2014, supra note 138, p. 8).

[580] MALLOR, J. P., 1986, supra note 101, pp. 1085–1086.

strengthen their bargaining positions, ameliorate their competitive disadvantages, and yet conform to the rigor of contractual rules."[581]

This unjustifiably optimistic view of commercial contracts is, of course, inaccurate and anachronistic, failing to account for the massive changes that have occurred in the market. There are no strong reasons why businesses should be excluded from the relief provided from unconscionability. Indeed, as *some* courts have ruled, the principles of unconscionability are perfectly applicable to business undertakings.

> *"This might be because the company 'is in desperate financial position, and, attempting to escape from that position, acts without legal advice.' Additionally, a court may be prepared to look behind the corporate structure at the special disadvantages of its directors and impute those disadvantages to the company. There is merit in this approach. Sometimes individuals are advised to adopt corporate structures without understanding the consequences, and, indeed, incorporation may simply conceal the commercial reality that the business is being conducted by individuals, or a group of individuals. The exclusion of the principles of unconscionability from any application to companies would also mean that contracts entered into by the directors (for example, a director's guarantee of the company's debts) would be subject to the legal regime of unconscionability, but not the guaranteed contract entered into by the company and controlled by the directors. This is despite the fact that in the usual case all these transactions are related and interlinked."*[582]

Certainly, while there has been a paradigm shift in regards to non-commercial contracts, a similar shift is yet to happen, at least on the same scale, in regards to commercial transactions. So, while the meaning of "assent" has changed as some market players become more powerful *vis à vis* their contractual partners, this change in the understanding of contracts has not extended to business transactions.

Although we can certainly agree with the idea that a consumer contract is, first and foremost, a contract where the power of the parties is unequal, it is wrong to analyze commercial transactions from the standpoint that they are, by their very nature, balanced. The situation is particularly evident when it comes to behemoth corporations dealing with suppliers, all of whom are in no position to dicker over the terms presented to them.[583] A good example of this situation is that of enterprises like McDonald's which, as one of the largest purchasers of beef, chicken, tomatoes, lettuce, potatoes, pork and

[581] MORANT, B. D., 2003, supra note 126, pp. 238–239.
[582] PHILLIPS, J., 2010, supra note 18, pp. 842–843.
[583] ibid., p. 843.

apples, has a considerably larger bargaining power than that of any individual supplier of these products and, as such, is able to dictate the terms of their contracts.[584]

Of course, analyzing issues of unconscionability in commercial transactions is a difficult task, since its application needs to be more nuanced than it would be in a consumer setting, as the grounds on which unconscionability can be applied to favor a consumer might not work regarding a merchant.[585] After all, it is true that commercial parties are more knowledgeable than consumers, and that they are more likely to obtain external counsel when they become party to a contract with a fellow merchant (although, certainly, it is unrealistic to expect them to obtain proper counsel in every transaction). As MALLOR notes, "[i]*f all merchant-to-merchant transactions really fitted this model, the policies that support certainty and predictability would be overwhelming. The application of unconscionability would strike at the heart of freedom of contract in an unprincipled perversion of the purposes of the doctrine. As one court put it, unconscionability was not designed to 'relieve an experienced merchant of the misfortune occasioned by his own poor business practices.'"*[586] The issue is, of course, that the fact that a party is commercial should not be seen as guarantee that he cannot be taken advantage of.

The UCC itself seems to have recognized that it would not be appropriate to limit unconscionability exclusively to consumer transactions. The history of UCC shows that there was originally *"a special rule for merchant's negotiations"* written into what would later become §2-302, and which established that *"if the merchant had an opportunity to read a contract, he was bound, even if he had not read it (the rule being otherwise for non-merchants)."*[587] By the time the UCC was finally published, however, this provision had been discarded. Clearly, if the drafters of the UCC, who were codifying existing legal rules, had wanted to exclude commercial contracts from the application of the doctrine of unconscionability, they could have easily done so by keeping this provision in the final text. This is further demonstrated by the fact that the majority of illustrative cases

---

[584] Regarding the size of McDonald's as a purchaser, *See* ADAMS, C., 'Reframing the Obesity Debate: McDonald's Role May Surprise You', 2007, 35 *The Journal of Law, Medicine & Ethics,* p. 155; SCHLOSSER, E., *Fast Food Nation: The Dark Side of the All-American Meal*, 2012, Mariner Books/Houghton Mifflin Harcourt, p. 268; and DEMARIA, A. N., 'Of Fast Food and Franchises', 2003, 41 *Journal of the American College of Cardiology*, no. 7, p. 1227 (also noting that McDonald's *"annually hires more employees than any American business*").

[585] This is also the opinion of MALLOR, who argues that

> *"While it is clear that some forms of unconscionability that occur in merchant-to-consumer transactions probably could not occur in many merchant-to-merchant transactions, it is equally clear that a principled application of the doctrine of unconscionability to merchant cases requires that courts take into account the characteristics of the parties, the details of the transaction, and the type of unconscionability alleged."*

MALLOR, J. P., 1986, supra note 101, p. 1067.

[586] ibid., pp. 1085–1086.

[587] LEFF, A. A., 1967, supra note 447, p. 507.

included in the official comment to the UCC in regards to §2-302 deal, precisely, with commercial contracts.[588]

While we can certainly concede that commercial parties are indeed "stronger" and more knowledgeable than consumers, by extending (or at least not prohibiting) the application of the doctrine of unconscionability to commercial transactions, the UCC clearly demonstrated that this assumption does not mean that all merchants are the same. "[B]*usiness experience and knowledge varies as much among merchants as among consumers. Certainly the alarming rate at which small businesses fail rebuts the presumption that all businesspeople are knowledgeable, competent, and experienced.*"[589]

Once we have established that unconscionability can, and even should, also apply also to commercial contracts, a new problem arises. While in consumer contracts it is easy to predict that the consumer will be the one in a disadvantageous situation *vis à vis* the commercial party, this rule of thumb is of no assistance when it comes to commercial contracts. This forces courts to create *"a standard by which to identify those businesses in need of protection from themselves and others."*[590] In other words, courts will need to determine when a merchant will need to be protected from his own ignorance, or his poor market position, both of which are situations for which the other party, the more powerful merchant, cannot be held responsible. This is a problem that affects the issue of unconscionability in both consumer and commercial contracts, since the application of the doctrine seems hard to explain when the only reason why the contract (or one of its terms) "shocks the conscience" is because of the individual characteristics of the weaker party, and for which the stronger party cannot be blamed.

Just as it happens with consumer contracts, in a commercial setting the issue of the information that is disclosed to the weaker party is of vital importance, although some

---

[588] ibid., pp. 502–503.

[589] MALLOR, J. P., 1986, supra note 101, pp. 1085–1086. A reluctant agreement to this premise appears in Note, 'Unconscionable Business Contracts: A Doctrine Gone Awry', 1961, 70 *The Yale Law Journal*, no. 3, p. 458. While there the author considers that an analogy between merchants and consumers in regards to the application of unconscionability is not really appropriate, since *"decision*[s] *of small businessmen are probably better informed and more carefully calculated than those of any single worker or consumer",* he concedes that there might be good policy reasons to do so anyway:

> *"*[T]*he alarming rate of small business failures in recent years might cast doubt on the presumed competency of the small businessman. And since preservation of the small business enterprise is now recognized as a major national policy, courts might feel justified in protecting small businesses from their own shortcomings as an additional protective measure."*

[590] ibid., p. 458. While some critics have acknowledged this difficulty, such an acknowledgment is done to illustrate what they perceive as the futility of unconscionability in merchant contracts. They argue that, unlike what happens in antitrust regulation, market power cannot be used as a basis for applying the doctrine of unconscionability, since although it might serve as an indication of the power *between* the parties, it says nothing about the need of the party to be protected *"from itself"*. Because of this, they refer to unconscionability in a commercial setting as *"essentially a judicial determination of proper business policy"* (ibid., pp. 459–460).

reservations must be kept in mind. First of all, commercial parties should be held at a much higher standard of diligence than consumers, since simply allowing them to default on their obligations alleging a lack of knowledge or information would only prove to be a protection from their own negligence. Merchants should be expected to seek out the information required to understand the nuances of the obligations that they are subscribing, as any diligent commercial party would. Second, the level of ignorance or lack of understanding that a merchant could allege in regards to contractual terminology or technical details of the service or product, should be held at a much higher and stricter standard than that required for a consumer to void a transaction.

In *Bowlin's, Inc. v. Ramsey Oil Co., Inc.*, for example a clause through which the owners of a chain of gasoline outlets waived claims for short delivery against the supplier was not deemed unconscionable due to the commercial character of the plaintiff.[591] In this case, the Court of Appeals of New Mexico considered that since this was a contract between *"experienced and sophisticated"* parties, the plaintiff could not claim that the term was unconscionable or that he was surprised by it.[592] Clearly, and the court seemed to recognize this in its decision, an experienced commercial party cannot seek the protection that was established to protect the weak and unexperienced parties of a contractual relation.

This fundamental distinction that must be made between consumer and commercial contracts can be best illustrated by the following example:

> *X, a small Dutch producer of artisan beers, concludes a contract of carriage with Y, a large German shipping company, for the carriage of 1 container full of beer bottles from Rotterdam, the Netherlands, to Houston, United States. In the face of this boilerplate contract, in bold capital letters, there is a choice of law clause that establishes that the law ruling the contract is that of the Republic of Germany, and a choice of court clause establishing that German courts will have jurisdiction over any dispute arising from or in connection to the contract. The contract then spends 10 single-spaced pages detailing a series of technical issues and mathematical formulas based on which liability is to be calculated. On the basis of these obscure formulas, the contract allows the carrier to be free of any and all liability for cargo damages.*[593]

In a consumer contract, for example, for the purchase of a television set in a retail store, it would be possible to argue that the choice of law and/or the choice of court are unconscionable, even when they are presented to the consumer on the face of the contract. An argument could be made that consumers are often unable to understand

---

[591] *Bowlin's, Inc. v. Ramsey Oil Co., Inc.* [1983], 662 P. 2d, 661–674.
[592] ibid., p. 664
[593] For the sake of this example, of course, we should ignore any applicable convention that might establish minimum liabilities for the carriers.

what "choice of law" and "choice of court" mean, let alone being in a position to embark in long journeys to seek redress in faraway courts, nor to understand the intricacies of foreign legislation; furthermore, it is certainly questionable whether it would be fair to include such an unexpected clause in a consumer transaction. In a commercial contract like the one mentioned in the example above, however, and which has clear international elements, it would in principle be naive to pretend that a merchant cannot understand what it means to determine the law that will apply to the contract, or the courts that will have jurisdiction. A different situation happens in the case of the highly complex method of calculating (and, in the end, excluding) liability, which could be considered unconscionable whether it was present in a consumer or in a commercial contract. In the example above, it would be irrational to expect a small business, contracting for a small shipment, to engage in the long, tedious and highly complex process of merely *understanding* the method of calculating liability, particularly when it is a boilerplate contract over the terms of which there can be no negotiation.

While allowing unconscionability to provide relief in commercial contracts is certainly the right approach, this must be done very carefully. A doctrine that is already controversial, seen by many as an example of a noxious paternalism that seeks to reward the negligent and destroy otherwise valid bargains, must be applied in a way that allows for the special characteristics of commercial transactions to be taken into careful consideration. While it is certainly true that merchants are different from consumers, and so the standards of care that we can demand from them are completely different, we should also remember that commercial parties are not all-knowing, and that they are actually made up of the same prejudiced, feeble-minded, biased and impulsive people that, in other facets of their lives, are mere consumers.[594]

This fallibility of the human element within commercial parties, together with the practical impossibility of expecting every commercial contract to be carefully assessed by external counsel (due to, for example, the delays and the prohibitive costs that such a process would entail), makes it necessary to free the understanding of this doctrine from the anachronistic idea that only individual consumers can reap its benefits.[595] Although, as a Louisiana court recently stated, it is understandable that there is a certain *"presumption of permissible dealings* [...] *between commercial parties,"* this presumption should not be treated as an absolute, either explicitly or by establishing such a high burden of proof that, in effect, it becomes virtually impossible to defeat.[596]

---

[594] GARVIN argues that, in fact, small-businesses might actually be *especially* susceptible to some heuristics and biases (GARVIN, L. T., 'Small Business and the False Dichotomies of Contract Law', 2005, 40 *Wake Forest Law Review*, no. 1, pp. 382–383).
[595] MALLOR, J. P., 1986, supra note 101, p. 1086.
[596] *Helena Chemical Co. v. Williamson* [2015], 1298435 WL, 1–7, p. 5.

The special care that must be paid in regards to unconscionability is particularly relevant in the case of small and middle-sized businesses, regarding whom the strict separation between "consumer" and "merchant" is not so straightforward. Indeed, as GARVIN argued:

> *"In many ways, small businesses most resemble consumers and non-merchants in their abilities to deal with risk, whether financially or cognitively, to secure and process information, and to fend for themselves in the market. Nevertheless, they are generally-almost invariably- treated like merchants. Small businesses thus get the worst of each dichotomy. In their dealings with consumers, small businesses must give protections based on asymmetries that may not exist. In their dealings with larger businesses, small businesses are treated as though the parties are essentially equal, which will not usually be true save in the most formal sense. By putting small businesses on the wrong side of each dichotomy, the law may thus promote inefficiency, burdening small businesses on the one hand and failing to protect them on the other. Put otherwise, the law may effectively subject small businesses to a regulatory tax-a peculiar tax indeed, if small businesses are, as we are told, the driving forces of our economy."*[597]

An interesting example on the legislation of unconscionability regarding small businesses is that of Australia. Indeed, until 2010, when the new Australian Consumer Law (ACL) was enacted, the Trade Practices Act of 1974 (TPA) included, after regulating unconscionability in regards to consumers, Section 51AC on *"Unconscionable conduct in business transactions."* This section, introduced in 1998, had the express purpose of protecting small businesses from exploitation by larger enterprises, as it was thought that *"overall* [...they] *seemed to suffer similar disadvantages to ordinary consumers."*[598] Although this section was later repealed when the ACL entered into force, its rules have more or less remained in Australian legislation.[599]

---

[597] GARVIN, L. T., 2005, supra note 594, p. 297.

[598] BROWN, L., 'The Impact of Section 51AC of the Trade Practices Act 1974(CTH) on Commercial Certainty', 2004, 28 *Melbourne University Law Review*, no. 3, p. 598.

[599] *See* FREILICH, A. & WEBB, E., 2013, supra note 399, p. 135 and CHEW, C., 2014, supra note 358, p. 251. While originally s51AC was to be echoed in full in s22 of the ACL (*See* Australian Government Solicitors, *Fact Sheet: Australian Consumer Law*, no. 12, <http://www.ags.gov.au/publications/fact-sheets/fact_sheet_no_12.pdf> (last visited 18 November 2015), p. 7) in the end this was not the case, and the provision was scrapped altogether. Despite the absence of this rule, however, the ACL continues to extend the application of unconscionability to business transactions, as *"many pivotal sections are equally applicable to consumer or business plaintiffs"*; among them, s21 on unconscionable conducts. While some authors lament that the protection of commercial parties does not extend to unfair contractual terms, a sentiment we can certainly side with, this exclusion is not unique to Australia (for example, the English Unfair Contract Terms Act 1977 applies only some of its provisions to commercial dealings). It should be noted, however, that, as of this writing, an amendment has been passed in Australia that extends the unfair contract terms protections to small business contracts; it is expected that this new legislation will come into effect sometime in 2016, under the name of Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015.

The irrationality of excluding business parties, particularly small businesses, from the protection of unconscionability is best explained in the words of the Australian Treasury. In a report from 2009, in regards to whether the protection from unfair contractual terms should be extended to small businesses, the Treasury explained:

> *"Standard-form contracts are used by parties irrespective of the legal status or nature of the party to whom the contract is presented, and without any effective opportunity for that party to negotiate the term. In such cases, it would be invidious to suggest that the same term, which may be considered unfair in relation to a contract entered into by a natural person, would not be similarly unfair in relation to a business, where neither of them is in a position to negotiate the term."*[600]

The position put forward by the Australian Treasury is certainly true. If we see a term as inherently unconscionable (as might be the case with certain forms of remedy-meddling or deliberately complex and obscure fine print) when it exists in a consumer setting, it makes no sense to assume that the fact that the parties are "commercial" suddenly makes it fair and acceptable. The fact that an individual, for whatever reason, decides to embark in a business venture does not mean that he magically becomes impervious to being abused by others. On the contrary, the lack of protective regulation in the commercial world (as opposed to consumer dealings) creates such a dog-eat-dog environment that abuses against the weak are, perhaps, even more likely to occur.

[600] Cited in FREILICH, A. & WEBB, E., 2013, supra note 399, p. 150.

Chapter 5
Unconscionable Contracts in the Civil Law

"Auro pulsa fides, auro venalia jura, aurum lex sequitur, mox sine lege pudor"
"By gold all good faith has been banished, by gold our rights are abused, the law itself follows gold, and soon there will be an end to every modest restraint"

Sextus Propertius.[601]

5.1 Introduction

As we have already seen, unlike what happens in the Common Law, the philosophy of the Civil Law world regarding contractual obligations answers to a different moral calling. Indeed, under the influence of Roman law, as interpreted by the canon lawyers, *pacta sunt servanda*, the duty to comply with contractual obligations, is a moral imperative. Ideas of, for example, "efficient breaches" of contracts, quite common within the Common Law, appear as alien to a system in which compliance (and specific performance) are seen as a social imperative.[602] As explained by SCALISE:

[601] DUNLOP, J., *History of Roman Literature During the Augustan Age*, 1828, Longmans, Rees, Orme, Brown and Green, London, p. 326.

[602] In his very critical review, FRIEDMAN describes the efficient breach theory as one in which if the promisor's breach allows him to profit to an amount higher than the losses suffered by the promisee, then the breach is to be permitted, or even encouraged, since it would allow for the maximization of resources. The idea behind this theory is that no party would suffer any losses, since the promisee would be paid expectation damages to an amount that would make him indifferent to the breach, and the promisor would still profit since the gains from the breach would be higher than the damages he paid (FRIEDMANN, D., 'The Efficient Breach Fallacy', 1989, 18 *The Journal of Legal Studies*, no. 1, pp. 2–3). An example might serve to illustrate this point in a better way:

> *α agreed to sell his car to β for €1000. Between the agreement and the exchange, however, χ approaches α and offers him €2000 for the car. α values his car at €800. If he sells the car β, he will have a profit of €200; if he instead decides to breach his contract with β and sell it to χ, he will pay expectation damages to β of €1100, and still have a profit of €900 from his contract with χ. As long as the expectation damages paid to β allow him to still profit more than €200, it will be more efficient for α to sell his car to χ.*

> *"Contract law in civilian systems begins with the foundational Latin maxim pacta sunt servanda* [...]. *To classify some breaches of contract as "efficient" would be to sanction [a] conduct that has been prohibited from the time of the praetors in early Roman law*. [...] *Thus, allowing or encouraging some breaches of contract would conflict with the foundational moral significance attached to contracts."*[603]

While, for historical reason relating to maritime trade, the focus of this work is strongly placed in the Common Law, in this section we will perform a cursory review of some of the ways in which Civil Law systems have dealt with unconscionable bargains. Due to its brevity, this chapter should only be seen as a general overview of the situation, and readers are encouraged to consult the accompanying bibliography in order to obtain a better picture.

5.2 Unconscionability and the Civil Law

As we have seen, the *pacta sunt servanda* principle has had a much stronger influence in Civil Law systems. As a result of this apparently more zealous view regarding the inviolability of contracts, it would be reasonable to assume that doctrines aimed at dissolving or amending valid agreements would not have a place in these systems. And yet, this is not the case. Indeed, despite appearances, Civilian systems have a rich history of doctrines aimed at restoring contractual balance, even if that means going against the express will of the parties manifested in their contracts. These include situations well beyond those in which consent is in question, dealing instead with cases where even though the parties freely agreed to their contract, the courts take issue with the rights and obligations created by the agreement, or with the way in which such agreement came into existence.

As some have argued, in its early stages, Roman law *"was uncompromising on the enforcement of contracts,"* so much so that if all the formalities were complied with, a man *"was unconditionally bound to* [his contract]*, and even coercion and fraud were no defenses. The Roman Shylock was entitled to his pound of flesh."*[604] This strict approach to enforceability, however, did not last, and the praetors soon introduced a variety of exceptions that allowed parties to prevent the enforcement under certain conditions.[605] Good faith quickly became a fundamental value in the interpretation and performance of contracts, allowing the praetors to reject the enforcement of agreements that although might be valid in appearance, were somehow affected by wicked provisions.

---

[603] Jr. Ronald J. Scalise, 'Why No "Efficient Breach" in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract', 2007, 55 *The American Journal of Comparative Law*, no. 4, p. 721.
[604] HAHLO, H. R., 1981, supra note 219, p. 71.
[605] ibid., p. 71.

Perhaps the clearest manifestation of this shift in favor of fairness, and which has persisted to this day in some civilian systems, is the doctrine of *laesio enormis*, and which allowed the severely underpaid seller of a plot of land to rescind the contract. It is a case in which the inner feelings of the parties to the contract became irrelevant, authorizing the praetor (and later the courts) to simply rescind an agreement in which the price (the *consideration* of the contract, if we are to speak in Common Law terms) was seen as absurdly and unfairly low. It had as its only motivation the protection of weak parties that might otherwise have found themselves at the mercy of powerful and savvy buyers, who would take advantage of their positions. As one author explained:

> *"The reason why laesio enormis operated only in favour of a seller (not a buyer) of land (and not of movables) is found in the economic conditions of the late Roman Empire, which placed peasants and small-scale farmers at the mercy of the owners of the large latifundia, who by means of various pressures were often able to compel them to sell them their lands at give-away prices and place themselves under their protection."*[606]

The developing of concepts such as "just price" is also a clear example of the civil law's openness to policing the "morality" or "fairness" of an agreement. It was, without a doubt, a paternalistic doctrine in which the legislator knew better, going well beyond the precepts of classic Roman law. As a matter of fact, this doctrine of the "just price," as manifested in the *laesio enormis* doctrine, was heavily influenced by theological and moral ideas, as it actually

> *"embodied what the Holy Roman Church thought the law ought to be concerning the pricing of goods in their economy. This inspiring set of moral values based on fair play in contracts had no basis in Roman Law at all*[,] *yet the Middle Ages giants seized upon it to construct an economic system that was so paternalistic that it made both ancient Greece and Roman markets look like the essence of the market overt."*[607]

The plethora of remedies that arose during the Middle Ages, and which aimed at protecting the weak and ensuring balance, shaped the development of the Civil Law system, even as liberal (and even libertarian) economic and social philosophies started to take over the European mindset. In France, for example, the *laesio enormis* doctrine continues to exist in its legislation despite a backlash against the doctrine that arose in

---

[606] ibid., p. 71.

[607] SQUILLANTE, A. M., 'Doctrine of Just Price - Its Origin and Development, The', 1969, 74 *Commercial Law Journal,* p. 334.

the aftermath of the Revolution, and in which the legislature, in the middle of a period of inflation, abolished it and indefinitely suspended all pending actions.[608]

Just as it happened in the development of the Common Law remedies for unconscionability, Civilian systems have seen a fair share of disputes. Both France and Germany, for example, arguably the most important civil law systems, saw in their development a great deal of controversy regarding how to balance liberal ideas of commerce with those aimed at ensuring fairness. Even though remedies continue to be part of these and many other systems, the fact remains that debates continue as to how convenient it is to allow these moral considerations to remain as part of the legal system.

Beyond specific remedies, however, it is the underlying philosophy that makes up the Civil Law systems that has allowed that fairness and balance are policed and ensured. This due to the fact that while remedies such as *laesio enormis* have a specific area of application, the ideological underpinnings of the Civil Law apply in all transactions.[609] In general,

> *"*[t]*he idea underlying this model* [of restricting contractual freedom] *is that the main function exerted by law in setting limits to freedom of contract is to trace a sharp divide between what is inside/what is outside of the market, the first realm being mostly ruled by laissez faire, the latter by the intervention of the state according to a paternalistic approach. Here the state curtails personal choices with the goal of satisfying the individual's deep preferences."*[610]

The doctrines of "good faith" and "good morals" (*"bonnes moeurs"* or *"gutten Sitten"* in French and German law, respectively) are an essential part of most Civil Law systems, and actually allow for contracts that would otherwise be considered valid, to be rescinded or modified. German and French law, for example, specifically resort to these values as a way to police fairness. Indeed, both systems

> *"frown upon, discourage and, indeed, give no force or effect, to those harsh overreaching, unagreed upon contracts, the very existence of which is considered to be corrosive of good morals. The concept of unconscionability is captured in that sense of good moral. Contracts promulgated by* [a] *business, where there is no true*

---

[608] SQUILLANTE, A. M., 1969, supra note 391, p. 302.

[609] It is worth noting that the applicability of *laesio enormis* is not the same throughout the Civil Law world. Indeed, while countries like Chile (arts. 1888-1891 of the Civil Code) and France (art. 1674 of the Civil Code) limit its application to the sale of land, others, like Peru (art. 1447 of the Civil Code) and Argentina (art. 954 of the Civil Code), do not establish such limitations, extending the *laesio enormis* protection even to the sale of movable goods and to contracts other than sale. *See,* generally, ESPANÉS, L. M. de, 'Lesión, Elementos y Naturaleza Jurídica', 1998, 38 *THEMIS: Revista de Derecho*, 173–177.

[610] MARELLA, M. R., 2006, supra note 562, p. 262.

> *equality of bargaining position, cannot be held to be mutually agreed upon between the parties."*[611]

This is precisely the principle established in §138 of the German Civil Code (BGB), when it states that:

> *"(1) A legal transaction which is contrary to good morals is void.*
>
> *(2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance."*[612]

Similarly, the French Civil Code establishes in Article 1108, among the requirements for a valid obligation, the existence of "*a lawful cause*" (*"une cause licite dans l'obligation*"). Then, in Article 1133, establishes that:

> *"A cause is unlawful where it is prohibited by legislation, where it is contrary to public morals or to public policy."*[613]

The Chilean Civil Code establishes an analog rule in Article 1467, stating in the relevant part that:

> *"There can be no obligation without a cause that is both real and lawful* [...]
>
> *Cause is the reason that informs the act or contract; and unlawful cause is the one that is forbidden by law, or that goes against good morals or the public order."*[614]

---

[611] SQUILLANTE, A. M., 1969, supra note 391, p. 303.

[612] "§ 138 Sittenwidriges Rechtsgeschäft; Wucher
(1) Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.
(2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen."
The German Federal Constitutional Court (FCC) reached an interesting decision in regards to this provision in the so-called *Bürgschaft* case ("collateral" case) of 1993, and in which the FCC *"established constitutional standards to be applied to a private contracts when there is reason to believe that there exists an inequality of bargaining power"* (MARELLA, M. R., 2006, supra note 562, p. 264). What is remarkable about this decision, as well as those that have affirmed and even expanded it, is that it goes beyond merely confirming that contracts that go against this *boni mores* provision are unenforceable, but that it actually resorts to constitutional principles (and the doctrine of the horizontal effect of constitutional rights) to argue that it violates German law (See, generally, MILLER, R. et al., 'Constitutional Control Of Marital Agreements II: The FCC Affirms Its Path-Breaking Decision', 2001, 2 *German Law Journal*).

[613] "Article 1133.
La cause est illicite, quand elle est prohibée par la loi, quand elle est contraire aux bonnes moeurs ou à l'ordre public."

Regarding the French and the Chilean provisions, it should also be noted that the doctrine of *cause* is, in itself, aimed at policing morality in contracts, and that *"it represents the essential tool whereby the underlying interests, either economic or non-economic, may be clearly identified"*.[615] On this basis, when a *cause* is considered illicit, this qualification is not limited to only breaches of mandatory rules, public policy, good faith, or good morals, but also to situations in which the contract was drafted in the aims of evading the application of law.[616]

As the cited norms reveal, these Civilian systems have attempted to establish safety measures to be used in the event of contracts that, although might appear to be legal and enforceable, are somehow "not quite right." Although, just as in the case of the doctrine of unconscionability, there have been those who see these exceptions as going against the sanctity of contracts and the principle of party autonomy, proponents of these rules argue that they *"cannot be seen as a weakness of the pacta sunt servanda principle but, to the contrary, as one of its strengths, since they seek to maintain the equitable content of the contract in order to provide it with stability and intangibility."*[617]

It has also been argued, as it happened elsewhere in regards to the definition of unconscionability, that the malleability of these concepts is, despite some criticisms, not a weakness, but rather one of their strengths. The argument here is that this flexibility allows the courts to shape their analysis based on the specific circumstances of the case. As professor SQUILLANTE colorfully put it, *"if something smells fishy and there is no legal remedy with which to purify the air, then they declare smelly fish to be against public policy (bonnes moeurs, ordre public or die Gutten Sitten) and get rid of it."*[618]

Just as it occurred in Common Law systems, Civil Law systems have gone through different stages in regards to their regulation. From the classical contract theory that was based in a *laissez-faire* understanding, to a more nuanced view of party autonomy. These changes and evolution have been characterized by an understanding of the fact that the "stability" that was treasured so much in classical law, was often simply confused with "rigidity."

> *"General standards of the nineteenth century are now obsolete because they do not correspond to new economic realities. Contracts that are unfair, unjust, or*

---

[614] "Artículo 1467.
No puede haber obligación sin una causa real y lícita […]
Se entiende por causa el motivo que induce al acto o contrato; y por causa ilícita la prohibida por ley, o contraria a las buenas costumbres o al orden público."

[615] FARINA, M. & MALTESE, D., *Abuse of Rights and Freedom of Contract in Comparative Perspective: A Legal and Economic Analysis*, 2012, 2012/08/07, p. 3.

[616] ibid., p. 3.

[617] RODRÍGUEZ GREZ, P., 'Pacta Sunt Servanda', 2008, 18 *Revista Actualidad Jurídica,* p. 167.

[618] SQUILLANTE, A. M., 1969, supra note 391, p. 303.

> *unconscionable ought not to be enforced in the name of stability of contractual relationships, for what their enforcement preserves is not so much the contractual relationship itself as the unfairness and unconscionability of the system as a whole. On the contrary, one may have to start from the opposite premises that fairness and good faith always should be present in every contract at the level of both its conclusion and its performance, and that instruments which do not abide by these basic rules do not deserve to be enforced."*[619]

This new understanding lead to an important change in these legal systems and in which, as FARINA and MALTESE argue,

> *"the fundamental question shifted from* ***whether*** *the State was supposed to intervene on economy-related issues to* ***how*** *it actually should* [intervene]*, on the assumption that the costs of individual rights are borne by the community, and hence re-distribution by law could not but 'result from the application of* [...] *legal rules aimed at protecting the weaker parties and directing the behaviour of market players.'"*[620]

5.3 Good Faith and Fairness

For English legal practitioners, the existence of a duty to negotiate a contract in good faith is an alien concept.[621] As Lord ACKNER stated in *Walford v. Miles*:

> "[T]*he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating party."*[622]

---

[619] BAUDOUIN, J.-L., 1985, supra note 110, p. 1128.

[620] FARINA, M. & MALTESE, D., 2012, supra note 615, p. 3 (emphasis in the original).

[621] PIERS, M., 2011, supra note 131, p. 130. While the duty of good faith is also part of American contract law, our focus shall be placed in Civilian systems. This due to the fact that although it is true that American law now fully embraces the good faith doctrine in the Uniform Commercial Code and the Restatement (Second) of Contracts, this came *"*[u]*nder the influence of civilian traditions"* (STEYN, J., 'The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy', 1991, 6 *Denning Law Journal,* pp. 133–134).

[622] *Walford v. Miles* [1992], 2 AC, 128, p. 138. It is worth mentioning that, despite Lord ACKNER's categorical comments in this case, the concept of good faith is not, historically speaking, completely foreign to English law. As a matter of fact, it was *"part of the mercantile customary law"* that "*required merchants to act in good faith*." As Lord MANSFIELD expressly recognized in the 1766 case *Carter v. Boehm*, "[t]*he governing principle is applicable to all contracts and dealings. Good faith forbids either party from concealing what he privately knows, to draw the other party*

While the view of this principle as "repugnant" does not, of course, mean that under English law parties are allowed to act in a predatory manner, it does show that the system looks at the contractual parties from a completely different standpoint than Civilian systems.[623] Indeed, as Justice BINGHAM explained in *Interfoto Library Ltd. v. Stiletto Ltd*.:

> *"English law has, characteristically, committed itself to no such overriding principle but has developed solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways."*[624]

In a way, English law takes a rather pragmatic view of contracts, looking at the parties *not* as collaborating in fulfilling their interests and desires, but rather competing in an attempt to obtain the best possible results, even at the expense of their contractual partner.[625] It starts from the assumption that the parties are under no obligation to go against their own individual interests and benefit the other, and that as long as they do not go against the express terms of the contract, or create some sort of misrepresentation, they are in the clear.[626] And so, while under English law *"the reasonable expectations of honest men"* are not neglected, *"parties should look out for themselves and are allowed to pursue their own interests without having to concern themselves with the interests or fair position of their contractual parties."*[627] Furthermore, as part of a system that gives special importance to ensuring that the reasonable expectations of the parties prevail,

---

into a bargain, from ignorance of that fact, and his believing to the contrary" (cited in PIERS, M., 2011, supra note 131, pp. 139–140).

[623] ibid., p. 140 ("[English law] *maintains a standard of honesty and fairness that is analogous to the solutions offered under the civil law standard of good faith*").

[624] *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1989], 1 QB, 433–445, p. 439; *See* also STEYN, J., 1991, supra note 621, p. 132.

[625] PIERS explains this situation noting that, under English law,

> *"contractors will pursue their own (one-sided) economic interests and are under no obligation to concern themselves with other party's interests. Parties are under no legal obligation to cooperate within the framework of this adversarial model. On the contrary, one can assume that each party will endeavor to pursue only their narrow interests in the contractual process."*

PIERS, M., 2011, supra note 131, pp. 130–131.

[626] STEYN, J., 1991, supra note 621, p. 131. STEYN argues that this difference also stems from the civil law's preference for *"broad first principles,"* while English law favors *"empirical and concrete solutions."*

[627] PIERS, M., 2011, supra note 131, p. 140.

English courts *"hold the view that a good faith obligation cannot be defined and is thus too ambiguous to be enforced."*[628]

Within Civilian systems, the view of the contractual process is quite different. Some authors (albeit a reduced number) even go as far as seeing contracts as *"a sort of little partnership in which each* [party] *must work towards a common purpose which is the sum (or more) of individual purposes pursued by each"*.[629] Extremely optimists commentators aside, the majority of authors seem to take a more nuanced approach, and consider that although good faith is an important part of contractual theory, it does not mean that the parties should forfeit their own interests in the benefit of the other. It is not, in other words, a burden laid upon the parties that expects them to do charity in favor of the other, but that instead seeks a certain *"cooperativism"* in contractual relations.[630]

Highlighting these philosophical differences further, even when it comes to the performance of the contract, English law does not impose a duty to perform in good faith. As the English Court of Appeal stated in a 1998 case, *"there is no general doctrine of good faith in the English law. The* [parties] *are free to act as they wish, provided that they do not act in breach of a term of the contract."*[631] Under English law, therefore, *why* a party decides to act in a certain manner within the contract is irrelevant; if the agreement grants him that right, he can exercise that prerogative regardless of any other considerations. This sentiment was best expressed by the English Court of Appeal in the 1963 case of *Chapman v. Honig*, where it ruled:

> *"A person who has a right under a contract or other instrument is entitled to exercise it and can effectively exercise it for a good reason or a bad reason or no reason at all."*[632]

It is because of the above considerations that the concept of the "abuse of rights", so common among *civilian* lawyers, thus appears as alien to English practitioners. Within a system where the exercise of rights is seen as inherently legitimate, devoting much attention to the volitive aspect behind this exercise become, for the most part, unnecessary.[633]

In stark contrast with the English tradition, Civilian systems have taken a completely different approach. These systems subject the actions of the parties to scrutiny by the

---

[628] ibid., p. 133.
[629] WHITTAKER, S. & ZIMMERMANN, R., *Good Faith in European Contract Law: Surveying the Legal Landscape*, in Zimmermann, R. & Whittaker, S. (eds.), *Good Faith in European Contract Law*, 2000, p. 38.
[630] PIERS, M., 2011, supra note 131, p. 131.
[631] *James Spencer & Co. Ltd. v. Tame Valley Padding Co. Ltd.* [April 8, 1998] Unreported.
[632] *Chapman v. Honig* [1963], 2 All ER, 513, p. 522.
[633] On the abuse of rights, *See* Section 5.5 infra.

courts, both during the negotiation, as well as during the performance of the contract, particularly in regards to the duty to act in good faith.

According to POWERS, the duty to act in good faith is "*an expectation of each party to a contract that the other will honestly and fairly perform his duties under the contract in a manner that is acceptable in the trade community*."[634] This definition, however, is not universally accepted. As a matter of fact, none are. Indeed, despite the emphasis that these systems place on good faith, defining the term has proven to be a very complex endeavor. As TETLEY put it, defining this concept is "*a formidable task*," as a result of which definitions abound.[635]

Disagreements as to what exactly it means for the parties to be under an obligation to negotiate and perform in good faith are an expected consequence of a term that, throughout all legislations, seems to escape a clear and precise definition.

Just like it happened with the doctrine of unconscionability under the Common Law, it has been hard to pinpoint precisely what this duty imposes on the parties, and what exactly it is that they are forbidden to do. Indeed, the exact meaning of this good faith obligation depends greatly on the specific system within which it is being used, as well as the specific legal tradition to which it belongs, not to mention the specifics of the transaction being analyzed.[636] This is a consequence of how vague in nature is this notion of good faith, and which in practice continues to be *"essentially moral,"* despite having been

---

[634] Cited in TETLEY, W., 'Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering', 2004, 35 *Journal of Maritime Law and Commerce*, no. 4, p. 563. CAJARVILLE defines good faith, *"bona fides"*, as something that is *"related to rectitude, honesty, and integrity in social and legal relations."* It is opposed to *"bad faith,"* something that is in turn related to *"duplicity, premeditation, ungratefulness or betrayal,"* and which can be defined as *"the malice or recklessness with which something is done or a good is possessed or held"* (CAJARVILLE, J. C., 'La Buena Fe y su Aplicación en el Derecho Argentino', 2012, 74 *Prudentia Iuris,* p. 250).

[635] TETLEY, W., 2004, supra note 634, p. 563. A good illustration of this problem appears in the work of SOTO COAGUILA, who argues that good faith *"binds the parties to behave with loyalty and honesty in their contractual relations,"* and that it also *"imposes on them the duty to act in accordance with the law."* He goes on to add that:

> *"In practice, this principle translates into the respect that the parties must have for each other, the information, confidentiality and clarity during their negotiations, and the conclusion and performance of the contract; in not taking advantage of the necessity of the other party, in the absence of bad faith, fraud, deceit, etc."*

The problem with this type of definitions, and which should be fairly obvious, is that they basically consider "good faith" to be catch-all concept, inside of which every contractual facet fit (SOTO COAGUILA, C. A., 2012, supra note 80, p. 199). TETLEY's words, therefore, referring to defining the term as *"a formidable task"* thus ring painfully true.

[636] Although in this section we are largely focusing on good faith in Civil Law systems, it should be noted that

> *"*[g]*ood faith differs in its scope and application depending on which legal tradition governs the particular commercial transaction. Civil law states tend to use a more expansive approach to the good faith obligation, applying it to both contract formation and performance. Common law states prefer a narrower good faith duty applicable only to contract performance."*

POWERS, P. J., 'Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods', 1998, 18 *Journal of Law and Commerce*, no. 2, p. 336.

made into a norm that governs the behaviour of the parties both in their precontractual and contractual relations.[637] Indeed, in regards to this link to inherent relation to morality, as HESSELINK notes how

> *"*[g]*ood faith is often said to be in some way connected with moral standards. On the one hand, it is said to be a moral standard itself, a legal-ethical principle; good faith means honesty, candour, loyalty et cetera. It is often said that the standard of good faith basically means that a party should take the interest of the other party into account. On the other hand, good faith is said to be the gateway through which moral values enter the law."*[638]

In what is perhaps one of the clearest and most complete and thorough definitions of good faith, TETLEY had defined it as:

> "[The] *just and honest conduct, which should be expected of both parties in their dealings, one with another and even with third parties who may be implicated or subsequently involved. Good faith requires that each party be fair and honest in negotiations and, once the agreement has been reached, that the parties also perform their respective obligations and enforce their rights honestly and fairly."*[639]

TETLEY's reference to "fairness" is interesting, as it once again shows how moral and ethical considerations are an essential part of the doctrine of good faith. It also shows that it goes beyond the oft-quoted requirement of simply not deceiving the contractual partner, actually going as far as requiring both parties to act in a collaborative way. Noting this close relation with morality, DIEZ PICAZO, a noted Spanish legal scholar and former Magistrate of the Spanish Constitutional Court, defined good faith as:

> *"A behavioral standard based on the ethical imperatives demanded by the prevailing social conscience. This means that* [...] *1º contracts are to be interpreted assuming that there was a loyal and correct behavior in their drafting, that is, assuming that the parties, when drafting the contract, wanted to express themselves in a manner according to honest people, and not seeking circumlocutions, deliberate confusions, or obscure language; 2º good faith, in addition to being a starting point, should also be an end-point. The contract must be interpreted in a way that the sense that is given to it is the most adequate to reach a loyal performance of the contractual*

---

[637] WHITTAKER, S. & ZIMMERMANN, R., 2000, supra note 629, p. 38.

[638] HESSELINK, M. W., *The Concept of Good Faith*, in Hartkamp, A. S. et al. (eds.), *Towards a European Civil Code*, 2011, p. 621. The same sentiment is echoed by O'CONNOR, who states that good faith is *"directly related to honesty, fairness and reasonableness, the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules"* (Quoted in TETLEY, W., 2004, supra note 634, p. 563).

[639] ibid., pp. 563–564.

> *relations, and to reach the contractual consequences in accordance to ethical norms."*[640]

This is also the understanding that Lord Justice BINGHAM demonstrated in *Interfoto Picture Library Lt. v. Stiletto Visual Programmes Ltd.* where, recognizing the differences between the Common Law and Civil law understanding of the doctrine, stated that:

> *"In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair open dealing. English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."*[641]

In lieu of an all-encompassing definition of good faith, some have suggested that perhaps an apt substitute might be to define bad faith. This is reasonable, since while it might be impossible to know exactly what a party should do, it is certainly easier to say what she should *not* do. With this in mind, BURTON, for example, states that:

> *"Bad faith performance occurs* [...] *when discretion is used to recapture opportunities foregone upon contracting -when the discretion-exercising party refuses to pay the expected cost of performance. Good faith performance, in turn, occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation - to capture opportunities that were preserved upon entering the contract, interpreted objectively. The good faith performance doctrine therefore directs attention to the opportunities foregone by a discretion-exercising party at formation, and to that party's reasons for exercising discretion during performance."*[642]

REID, on the other hand, speaking from the standpoint of the Quebecer Civil Law, defines bad faith in a more concise manner:

> *"The attitude of a person whose actions reveal the desire or intention to cause harm to another or to evade his obligations."*[643]

---

[640] Cited in ZUSMAN, S., 'La Buena Fe Contractual', 2005 *THEMIS: Revista de Derecho*, no. 51, p. 22.
[641] *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1989], p. 439.
[642] TETLEY, W., 2004, supra note 634, p. 564.
[643] GONZÁLEZ, F. F. V., 'La Obligación de Negociar con Buena Fe una Convención Colectiva de Trabajo en el Régimen Laboral Quebequense', 2014, 64 *THEMIS: Revista de Derecho,* p. 285.

As the conceptual difficulties above show, it seems undeniable that, as laudable as the efforts to create a moral standard within the law might be, injecting morality into the law can easily muddle up our understanding. While it is unlikely that anybody would advocate for a system that allows for *immoral* behavior to exist and prosper, the foggy nature of these values create a difficulty that seems, at least in principle, larger than that present in regards to unconscionability.

The above difficulties notwithstanding, supporters of the use of the good faith obligation see its malleability as an asset. Indeed, it would be this very conceptual plasticity that would allow good faith to fulfill its purpose as a safety valve established to ensure fairness in otherwise valid agreements. Since it would be impossible for any legislator to simply predict every possible case of abusive clauses presented in a contract, this "open-ended" solution gives this tool the flexibility that it requires to be actually useful.[644] In this way, courts are able to, so to speak, "bypass" the *pacta sunt servanda* principle in case the negotiation, the terms, or the performance of the contract seem to go against these underlying values. In this manner, by resorting to good faith, we can assure a certain balance to the otherwise inherent tension *"between the desire of both parties to obtain the best commercial deal for themselves and a need to have a good on-going commercial relationship based upon a modicum of mutual trust."*[645]

In the case of France, the malleability of the good faith concept has allowed it to serve as a sort of *moderating* force *vis à vis* article 1134 of the Civil Code, under which the contract has force of law for the parties, and according to which they are, in principle, *"free to make and enforce against each other whatever bargains they wish."*[646] As one author noted in regards to this provision:

> *"Contracts were* [...] *the law of the parties, that is, a 'law' the parties had freely chosen to give themselves and freely chosen to abide by. Being law on the one hand, it was enforceable as such and could not be changed, altered, or modified except with the consent of both parties. Being an act of free will on the other hand, it was by definition just and fair in its results and effects. To find otherwise was simply the demonstration that the contracting parties had either lost the ability or capacity to do the act (they could then be relieved under the rules of capacity) or that consent had not been properly given (they could then find relief under the theory of the vices*

---

[644] DE LA MAZA GAZMURI, I., 'Contratos por Adhesión y Cláusulas Abusivas: ¿Por qué el Estado y no Solamente el Mercado?', 2003 *Revista Chilena de Derecho Privado*, no. 1, p. 120. *See* also MERRYMAN, J. H. & PÉREZ-PERDOMO, R., *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 2007, Stanford University Press, pp. 52–53 and HESSELINK, M. W., 2011, supra note 638, p. 639.

[645] ABELL, M. & HOBBS, V., 'The Duty of Good Faith in Franchise Agreements – A Comparative Study of the Civil and Common Law Approaches in the EU', 2013, 11 *International Journal of Franchising Law*, X, p. 1.

[646] ANGELO, A. & ELLINGER, E. P., 1992, supra note 176, p. 472. For similar rules in other Civilian jurisdictions regarding the binding character of contracts, *See* supra note 87.

> *of consent). In all other circumstances, the contract was by definition ruled to be fair, honest, just, and thus enforceable."*[647]

In light of this virtually limitless right, what the legislator does by establishing the good faith obligation is to create a safety valve against the ability of the parties to dictate their terms (i.e. privately "legislate") in whatever manner they desire. Indeed, in the case of French law, although in its face Article 1134 of the *Code* seems to establish an almost absolute freedom for the parties, the *Code* quickly limits their otherwise unrestrained autonomy, by establishing in its closing sentence that contracts

> *"must be executed in good faith."*[648]

Furthering this limitation, the *Code* then adds, in Article 1135:

> *"Agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature."*[649]

On the basis of these (and other) provisions, the French legislator aims to curtail the freedom of the parties, based on ideas of equity and good faith.[650] By resorting to these moral values, the legislator seeks to ensure a more or less orderly market. Other Civilian codifications have, to a large extent, echoed these provisions and incorporated their own moral values into their law of contracts. For example:

Article 1258 of the Spanish Civil Code:

> "[…] *contracts bind the parties not only to what they expressly agreed, but also too al the consequences that […] result from good faith* […]"[651]

Article 227 of the Portuguese Civil Code

> *"The person that negotiates with other for a contract must, both in its preparation and formation, act according to the rules of good faith* […]"[652]

---

[647] BAUDOUIN, J.-L., 1985, supra note 110, p. 1120.

[648] *See* supra note 84.

[649] "Article 1135.

> *Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature."*

[650] BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, p. 247 ("*similar to Germany, French courts employ the concept of loyalty or good faith to ensure contractual fairness*").

[651] "Artículo 1258.

> *Los contratos se perfeccionan por el mero consentimiento, y desde entonces obligan, no sólo al cumplimiento de lo expresamente pactado, sino también a todas las consecuencias que, según su naturaleza, sean conformes a la buena fe, al uso y a la ley."*

Article 1546 of the Chilean Civil Code

> *"Contracts must be performed in good faith, and so they bind the parties not only to what they expressly establish, but to all the things that emanate from the nature of the obligation, or which belong to it based on the law or customs."*[653]

§242 of the German Civil Code (under the heading *"Performance in Good Faith"*)

> *"An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration."*[654]

Article 1337 of the Italian Civil Code

> *"The parties, both in the in negotiations and in the formation of the contract, must act in good faith."*[655]

Article 1375 of the Québec Civil Code

> *"The parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished."*[656]

An interesting case study on the role of good faith comes from Dutch law, where, as HARTKAMP notes, *"good faith permeates all branches of the* [...] *law of obligations and contract law,"* as well as some others.[657] Indeed, under Dutch law, morality and equity play a fundamental role, as it is evident from the wording of the relevant provisions of the Dutch Burgerlijk Wetboek (BW):

Book 6, Article 2, Paragraph 1:

---

[652] *"Artigo 227 (Culpa na formação dos contratos).*
Quem negoceia com outrem para conclusão de um contrato deve, tanto nos preliminares como na formação dele, proceder segundo as regras da boa fé [...]*"*

[653] *"Artículo 1546.*
Los contratos deben ejecutarse de buena fe, y por consiguiente obligan no sólo a lo que en ellos se expresa, sino a todas las cosas que emanan precisamente de la naturaleza de la obligación, o que por la ley o la costumbre pertenecen a ella."

[654] *"§ 242 Leistung nach Treu und Glauben*
Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern."

[655] *"Articolo 1337.*
Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede."

[656] Demonstrating the importance given to this principle, extending its application to all areas of private law, Quebecer law actually includes two articles regarding good faith in Book One of the Civil Code ("Persons"), in article 6 ("*Every person is bound to exercise his civil rights in good faith*) and article 7 ("*No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith*").

[657] HARTKAMP, A. S., 'Judicial Discretion under the New Civil Code of the Netherlands', 1992, 40 *The American Journal of Comparative Law*, no. 3, p. 554.

> *"The creditor and debtor must behave themselves towards each other in accordance with the standards of reasonableness and fairness."*[658]

Art. 6:248:

> *"1. An agreement not only has the legal effects which parties have agreed upon, but also those which, to the nature of the agreement, arise from law, usage (common practice) or the standards of reasonableness and fairness."*
>
> *"2. A rule, to be observed by parties as a result of their agreement, is not applicable insofar this, given the circumstances, would be unacceptable to standards of reasonableness and fairness."* [659]

5.3.1 The Functions of Good Faith

In Civilian legislations, although not always in the same fashion, good faith affects three distinct areas:

a. Interpretation: All contracts must be interpreted in accordance to good faith.[660] The effect here is that if the intentions of the parties are unclear,

---

[658] "*Artikel 6: 2*
1. Schuldeiser en schuldenaar zijn verplicht zich jegens elkaar te gedragen overeenkomstig de eisen van redelijkheid en billijkheid."

[659] "*Artikel 6:248*
1. Een overeenkomst heeft niet alleen de door partijen overeengekomen rechtsgevolgen, maar ook die welke, naar de aard van de overeenkomst, uit de wet, de gewoonte of de eisen van redelijkheid en billijkheid voortvloeien.
2. Een tussen partijen als gevolg van de overeenkomst geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn."
It is worth mentioning that this article, as well as, for example, art. 1546 of the Chilean Civil Code, are both adaptations of article 1135 of the French Civil code (BRITO, A. G., 'La Buena Fe en el Código Civil de Chile', 2002, 29 *Revista Chilena de Derecho,* p. 11).

[660] HARTKAMP, A. S., 1992, supra note 657, p. 555. *See*, for example, Article 1366 of the Italian Civil Code (*"Il contratto deve essere interpretato secondo buona fede"*, *"The contract must be interpreted according to good faith"*), §157 of the German Civil Code (*"Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern"*, *"Contracts are to be interpreted as required by good faith, taking customary practice into consideration"*), Article 1198, Paragraph 1, of the Argentinean Civil Code ("*Los contratos deben celebrarse, interpretarse y ejecutarse de buena fe y de acuerdo con lo que verosímilmente las partes entendieron o pudieron entender, obrando con cuidado y previsión*", *"Contracts must be concluded, interpreted and performed in accordance to good faith to what the parties likely understood or could have understood, acting with carefully and thoughtfully"*) and Article 168 of the Peruvian Civil Code ("*El acto jurídico debe ser interpretado de acuerdo con lo que se haya expresado en él y según el principio de la buena fe*", *"The legal act must be interpreted based on what was expressed in it, and based on the good faith principle."*). Furthermore, the already cited Article 1546 of the Chilean Civil Code ("*contracts must be performed in good faith"*), although *apparently* restricted to the performance stage of the contract, has been understood by the courts and the commentators as extending to the whole of the contractual process, including the pre-contractual stage *and* the contractual interpretation (on the Chilean case, *See* MOMBERG URIBE, R., 'La

then "*a court should interpret a contract according to the meaning that reasonable parties would give to it and not by the literal terms of the agreement*."[661]

b. Expanding Rights and Obligations (Supplementary Function): Contracts not only bind the parties to what is expressly established in them, but also to what custom or equity might establish.[662] Some have argued that the role of good faith as a means to supplement the terms of the contract is similar (albeit not equivalent) to the Common Law doctrine of implied terms.[663]

c. Estoppel (Restrictive Function): The parties are not bound to those obligations that, based on the circumstances, "*would be unacceptable to standards of reasonableness and fairness*."[664] Unlike the other two facets of good faith, the restrictive function is, by and large, its most controversial aspect. Indeed, its acceptance in civilian legislations is far from harmonious, and important differences exist. Under Dutch Law, for example, while the already cited art. 6:248 expressly establishes the possibility of some of the rights and obligations created by the contract to be extinguished or excluded "*based on the circumstances*", before the reformation of the Dutch Civil Code in 1992 this possibility was not well received by Dutch courts. Indeed, the *Hoge Raad* (Dutch Supreme Court) was reluctant to admit such possibility except in very specific cases in which "*a party may be estopped from asserting a*

Revisión del Contrato por las Partes: El Deber de Renegociación como Efecto de la Excesiva Onerosidad Sobreviniente', 2010, 37 *Revista Chilena de Derecho*, no. 1, p. 56).

[661] HARTKAMP, A., 'The Concept of Good Faith in the UNIDROIT Principles for International Commercial Contracts', 1995, 3 *Tulane Journal of International and Comparative Law*, p. 65.

[662] HARTKAMP, A. S., 1992, supra note 657, p. 555. *See*, for example, Article 1546 of the Chilean Civil Code, Article 1258 of the Spanish Civil Code, Article 1135 of the French Civil Code, Article 6:248 of the Dutch Civil Code, Article 1374 of the Italian Civil Code. (*"Il contratto obbliga le parti non solo a quanto nel medesimo espresso, ma anche a tutte le conseguenze che ne derivano secondo la legge, o, in, mancanza, secondo gli usi e la equità"*, *"A contract binds the parties not only as to what it expressly provides, but also to all the consequences deriving from it by law or, in its absence, according to usage and equity"*) and Article 1603 of the Colombian Civil Code (*"Los contratos deben ejecutarse de buena fe, y por consiguiente obligan no solo a lo que en ellos se expresa, sino a todas las cosas que emanan precisamente de la naturaleza de la obligación, o que por ley pertenecen a ella"*, *"Contracts must be performed in accordance to good faith, and therefore bind the parties not only to what they expressly establish, but also to all the consequences derived by law or by the nature of the obligation"*).

[663] HARTKAMP, A., 1995, supra note 661, p. 65.

[664] HARTKAMP, A. S., 1992, supra note 657, p. 555. While not many legislations include an express reference to this function of good faith, some do exist. *See,* for example, Article 1198, Paragraph 2, of the Argentinean Civil Code ("*si la prestación a cargo de una de las partes se tornara excesivamente onerosa, por acontecimientos extraordinarios e imprevisibles, la parte perjudicada podrá demandar la resolución del contrato*", "*if one of the parties' obligations becomes too onerous due to extraordinary and unforeseen circumstances, the affected party can demand the resolution of the contract*").

> *contractual right because of his own conduct incompatible with his exercising that right*."[665]

5.3.2 Good Faith and Bargaining Power Disparities

Wherever we choose to place them within the different functions of good faith, it is plain to see that abuses of bargaining power disparities, manifested in clauses that go against fairness and balance, represent a breach of the obligation of the parties to act in good faith. Indeed, abusive clauses appear as the result of the breaking, the destruction, of the contractual equilibrium.[666]

This relation between abuses of bargaining power and a breach of the good faith obligation is more than mere guesswork. Indeed, more and more pieces of legislation expressly draw this line between unfair terms and the failure to act in good faith. In Spain, for example, Article 82 (1) of the General Law for the Defense of Consumers and Users establishes:

> *"Abusive Clauses are those stipulations that are not individually negotiated and all those practices that were not expressly agreed to, and that, contrary to the requirements of good faith, cause, against the consumer, an important imbalance in the rights and obligations of the parties that stem from the contract."*[667]

While the cited Spanish provision is limited to consumer contracting, this is not always the case. §307 (1) of the German Civil Code, for example, establishes:

> *"§ 307 Review of subject-matter*
>
> *(1) Provisions in standard business terms are invalid if, contrary to the requirement of good faith, they place the contractual partner of the user at an unreasonable*

---

[665] ibid., p. 555. HARTKAMP notes, however, that by the early 1990's the courts had already started to construe the rule of the old Code, which only established a "good faith performance" obligation akin to that of article 1134 of the French Civil Code, in a way similar to that established in the new text of the Burgerlijk Wetboek. Courts acted in this manner, for example, *"by refusing a debtor the right to rely on an exemption clause which in the circumstances of the case, turned out to be unreasonably onerous ('unconscionable') towards the creditor*."

[666] DE LA MAZA GAZMURI, I., 2003, supra note 644, p. 120.

[667] "Artículo 82. Ley General para la Defensa de los Consumidores y Usuarios.
Concepto de cláusulas abusivas.
1. Se considerarán cláusulas abusivas todas aquellas estipulaciones no negociadas individualmente y todas aquéllas prácticas no consentidas expresamente que, en contra de las exigencias de la buena fe causen, en perjuicio del consumidor y usuario, un desequilibrio importante de los derechos y obligaciones de las partes que se deriven del contrato."

> *disadvantage. An unreasonable disadvantage may also result from the fact that the provision is not clear and comprehensible."*[668]

The role of good faith as a control method against abusive terms that result from an imbalanced bargaining position, becomes even more evident when the cited §307 BGB is read in light of §138 BGB, which establishes in its second numeral that a transaction is specifically void if the stronger party obtained the disputed terms *"by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another."*[669] The fact that this provision aims at remedying the possible abuses that come as a result of bargaining power disparities becomes evident when we consider that in the 1970's, in consumer credit cases,

> *"some German courts produced an interpretation of § 138 Satz 1 BGB – the general clause of boni mores – that directly addressed the problem of structural inequality of bargaining power between the poor and the rich. Not only the sanction of immorality has to grant transparency and fairness in market transactions in order to make possible the access to credit of the poor as a group; more radically the central idea is that the general limit to freedom of contract has the specific function of correcting and/or compensating a sort of original lack of solidarity and proportionality that inheres to freedom of contract."*[670]

A similarly wide provision appears in article 36 of the Contracts Act of Denmark, which establishes that:

> *"An agreement may, in whole or in part, be modified or set aside if it would be unreasonable or contrary to good faith to enforce it. The same applies to other legal acts.*
>
> *Deciding in accordance to paragraph 1, the court shall into account the conditions surrounding the making of the contract and subsequent circumstances."*[671]

---

[668] "§ 307 Inhaltskontrolle

> *(1) Bestimmungen in Allgemeinen Geschäftsbedingungen sind unwirksam, wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen. Eine unangemessene Benachteiligung kann sich auch daraus ergeben, dass die Bestimmung nicht klar und verständlich ist."*

Previously, an analogous rule appeared in §9 of the "Law Regulating General Terms and Conditions" (*"Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen"*).

[669] *See* supra note 612.

[670] MARELLA, M. R., 2006, supra note 562, p. 266. *See* also ABELL, M. & HOBBS, V., 2013, supra note 645, p. 3 (noting that §138 BGB *"seeks to adjust the terms agreed by the parties to the agreement to new and unforeseen circumstances,"* something that comes in stark contrast with *"the English concept of 'caveat emptor' and the freedom of the parties to negotiate the contractual terms of their relationship is thus limited"*).

[671] *"Bekendtgørelse af lov om aftaler og andre retshandler på formuerettens område. § 36.*

We can also find these links between good faith and contractual imbalances in regulations of the European Community, albeit often within a more restrictive sphere. In the realm of consumer protection, for example, the European Directive on Unfair Contract Terms (Directive 93/13/EEC), establishes in article 3 (1) that:

> *"A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."*

Further demonstrating the importance that the European Community gives to these considerations, it should be noted that this Directive also makes a specific reference to bargaining power and good faith in its preamble, stating that "[…]*in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties*."

What these norms manifest is a desire on the part of the Civilian legislators to express that *"a contractual party owes a pre-contractual duty of good faith to negotiate fairly and honestly*," and that then this *"good faith obligation* [extends] *to performance of the contract, requiring that the parties act reasonably."*[672] Within this duty of reasonableness, parties are thus bound to exercise their bargaining power in a manner that does not put the other to an *unreasonable* disadvantage. It will then be the duty of the judge to determine, within his discretion, what actions can amount to an unreasonable exercise of power.

In a similar vein to what occurs with the doctrine of unconscionability in the Common Law, the criticism that is often directed to good faith as a tool to prevent the enforcement of an agreement, is that it actually grants too much discretion to the judge. Indeed, as we have seen, it will be the judge who will be making the decision as to what behaviors can be considered as contravening this general obligation.[673] This becomes particularly relevant in legal systems (such as the Dutch) where the good faith principle expressly allows for a restrictive function through which to strike down agreements.

Not everyone shares this fear, however, and many authors see the discretion of the judges as nothing to be afraid of. HARTKAMP, for example, echoing the words of SAUVENPLANNE, argues that "*the certainty of the law does not depend on the provisions of a code or the*

> *En aftale kan ændres eller tilsidesættes helt eller delvis, hvis det vil være urimeligt eller i strid med redelig handlemåde at gøre den gældende. Det samme gælder andre retshandler.*
> *Ved afgørelsen efter stk. 1 tages hensyn til forholdene ved aftalens indgåelse, aftalens indhold og senere indtrufne omstændigheder."*

[672] TETLEY, W., 2004, supra note 634, p. 569.

[673] *See*, for example, ZUSMAN, S., 2005, supra note 640, p. 28 (arguing that legal practice in Perú has, traditionally, sought to limit the discretion of the judges, which has in turn lead to the application of good faith being limited, lest it allows contractual modifications).

strictness of a rule of precedent, but on the wisdom of the judges."[674] In other words, he dismisses the fear that an open-ended solution in the legislation might pose a threat to certainty, since as long as the judges are adequately prepared, they will not indulge in excessive discretion. Granted, this is a bit of a gamble, since it requires the legislator to blindly trust in the ability of the judges to act appropriately; however, there is no evidence to indicate that the catastrophic consequences that are often mentioned have ever actually occurred.

The fears of granting excessive discretion to the judge might also respond to historical reasons, as the figure of the Civil judge has often been associated with a more mechanical role than that of the Common Law judge. A good example of this almost pejorative look comes from a 1969 analysis of the Civil Law systems by MERRYMAN, who described the figure of the Civil judge, almost dismissively, as:

> *"*[A] *kind of expert clerk. He is presented with a fact situation to which a ready legislative response will be readily found in all except the extraordinary case. His function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to fit into the formal syllogism of scholastic logic. The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows ...*
>
> *The net image is of the judge as an operator of a machine designed and built by legislators ...*
>
> *Judicial service is a bureaucratic career; the judge is a functionary, a civil servant; the judicial function is narrow, mechanical, and uncreative."*[675]

Although Civilian attorneys will probably recoil at the downright derogatory description put forward by MERRYMAN, there is *some* truth to it. Although applying the law is certainly not, as MERRYMAN said, "*narrow, mechanical, and uncreative*", it is different from the way in which a Common Law judge performs the same task. This almost certainly responds to historical reasons, as the Civil Law judge was often prevented from using the same level of discretion in his work compared to that enjoyed by the Common Law judges.

We can observe these differences in, for example, the German Code of Law instituted by Fredrick the Great of Prussia, which expressly forbid the judge to interpret the law, or in the philosophy of the separation of powers that arose in the aftermath of the French Revolution, and which put the judges "*on probation*" in society. The reasons behind both of these situations can be traced directly to an inherent distrust, for a plethora of reasons, in

---

[674] HARTKAMP, A. S., 1992, supra note 657, p. 571.
[675] Cited in MACLEAN, R. G., 'Judicial Discretion in the Civil Law', 1982, 43 *Louisiana Law Review*, pp. 45–46.

the figure of the judge as a fair and impartial figure.[676] Furthermore, as the contract was seen as "law" for the parties, it was thought that the ability of the judge to go against it needed to be very restricted.

> *"This attitude was perhaps more understandable in the French tradition for two reasons. The first is historical: the new revolutionary regime of 1804 was very suspicious of judicial power because of the abuses under the old regime ("Que Dieu nous garde de l'equité des Parlements"* ["may god save us from the equity of Parliaments"]*). The second is one of basic civilian philosophy regarding the hierarchy of the sources of law which considers legislation as the only real source of law, jurisprudence being viewed only as the process of application of the law to facts. The court does not make law and indeed should not."*[677]

The problem with these historical considerations, however, as well as those analyses made from a Common Law perspective, is that they are a bit simplistic and perhaps even shortsighted. First, the historical mistrust in judges, coming from the Roman *iudex*, bears little to no relation to the current situation. Second, and most importantly, they ignore, perhaps willfully, that the Civil judge does possess a large amount of discretion. Codified law is far from being a one-size-fits-all endeavor, and it is the judge who must make the norm fit the individual characteristics of the case. This is the situation, for example, when the judge analyzes the remedies that can be granted to a given plaintiff; determining when the actions of a defendant have reached the level of malice; or, of course, whether the defendant breached his good faith obligations, resulting in an unconscionable agreement.

5.3.3 Good Faith and Unconscionable Terms

In regards to contracts, Civil Law judges have, historically, taken an approach similar to that of their Common Law counterparts. Indeed, it has been stated repeatedly that it is not up to the courts to review and redraft what the parties have freely agreed upon. In a 1925 case, for example, the Chilean Supreme Court stated:

> *"The courts do not have the ability to derogate from or avoid the application of the law of the contract, whether for reasons of equity, customs or administrative regulations."*[678]

Similarly, for most of their history French courts were reticent, if not downright opposed, to go against the will of the parties as manifested in their contract.[679] This even in the face

---

[676] ibid., pp. 46–47.
[677] BAUDOUIN, J.-L., 1985, supra note 110, p. 1123.
[678] Cited in MOMBERG URIBE, R., 2013, supra note 387, p. 11.

of new events that might jeopardize the ability of one of the parties to adequately perform. French judges were, quite simply, *"intent to safeguard the principle of* [the] *sanctity of contracts (Pacta sunt servanda)."*[680]

Despite their original reluctance to go against the manifested will of the parties, however, and just as it happened in the Common Law, changes in the makeup of society also resulted in a shift in regards to contractual sanctity.[681] As contracts of adhesion became more and more common, so did the use of abusive clauses. In lieu of a unified regulation of unconscionability (as it appears in, for example UCC §2-302), what Civil Law systems have often done is to link these abusive clauses to a breach of the good faith obligation of the parties.[682] In the German case, for example,

> *"when an alteration of the legal norms is so unfair or inequitable, it is to be presumed that the injured party has agreed to it as a result of some pressure. If this presumption cannot be refuted (perhaps by proving some benefit that compensates the damage, or by some other reasonable cause), the courts cannot validate the existence of the agreement, as a result of being against the spirit of the legal system* [...] *since the courts cannot sanction an evident breach of the basic requirements of justice."*[683]

The reason why the courts, and even the legislatures, resort to good faith as a way to combat abusive clauses is simple. These clauses violate the good faith obligation by binding the adhering party to more than what he could have reasonably expected from the contract, or by establishing less rights in his favor that what should have been understood to come with it.[684] Furthermore, good faith serves as a very useful tool, since predicting every possible case in which the parties might act in an unconscionable manner is impossible, and so resorting to this general value as an open-ended tool is vital. The already cited §307 BGB, for example, takes this approach when it establishes good faith as the basis for the reasonableness test of a standard business term.

The German approach towards good faith is quite interesting, because even though the BGB makes several references to this principle, the German judge is not really empowered

---

[679] BAUDOUIN, J.-L., 1985, supra note 110, p. 1124 (arguing that French courts "*while treating good faith as an essential element of contractual relationship, by and large did not use it as a tool for the control of unconscionable or unjust clauses*").

[680] DAVID, R., 'Frustration of Contract in French Law', 1946, 28 *Journal of Comparative Legislation and International Law*, no. 1, p. 12.

[681] In regards to the philosophical shift undergone by French courts in regards to pacta sunt servanda, *See* LANDO, O., 'Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law?', 2007, 15 *European Review of Private Law*, no. 6, p. 847.

[682] DE LA MAZA GAZMURI, I., 2003, supra note 644, p. 120.

[683] ibid., p. 120.

[684] LAGUADO GIRALDO, C. A., 2003, supra note 205, p. 246. Although LAGUADO places an emphasis in insurance contracts, his conclusions are, *mutatis mutandis,* of general application.

to modify the party's agreement by resorting to principles of fairness and justice. Indeed, as MARKESINIS et. al. unequivocally state:

> *"Good faith in German law, it should be stressed, does not as a general rule empower the judge to look at the terms of the contract and decide whether they are substantively fair, i.e., whether the price agreed is 'just' or whether the bargain evinces a significant imbalance in the parties' rights."*[685]

As exceptions to this general rule, however, we find three situations in which the judge does have this ability to resort to good faith in order to interfere with the content of a contract: the doctrine frustration, standard business terms, and in cases that relate to the so-called constitutionalization of private law.[686] Due to their relevance to our analysis, as well as to their consequences in other Civilian systems, we shall focus only on the last two.[687]

Although nowadays German law has expressly incorporated the policing of standard business terms (e.g. via §305-§310 of the BGB and, before, the *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* or *AGB-Gesetz*), prior to this express regulation the courts had assumed the power to strike down terms that were so abusive as to represent a violation of the good faith obligation established in §242 BGB. Of course, this provision continues to prevail in those cases where there is an offending term, even if it was not part of a boilerplate agreement. In general, on the basis of German law, three broad classes of cases fall within the breaches of this good faith obligation:

> *"The first group of cases involves instances where the party who was given a promise by another misuses its contractual rights. An example is when an insurance company cancels a policy after a late premium payment, which courts have ruled violates good faith. A second group involves cases where one party seeks a harsh remedy for a contractual breach by the other party when a less burdensome alternative exists. For example, if one party receives damaged goods, that party should seek repairs before exiting the contract entirely. The third group contains cases where one party tells the other certain provisions of a contract need not be followed, only later to enforce*

---

[685] MARKESINIS, B. S. & UNBERATH, H. et al., *The German Law of Contract: A Comparative Treatise*, 2006, 2, Hart Publishing, p. 131 BAUDOUIN seems to disagree with this general appreciation, arguing that German courts, based on good morals (§138), good faith (§242) and, sometimes, determination of the mode of performance (§315), *"elaborated a very sophisticated system of judicial control of conscionability* (BAUDOUIN, J.-L., 1985, supra note 110, p. 1124).

[686] MARKESINIS, B. S. et al., 2006, supra note 685, pp. 131–132.

[687] On the topic of frustration in German law, *See* a AKSOY, H. C., *Impossibility in Modern Private Law: A Comparative Study of German, Swiss and Turkish Laws and the Unification Instruments of Private Law*, 2014, Springer International Publishing.

> *them, such as when deadlines are said to be lax, only later to be stringently enforced by an insurance company."*[688]

As we mentioned before, resorting to good faith in this manner is, undoubtedly, very similar to the doctrine of unconscionability in the Common Law.[689] The parallels that exist between unconscionable acts and breaches of good faith are numerous. Indeed, speaking about the EU Directive on Unfair Terms, for example, COLLINS references these similarities when he suggests that the incorporation of the Directive into English law might be better served if the references to good faith are eliminated and they are instead replaced with:

> "[The] *equitable idea of acting in good conscience or not unconscionably. For the civil law idea encompasses all the variety of instances when one party has abused the social practice of making promises. It involves taking advantage of another's trust either by encouraging misplaced reliance or by securing an unduly advantageous transaction."*[690]

In a recent ruling, the Quebec Supreme Court was quite open in its acceptance of using good faith as a way to ensure fairness. In its ruling, the Court stated:

> *"The development of Quebec's law of obligations has been marked by efforts to strike a proper balance between, on the one hand, the individual's freedom of contract and, on the other, adherence by contracting parties to the principle of good faith in their mutual relations."*[691]

The meaning of the Court's words is clear. While the parties may enjoy freedom of contract, this freedom needs to be balanced with the parties' compliance with their good faith obligation. Put in another words, freedom of contract can be limited when one of the parties has gone against what can be expected from her on the basis of good faith.

Although resorting to good faith as a safety valve for unfair terms has, in some systems, become less necessary as a result of statutory reforms that expressly police them, even those statutes themselves are based on this general duty.[692] The basic motivation behind these rules is that "[t]*he parties have duties of information, documentation, co-operation and disclosure, and a party should be protected against the other party's abuse of rights."*[693] Failure to fulfill with these duties represents a breach of the good faith obligation, and can make

---

[688] BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, pp. 244–245
[689] MARKESINIS, B. S. et al., 2006, supra note 685, p. 131 *See* also BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, p. 244
[690] COLLINS, H., 'Good Faith in European Contract Law', 1994, 14 *Oxford Journal of Legal Studies*, no. 2, p. 250
[691] Quoted in GRAMMOND, S., 'The Regulation of Abusive or Unconscionable Clauses from a Comparative Law Perspective', 2010, 49 *Canadian Business Law Journal*, no. 3, p. 346
[692] HESSELINK, M. W., 2011, supra note 638, p. 629
[693] LANDO, O., 2007, supra note 681, p. 844

a term, or a whole contract, voidable as a result. As a principle that *"governs, as far as is known, all Continental European Countries,"* (not to mention the non-European, yet Civilian countries), good faith fulfills a duty of protecting the weaker parties in a contract from unfair terms.[694]

In regards to the constitutionalization of private law, some clarifications need to be made, since the idea of fundamental rights seems alien to private law. Indeed, fundamental rights have traditionally been seen as a limit established in benefit of the citizens *vis à vis* the State, but not to be used between the citizens themselves.[695] Under the German system (as well as some others), however, there is a theory, known as 'indirect secondary effect' ("*mittelbare Drittwirkung*"), and based on which private law must be *interpreted* in a way that is compatible with basic constitutional values, due to the fact that a person's constitutional rights affect other areas of the law as well, and so should not be limited exclusively to the public sphere.[696] As the Federal Constitutional Court of Germany ("*Bundesverfassungsgericht*") said, in the seminal 1958 *Lüth* case:

> *"The influence of the basic rights value yardsticks will arise primarily with those provisions of private law which contain compulsory law and thus form a part of the public order-in the wide sense-i.e. the principles which for reasons of the public benefit should also be binding for the formation of legal relationships between individuals and therefore are withdrawn from the control of the private will. These provisions have, in accordance with their purpose, a close relationship with public law, which they complement. That must expose them to a special extent to the influence of constitutional law. From case law, the 'general clauses' present themselves primarily for the realisation of this influence. They, like s. 826 of the BGB, refer to the judging of human conduct by criteria which are outside civil law, in fact chiefly outside the law altogether, like 'good morals'. For in deciding what these social precepts require at any given time in the individual case, one must primarily proceed from the totality of value concepts which the people have reached at a certain point in time of their intellectual and cultural development and established*

---

[694] ibid., p. 846 *See* also PIZARRO WILSON, C., 2004, supra note 127, p. 125

[695] ONUFRIO, M. V., 'The Constitutionalization of Contract Law in the Irish, the German and the Italian Systems: Is Horizontal Indirect Effect Like Direct Effect?: A Comment on Professor Kumm's View', 2007 *Indret: Revista para el Análisis del Derecho*, no. 4, p. 3.

[696] It is precisely the issue of *interpretation* that makes the German an "indirect" approach ("*mittelbare Drittwirkung*"), as opposed to a "direct" one ("*unmittelbare Drittwirkung*"). The distinction between both approaches is determined based on whether the parties are able to invoke their fundamental rights directly against each other in case of violation (since fundamental rights are absolute, and therefore protect a person against everyone), or whether they can only influence private law by *"guiding the judicial interpretation of open-textured private law provisions"* (ibid., pp. 4–5).

> *in their constitution. Therefore the general clauses have been correctly described as the 'break through points' of the basic rights into civil law."*[697]

The facts of the *Lüth* case are interesting, since even though the case has been used as a source for the application of constitutional principles in contractual issues, the case was actually a tort. Indeed, in this case the producer and distributor of a new film by Veit Harland, a movie director made (in)famous for his work in the National Socialist propaganda film *Jud Süß* ("*Süss the Jew"*), sought an injunction against writer Eric Lüth who, due to Hardland's Nazi past, was organizing a boycott against his new film. The civil court that heard the case granted the request of the plaintiff, ruling that Lüth had violated the provisions of §826 of the BGB, and ordering him to refrain from uttering such statements in the future.[698] This section of the BGB, located within the Title devoted to Torts ("*Unerlaubte Handlungen"*) reads:

> *"A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage."*[699]

The defendant appealed the decision to the Constitutional Court, arguing that his right to freedom of speech, as protected by Germany's Basic Law, had been violated by the lower court's decision. Even though this was a private law dispute, decided in accordance to private law provisions, the Constitutional Court sided with Lüth, arguing that constitutional values took priority.

> "[The Court] *stated that basic human rights constitute an objective value system, influencing all branches of law, whether private or public. This objective value system is a standard for assessment of every action, whether legislative, executive or judicial. Every private law arrangement must adjust itself to this value system. However, the impact of this objective system in private law is by the doctrinal means of the private law itself.* [...] *This is particularly apparent in the private law rules reflecting public policy. These rules are closely linked to public law, and they complete it. They are exposed to influence by constitutional law."*[700]

---

[697] Cited in YOUNGS, R., 'Constitutional Limitations on Freedom of Contract: What Can the Germans Teach Us', 2000, 29 *Anglo-American Law Review*, no. 4, pp. 499–500.

[698] CHEREDNYCHENKO, O. O., *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions*, 2007, Sellier. European Law Publishers, München, Germany, p. 65

[699] "*§826 BGB*

> *Wer in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet."*

[700] BARAK, A., 'Constitutional Human Rights and Private Law', 1996, 3 *Review of Constitutional Studies*, no. 2, p. 250.

Based on the *Lüth* decision, it became an established principle that constitutional rights are not to be seen as limited exclusively as defensive rights against the State, but also as defensive rights between private parties. Constitutional norms, therefore, "radiate" into all areas of the legal system, including those that refer to the private sphere.[701] It is important to note that this does not mean that the matter becomes constitutional in nature; on the contrary, *"the dispute remains substantively and procedurally a civil law dispute, and the claim or defense continues to be grounded on civil norms,* ***such as the clauses of good faith and good morals****."*[702]

As a non-contractual (yet private) matter, the *Lüth* decision did not really affect the law of contracts. Indeed, for decades after the decision, contract law remained, for the most part, unaffected.[703] Relatively recent developments, however, have removed this "immunity" that surrounded contracts, as fundamental rights began to impact the relationship between the contractual parties, in what some commentators have referred to as "*the constitutionalization of contract law*."[704]

It was in 1993, in the *Bürgschaft* case, that the German Constitutional Court finally put an end to the discussion as to whether constitutional values also affect contractual matters, answering this question in the affirmative.[705] The facts of the case are quite simple, and represent a clear example of an abuse of bargaining power disadvantages:

> "*In 1982 a real estate agent tried to obtain extra credit for his business from the local state bank (Stadtparkasse). The bank agreed to increase his credit limit from DM 50,000 (approximately 25,000 Euros) to DM 100,000 (50,000 Euros), but only subject to the condition that the agent's daughter would sign the contract as a surety for the whole amount of her father's debt. Prior to the signing, the bank employee told the daughter: 'Would you just sign this here, please? This won't make you enter into any important obligation; I need this for my files.' ('Hier bitte, unterschreiben Sie mal, Sie gehen dabei keine große Verpflichtung ein. Ich brauche das für meine Akten'). The daughter agreed. At that time she was 21 years of age. She did not have any high level of education or any property of her own, and worked as an unskilled employee at a fish factory for a salary of DM 1150 DM (575 Euros) per month. That income was not even sufficient to be able to pay the interest rate on the amount of her eventual liability under the contract. In 1984 her father stopped working as a real estate agent to become a shipowner. He obtained a loan of DM 1.3 million*

---

[701] KUMM, M., 'Who's Afraid of the Total Constitution - Constitutional Rights as Principles and the Constitutionalization of Private Law', 2006, 7 *German Law Journal,* p. 350.
[702] ONUFRIO, M. V., 2007, supra note 695, p. 5 (emphasis added).
[703] CHEREDNYCHENKO, O., 'Fundamental Rights and Contract Law', 2006, 2 *European Review of Contract Law*, no. 4, p. 489.
[704] ibid., p. 490.
[705] *Bürgschaft* [19 October, 1993] BVerfGE 89, 214.

> *(650,000 Euros) from the bank to finance the purchase of a ship. Shortly afterwards, however, the father's business experienced financial difficulties. For this reason, the bank terminated the credit agreements with him in 1986. At that time the father's debt to the bank amounted to DM 2.5 million. The bank claimed DM 100,000 (50,000 Euros) with interest, amounting to a total of DM 160,000 (80,000 Euros), from the daughter under the suretyship contract. Since 1991 the daughter had been a single mother dependent on social security. She defended herself by claiming that the contract was void."*[706]

After a long litigation, the case reached the Federal Supreme Court (*Bundesgerichtshof*), who sided with the bank. The argument put forward by the Court in its decision was that since the daughter was an adult (even if barely), and of sound mind (even if uneducated), she knew or should have known that signing a surety would entail a risk. It would not be possible, therefore, to assume that the bank was under a special obligation to protect the daughter by informing her of the inherent risks of her adhesion to the contract. On the basis of this, as well as the principles of traditional contract theory, the daughter could not escape her bargain.[707] Although this was certainly a difficult decision to stomach for the daughter, since it meant that she would be put under severe economic strain, it was the only way, in the eyes of the Court, in which freedom of contract and *pacta sunt servanda* could be interpreted.[708]

The daughter filed a constitutional complaint against the Supreme Court decision, arguing that her basic rights had been violated. Specifically, she argued that she had been undermined in her human dignity and her right to develop her own personality, as well as the principle of the social state established in the German Basic Law.[709]

In a *"ground-breaking"* decision, the Federal Constitutional Court reversed the decision of the Supreme Court, siding with the daughter, reproaching the extremely strict stance taken by the Supreme Court in regards to contractual principles.[710] According to the Constitutional Court:

---

[706] CHEREDNYCHENKO, O. O., 2007, supra note 698, pp. 234–235.

[707] MAK, C., 'Fundamental Rights in the DCFR' *Centre for the Study of European Contract Law Working Paper Series*, 2009/1, p. 6.

[708] CHEREDNYCHENKO explains exactly the extent of this economic strain:

> *"This decision of the Supreme Court meant that the daughter had to pay DM 160,000 (80,000 Euros) under the original contract. The debt of DM 100,000 (50,000 Euros) alone entailed monthly interest payments of DM 708 (350 Euros); in order to be able to live at a subsistence level, the daughter had to earn at least DM 1800 (900 Euros) – an income which she had never earned."*

CHEREDNYCHENKO, O. O., 2007, supra note 698, p. 236.

[709] ibid., pp. 236–237.

[710] MAK, C., supra note 707, p. 6.

> *"*[I]*n cases where a 'structural inequality in bargaining power' has led to a contract which is exceptionally onerous for the weaker party, the private law courts are obliged to intervene on the basis of the general clauses (**§ 138 (1) and 242 of the Civil Code concerning, respectively, good morals and good faith**). This obligation is based on their duty to protect the constitutional right to private autonomy (Article 2 (1) of the Basic Law) in conjunction with the principle of the social state (Articles 20 (1) and 28 (1) of the Basic Law)."*[711]

The *Bürgschaft* decision, based on constitutional values, established a general principle of protection of the weaker contractual parties. Together with subsequent similar rulings by the Constitutional Court, this new principle brought about a series of important consequences:

> "*Firstly, according to the Constitutional Court, the Basic Law requires private parties to be protected against themselves. This protection should take place through legislation and court decisions. Secondly, it is in accordance with the value system embodied in constitutional rights and the principle of the social state that private law in general, and contract law, in particular, should fulfil not only the task of ordering the relationships between private parties but also the task of protection. Third, in typical cases of structural inequality between parties, the content of every legal transaction is to be scrutinized by a respective court as to its onerousness for the weaker party. All kinds of contracts and corporate decisions are open to intervention by the courts. In the same way as the phrase 'a contract is a contract' cannot in isolation provide a sufficient legal basis for the binding force of a contract, the phrase 'a majority is a majority' can provide a sufficient legal basis for the binding force of corporate decisions.*"[712]

It is truly impossible to overstate the importance of this decision. By resorting to the obligation of good faith and coupling it with the constitutional rights established in the Basic Law, what the Constitutional Court did was, among other effects, to establish a general principle of unconscionability based on the abuse of bargaining power disparities. Furthermore, by referencing the principle of the social state of the German nation, as well as protecting parties "from themselves", the Court made paternalism a national policy.

The pattern followed by the Court in regards to the interpretation freedom of contract is fairly easy to see. As MARELLA explained:

> *"First, the making of a contract is to be controlled (and eventually restricted) by the state as long as weak parties confront strong parties. This implies the identification of weak parties in relation to strong parties: women are weak in relation to men, the*

---

[711] CHEREDNYCHENKO, O. O., 2007, supra note 698, p. 237 (emphasis added).
[712] ibid., pp. 237–238.

> *poor are weak in relation to the middle and upper classes, wives are weak in relation to husbands, young people are weak in relation to grown-ups, children in relation to parents, etc. Second, the making of a contract is to be restricted when there are a weak and a strong party and unfair contractual terms. Here comes the fundamental rights argument and – third – the intervention of the state in terms of limits to freedom of contract is required because the unfair contract disregards the weak party's fundamental rights."*[713]

This shift towards constitutionalization of private law, with an emphasis on paternalism, has not been free from criticisms. There have been those who argue that there is an inherent risk in allowing the State to blur the lines between public and private law, "remedying" an individual's choice, by supposedly freeing him of the biases and mental weaknesses that affect him, and which allegedly made him unable to really know what he wanted. The risk is that the State can easily move from simply acting in a subsidiary manner to an individual's will (a paternalistic or social model), to directly correct the choices that an individual might make that seem to go against the State's own conceptions of what is desirable (a perfectionist model).[714] The consequences of a state adopting perfectionism as a guiding principle, let alone as a policy, are quite serious. As MARELLA explains:

> *"*[In the perfectionist model] *the state enunciates a conception of the good life and frowns on choices which are inconsistent with it!*
>
> *While paternalism restricts our bargaining freedom only in the name of satisfying our deepest set of preferences, the perfectionist is a moralist who is prepared to ignore our deepest wishes when these are deemed unworthy. Instead he identifies the good ends we have to pursue and obliges us to seek them, whether we want them or not."*[715]

Although MARELLA's criticisms against the perfectionist model might seem farfetched and outside of what can reasonably be expected from the legislator or the courts, reality is considerably more complex. Indeed, as she explains, the perfectionist model is precisely the one applied in both the German and French systems. As we will see, in both of those systems, on the basis of human dignity, courts have acted against the express will of the parties, even when the parties themselves feel that they are getting a good deal.

According to German and French doctrine, human dignity is understood based on three fundamental principles:

---

[713] MARELLA, M. R., 2006, supra note 562, p. 267.
[714] ibid., p. 269.
[715] ibid., p. 269.

i. "[H]*uman dignity has to be protected even against the wishes of the person whose human dignity is concerned (inalienability);*

ii. [O]*nly the judge – not the individual whose human dignity is concerned – is entitled to assess individual human dignity and its violations;*

iii. [T]*he respect of human dignity can prevail over the social dignity of the individual whose human dignity is concerned."*[716]

Taking these principles as a starting point, and constructing a legal protection of human dignity, some courts have taken paternalism to a new level. German and French courts have actually been clear in their refusal to respect an individual's desires, even in contractual agreements in which the individual being protected openly refuses the protection.

In Germany, human dignity was used as the basis for the famous 1981 *Peep Show* case of the Federal Constitutional Court, where a mechanical peep-show was denied a license because, according to the Court, the trade itself violated the human dignity of the women who would be exhibiting themselves.[717] The issue was not whether the women were voluntarily participating in this exhibition (the Court did not argue that this was a case of human-trafficking or of women held against their will), but rather that, whether they wanted it or not, this particular trade was against their dignity and, therefore, could not be allowed.[718]

This was a truly astonishing decision, since not only was it based on the idea that the State knew better than the performers, but also managed to waltz around the fact that Germany had a large pornographic industry. The Court, for example, took it upon itself to distinguish the peep-shows from, for example, strip tease shows, considering that only the former was inherently against human dignity, since it was based on the objectification of the women involved. The judges seem to have considered that the dancing involved in strip-tease had an inherently artistic value as a performance, whereas a strip-show performed in a peep show establishment, let alone a sexual act performed there, was somehow inherently against human dignity. As the Court explained:

---

[716] ibid., p. 271.

[717] The Court explained the working of this show as follows:

> *"During this* [show]*, on a round, revolving stage (5m in diameter) the bare body of a female person is supposed to be seen (to music) by a spectator on one of 21 single occupancy cubicles. The window of* [such] *cubicle is at any one time covered by a blind, which disappears for a predetermined period after a coin is inserted into a slot*[,] *and . . . the stage becomes visible from the booth."*

Cited in KADIDAL, S., 'Obscenity in the Age of Mechanical Reproduction', 1996, 44 *The American Journal of Comparative Law*, no. 2, p. 353.

[718] CHEREDNYCHENKO, O. O., 2007, supra note 698, p. 250 ("[H]*uman dignity as a so-called 'objective value' was used by the Court as a basis for the prohibition on peep-shows, despite the fact that a woman in that case had freely consented to carrying out such acts"*).

> *"The mere exhibition of the naked female body does not injure human dignity, since most probably no fundamental objections, from the perspective of an injury to human dignity, have been raised against the customary striptease entertainment. The interpretation of the appellate court [the Verwaltungsgerichthof, or VGH], that this critique of the peep-show applies similarly against the traditional striptease, cannot be followed in this instance. The peep-show can be fundamentally distinguished from the striptease. The striptease actress-appearing before an . . . engrossed audience in the hall-moves about in a compass which stands within the tradition of a customary stage- or dance-show, and under which the here-ordinary authoritative character allows [her] personal subjective position ... to pass untouched."*[719]

The Court continued its strange harangue adding:

> *"Conversely in the peep-show the woman appearing is assigned to a degraded, objectified role, to which end several circumstances of the event cooperate: those owing to the kind of payment which establishes an atmosphere of a mechanical and automatized [business] event, by which the spectacle of the naked woman is bought and sold like a commodity through the slot of a machine; those owing to the window-flap mechanism and the one-sided line of sight emphasize the woman's isolation as a thing for hire-she is shown as an object of desire in the show, lent out permanently to the voyeur; owing to the [temporal] expiration of the event an especially crass, prominent impression of a de-personalized marketing of the woman [is created]; the isolation also of the spectators, being alone in the booth and with it [an] allied defect [in] social supervision; the possibility- deliberately created by the system of solitary booths-of gratification and the commercial exploitation thereof. Taken together, these conditions assure that the woman displayed in the show is presented . . . like an object in the service of sexual stimulation with a view towards remuneration, and each spectator, existing in [his own] isolation-booth, invisible to the woman, has her offered as a mere stimulation-object for the gratification of sexual interest. This justifies the decision that the woman displayed in the show is degraded through this manner of performance-the peep-show characterized (in its own peculiar way) as 'professional public performance'* [...] *and thereby received a dignitarian injury."*[720]

In the best-case scenario, the members of the Court suffered from an extreme case of naiveté, assuming that men visit strip-clubs for their artistic value and not for sexual gratification. In the worst (and most likely) case scenario, the judges took it upon themselves to decide what can be qualified as an "artistic performance," considering peep-

---

[719] Cited in KADIDAL, S., 1996, supra note 717, p. 354. Although we can only guess, it seems fair to assume that the patrons of a peep show would be equally (if not more) engrossed as those visiting a strip-club.
[720] Cited in ibid., p. 355.

shows inhumane, and strip-teases artistic. Of course, the fact that strip-tease is not only a deeply objectifying practice, but also one in which women are systematically targeted for different degrees of sexual assault seems to have been lost in the learned judges.[721] With its bizarre double standard when it comes to the morality of certain practices and the immorality of others, the Court perfectly exemplified the risks of granting any authority the power to decide what can be considered as possessing artistic merit.

A similar case of "the State knows best" arose in France, in the so-called *Dwarf-Throwing* case of the *Conseil d' Etat*. This case dealt with the practice of "dwarf-tossing", a practice that DAVIS describes as:

> *"*[A] *form of entertainment that was invented in Australia in the nineteen eighties, and which spread rapidly to other parts of the world. Dwarf tossing is a contest of strength usually held in discotheques and bars, which rewards the person who is able to throw a willing and suitably protected dwarf the furthest onto a padded landing stage. Another variant, dwarf bowling, involves launching a helmeted dwarf who is strapped to a skateboard down a bowling alley; the winner is the contestant who knocks down the most pins."*[722]

The problems started when the mayor of the small town of Morsang-sur-Orge declared the practice of dwarf-tossing illegal. Dwarves challenged the mayor's ruling, in a case that made it all the way to the *Conseil d'Etat*. While the mayor's actions were motivated by,

---

[721] In this regard MARELLA mentions how "[i]*n the German cases of peepshows and sexy chat lines, the prohibition of the shows and/or the contracts' nullity will not have effects on the sex workers whose dignity has been supposedly harmed other than that of inducing them to work on the streets as prostitutes, which is not less degrading from the point of view of the courts themselves*" (MARELLA, M. R., 2006, supra note 562, p. 274). For an analysis of the strip club industry from a feminist perspective, See JEFFREYS, S., 'Keeping Women Down and Out: The Strip Club Boom and the Reinforcement of Male Dominance', 2008, 34 *Signs: Journal of Women in Culture and Society*, no. 1, 151–173. On the prevalence of violence against women in strip-tease venues and other areas of sex work, *See* FARLEY, M. et al., 'Prostitution and Trafficking in Nine Countries', 2004, 2 *Journal of Trauma Practice*, 3-4, 33–74 and RAPHAEL, J. & SHAPIRO, D. L., 'Violence in Indoor and Outdoor Prostitution Venues', 2004, 10 *Violence Against Women*, no. 2, 126–139.

[722] DAVIS, J., 'Forbidding Dwarf Tossing: Defending Dignity or Discrimination Based on Size?', 2006, 9 *Yearbook of New Zealand Jurisprudence,* pp. 239–240. *See* also MARELLA, M. R., 2006, supra note 562, p. 271. MCGEE adds more to this description:

> *"Dwarf tossing is a sport and a form of entertainment that usually takes place in a tavern or sports facility. The object is to throw a dwarf as far as possible. Whoever throws the dwarf the farthest wins a cash prize or trophy, plus the admiration of the spectators who are watching the tossing. The dwarfs wear protective knee and elbow padding, neck braces, and helmets. To minimize the chance of injury, they are sometimes thrown into a pile of mattresses. They also wear a harness with a handle, to make it easier for the tosser to get a good grip on the dwarf. Dwarf tossing is a fairly safe practice, in the sense that the dwarfs who get tossed seldom get injured. Furthermore, the dwarfs who go on tour can earn a six- figure income."*

MCGEE, R. W., 'If Dwarf Tossing Is Outlawed, Only Outlaws Will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?', 1993, 38 *American Journal of Jurisprudence,* pp. 335–336.

allegedly, considerations of human dignity (which he felt was not respected in the dwarf-tossing spectacle), the dwarves alleged that they were being deprived of their means to make a living in a discriminatory fashion.[723] Both the *Conseil d'Etat* as well as the United Nations High Commission on Human Rights (on appeal by the plaintiffs), confirmed the ban. In its ruling, the Commission found that the ban "*was necessary in order to protect public order, which brings into play considerations of human dignity*."[724]

This case demonstrates the incredibly difficult task that is entailed in a system that tries to police morality in private relations. This was a case in which private individuals agreed upon a service that was to be performed by someone (the dwarf), in exchange for remuneration. Not only that, as the individual in question argued, being tossed around provided him with *"a good income."*[725] The French state and the UN, conceivably patting themselves in the back for their progressive ideas, took a measure to protect the dignity of the dwarves that were being thrown in these shows, without taking into consideration that, in their zeal, they had deprived them of their means to make a living.

While the practice of dwarf tossing is certainly revolting, and it speaks volumes about the people who pay to participate in it, the human dignity of the protected parties was not, in reality, protected. Mr. Wackenheim, the submitting party at the UN High Commission, argued in his submission that, instead of protecting his dignity, French authorities had deprived him of it. He argued that his ability to make a living in a country where *"there is*

---

[723] LEGET, C. et al., "Nobody Tosses a Dwarf!' The Relation Between the Empirical and the Normative Reexamined', 2009, 23 *Bioethics*, no. 4, p. 227.

[724] Office of the High Commissioner for Human Rights, *Selected Decisions of the Human Rights Committee under the Optional Protocol (Volume 8): Seventy-Fifth to Eighty-Fourth Sessions (July 2002 – July 2005)*, 2007, United Nations, New York, NY, p. 114.

[725] MARELLA, M. R., 2006, supra note 562, p. 271. The fact that the dwarves being thrown can potentially earn a substantial amount has made some (e.g. MCGEE, R. W., 1993, supra note 722, p. 336) refer to the practice as a "*positive-sum game*" where "*no one loses*," since

> "[t]*he dwarfs who permit themselves to be tossed stand to earn substantial income; those who toss the dwarfs the farthest can win money plus gain the satisfaction of having won something; those who watch the tossing are entertained; and it is a source of income for promoters."*

While at first this line of thinking seems satisfying, it is not devoid of problems. It is worth questioning what leads a society to be a place where people with a physical disability can only make a good living by being tossed around for sport. In his article MCGEE demonstrates a rather extreme libertarian position, going as far as advocating for legalizing the sale of human organs as a way to increase transplants (ibid., pp. 349–350), on the basis that the only parties affected would be the donor and the recipient, a patently ridiculous idea. Indeed, even though there is not a lot of data available, current research shows that individuals who have sold organs have not actually improved their situation (*See,* generally, JHA, V. & CHUGH, K. S., 'The Case Against a Regulated System of Living Kidney Sales', 2006, 2 *Nature Clinical Practice Nephrology*, no. 9), not to mention that those selling their organs are often in a desperate situation. The problem with MCGEE's logic is that, while he might be correct in regards to the small role that the state should have in regards to some issues, he overlooks the risks of establishing a society in which everything becomes inherently commercial.

no work for dwarves" was taken from him, something that had, in a demonstrable way, damaged his human dignity.[726]

A similar case arose in 2011 in the state of Florida, when a lawsuit was commenced against then-Governor Jeb Bush and the head of the Florida Department of Business and Professional Regulations, after dwarf-tossing was made illegal. In this case:

> "*David Flood, a Tampa Bay radio personality known as 'Dave the Dwarf', alleged that his constitutional right to equal protection was violated by the law that prohibited dwarf tossing. Mr. Flood – whose antics have included being frozen in a block of ice, being sent to live in a Dumpster for charity, and being stuffed inside a giant bowling ball – said, 'This is serious, I don't want the government telling me what I can or cannot do. They assume [people with dwarfism] don't have a mind of their own. People confuse exploitation with capitalization. If I were 7 feet tall, I'd get paid to put a basketball through a hoop.'*"[727]

Although only tangentially related to our analysis, due to legal and jurisdictional differences, the words of Mr. Flood are certainly relevant. There is a certain patronizing attitude on the part of the authorities when they are willing to act against the express will of the parties, when no real and demonstrable damage is occurring. What we can observe is that a rather pseudo-scientific approach was taken by the German authorities in the *Peep-Show* case, as well as the French in the *Dwarf-Tossing* case. Indeed, both decisions assumed, out of thin air, that the behaviors that they were observing were morally abhorrent, and that therefore they should be banned. There was, however, no empirical data put forward to substantiate this repulsion. While it is certainly not our intention to defend or condone peep-shows or dwarf-tossing, practices that we might personally find morally repulsive, it is hardly the role of the State to make those decisions without first providing empirical support for their measures.[728] In the words of Steven PINKER:

> "*Could there be cases in which a voluntary relinquishing of dignity leads to callousness in onlookers and harm to third parties--what economists call negative externalities? In theory, yes. Perhaps if people allowed their corpses to be publicly desecrated, it would encourage violence against the bodies of the living. Perhaps the sport of dwarf-tossing encourages people to mistreat all dwarves. Perhaps violent pornography encourages violence against women. But, for such hypotheses to justify restrictive laws, they need empirical support. In one's imagination, anything can lead to anything else: Allowing people to skip church can lead to indolence; letting women drive can lead to sexual licentiousness. In a free society, one cannot empower the*

---

[726] Office of the High Commissioner for Human Rights, 2007, supra note 724, p. 111.
[727] LEGET, C. et al., 2009, supra note 723, p. 227.
[728] MCGEE, R. W., 1993, supra note 722, p. 343 ("*in a free society, acts between consenting adults should be legal and unrestricted. The state has no business prohibiting acts that do not result in the violation of someone's rights*").

> *government to outlaw any behavior that offends someone just because the offendee can pull a hypothetical future injury out of the air. No doubt Mao, Savonarola, and Cotton Mather could provide plenty of reasons why letting people do what they wanted would lead to the breakdown of society."*[729]

It seems fairly clear that using good faith as a catch-all safety mechanism is not free of complications. On the contrary, it is easy to see that it opens the door to the kind of policy-making and activism on the part of the courts that we would, most certainly, prefer to avoid. The same good faith that protected weak parties that sought relief from abusive clauses was, after all, the same good faith that was used to protect parties who argued, openly, freely, and loudly, that they did not need such protection. We will revisit these issues later.

5.4 Abuse of Rights

As we have seen, the notion of good faith is closely related to that of the abuse of rights. While, as it is often the case, it is a concept for which it is hard to establish a single, all-encompassing definition, some decent attempts exist. A good approximation to a stable definition comes from the 1972 Japanese Supreme Court case of *Mitamura v. Suzuki*, and in which the Court set "reasonableness" as the criteria to be used to determine when a right is being abused:

> *"In all cases a right must be exercised in such a fashion that the result of the exercise remains within a scope judged reasonable in the light of the prevailing social conscience. When a conduct by one who purports to have a right to do so fails to show reasonableness and when the consequential damages to others exceed the limit which is generally supposed to be borne in the social life, we must say that the exercise of the right is no longer within its permissible scope. Thus, the person who exercises his right in such a fashion shall be held liable because his conduct constitutes an abuse of right."*[730]

The abuse of rights doctrine represents a clear example of how contractual rights, even though legitimate, are not seen by the courts as granting an absolute right for their holder. Indeed, the Italian Supreme Court, for example, demonstrating this anti-absolutist view of contractual rights, developed an approach through which it does away with the idea of contracts as *"invincible strongholds"* within which the parties can do as they please. Instead, Italian Courts (as well as most of the ones in Civil Law systems) see

---

[729] PINKER, S., 'The Stupidity of Dignity: Conservative Bioethics' Latest, Most Dangerous Ploy', 2008, 238 *The New Republic*, no. 9, p. 31.
[730] Cited in BYERS, M., 'Abuse of Rights: An Old Principle, A New Age', 2001, 47 *McGill Law Journal*, no. 2, p. 393.

some exercises of rights as illegitimate, and the abuse of rights as an *"indicium revealing a breach of the duty of good faith."* In order to qualify an act in those terms, the Italian Supreme Court stated that four conditions need to be met, namely that

> *"(1) A party derives from the contract a legally protected right; (2) within the contract, such a right can be exercised in multiple ways; (3) though formally complying with the contract, the right is exercised in an abusive manner; (4) such an abusive exercise brings about an unfair disproportion between the benefit enjoyed by the right-holder and the counterpart's sacrifice."*[731]

The abuse of rights involves a *prima facie* legitimate exercise of a right, but which sees its legitimacy stripped away due to the motivations of the party exercising it, as well as the circumstances surrounding such exercise. In these situations, what the "abusive" party ("α") aims to do is to receive a benefit at the expense of the other ("β"), in such a disproportionate way that the law simply cannot tolerate it. What is most relevant here is that the abuse involves a right that was legitimately acquired by α (legitimacy *ab initio*), and which was actually granted to her by β at the time of the contract, but that is being exercised illegitimately (illegitimacy *ex post facto*). It is not, therefore, that α is going *against* what is established in the contract, but rather that it is going against its spirit and the terms that are implied within it, as well as against the principles that inform contract law itself, such as good faith, the duty of solidarity and the principles of proportionality and of *neminem laedere*.[732] As the Italian Supreme Court explained in a recent case:

> *"*[B]*oth parties are bound to not only give effect to the obligations stemming from the contract, but also to behave in order to reduce each other's efforts and safeguard each other's interests. Therefore, good faith is [the] expression of the 'compulsory principle of mutual protection', which requires cooperation by the contracting parties with a view to achieving the expected benefits."*[733]

German courts have taken a similar approach, also stating that the fact that the contract might strictly allow a party to do something does not mean that she can necessarily do that in any situation. And so, for example, on the basis of the good faith duty established in §242 BGB, courts have ruled that *"a promisee may not simply withdraw from a contract when his rights can be equally safeguarded by less drastic means"*, and that *"a landowner possesses no right to claim damages from an architect if the landowner can obtain equal*

---

[731] FARINA, M. & MALTESE, D., 2012, supra note 615, pp. 4–5.

[732] The consideration paid to the animus of the abusive party is, of course, not unique to Italian law, and actually pervades the Civilian position in regards to abuse of rights. Going back to the already cited §138 of the German BGB, for example, we note that the legislator does not merely require that the weak party is careless, weak or in need, but also (and arguably most importantly) that these are conditions that were deliberately exploited by the stronger party.

[733] ibid., pp. 6–7.

satisfaction through minor repairs by the builder."[734] Clearly, it is a policy goal furthered by the courts that the exercise of rights must be done in whatever way causes less harm to the other party. The party exercising her right, therefore, is not completely free in this exercise, as she must take into consideration the consequences that such exercise would bring on the other, being actually under an obligation to always seek to avoid or, at least, minimize the damage.

Although certainly an interesting venue by which the will of the parties, as expressed in their contract, can be modified by the courts, the abuse of rights doctrine is outside of the scope of our research. Those interested in a more in-depth review are directed to the different works on the topic suggested in the bibliography.

5.5 A Good Faith-Based Approach to Unconscionability

As we have shown in this very brief overview of Civilian control methods of unfair terms, the similarities with the unconscionability doctrine are legion. It seems to be that, beyond doctrinal differences, both Civilian and Common Law systems seek to achieve the same goal, even if they follow dissimilar paths to get there.

Despite the similarities, however, the Civilian method, relying on good faith and, consequently, human dignity, seems to present more problems than a unified unconscionability doctrine. What is more, and arguably backing our assertion, even those systems in which good faith was used as a method to stop unconscionable clauses (like the French and the Spanish) have reduced the application of this principle, opting instead to establish direct, specific legislation to tackle unfair clauses.[735] While it is certainly possible that we might be misunderstanding their motivations, the move towards special legislation seems like a clear indication of the insufficiency of the good faith approach as a catch-all device.

What is more, when good faith is coupled with conceptions of human dignity, and together they are used as methods to control contractual autonomy, the resulting uncertainty seems dangerously high. MARELLA offers two very compelling reasons to oppose the use of human dignity in this manner:

> *"First, unlike the way courts normally interpret standards like boni mores and public policy that are historically determined and relative, and therefore likely to work as an objective limit to judiciary discretion, the human dignity doctrine presents dignity as a transcendent, pre-legal value, which is not influenced or defined by historical or*

[734] ANGELO, A. & ELLINGER, E. P., 1992, supra note 176, p. 492.
[735] PIZARRO WILSON, C., 2004, supra note 127, p. 125.

> *social circumstances. As such it is completely detached from objective standards, so that the court is the only and absolute judge of it.*
>
> *Second, in the most significant case law the case could have been decided in two opposite ways, both based on dignity protection. In fact, courts prohibit an activity alleged as violating human dignity while the same activity is assumed by the person whose dignity is concerned as enhancing her/his social dignity."*[736]

Historical data seems to side with us in this conclusion, as records exist of good faith being employed well beyond its rational sphere. In German law, for example, there has been a historical opposition to judges resorting to principles such as this when they lack any other legal ground on which to base their decisions. As LANDO notes:

> *"Already in 1932 Gustav Hedemann warned against this 'Flucht in den Generalklauseln' (flight into the general clauses). In Germany there have been cases of misdirected use of it; in the Nazi period the courts applied the principle to discriminate against the Jews. After the war it led in some cases to a sloppy humanitarianism. Therefore, authors and superior courts now agree that § 242 BGB is not to be used for what the Germans call a 'Billigkeits-Justiz'; the courts cannot invoke it to replace the effects imposed by law and contract by what they in their taste consider to be reasonable and equitable in the concrete case."*[737]

While good faith certainly has a position in contract law, particularly in regards to interpretation, its use to prevent abusive clauses might be limited. While resorting to good faith in this manner might be useful in lieu of specific norms, it should only be a stepping stone towards specific regulation seeking to stop contractual abuses. Although, as we have seen, there is no question that abusive clauses are inherently against good faith, this fact alone does not suffice to identify which clauses or contracts can be struck down, nor does it grant the level of certainty that is required for the market to function.

Even in those systems, such as the Dutch, where the law has expressly given good faith a restrictive function in regards to unfair terms, claims that are based exclusively on a breach of this duty seldom succeed. As HARTKAMP himself noted, in regards to the good faith provision in the Dutch Civil Code:

> *"Now it speaks for itself . . . that art 6:248 part 2 does not give the judge the power to set aside a contract or clause on the sole ground that he finds the content to be unfair towards one of the parties. The mere fact that substantial inequality may*

[736] MARELLA, M. R., 2006, supra note 562, p. 273.
[737] LANDO, O., 2007, supra note 681, p. 845

> *exist between the reciprocal performances between the parties or that a clause is oppressive in respect of one of the parties does not justify interference."*[738]

Just like appeals to human dignity and the horizontal application of constitutional rights, good faith seems to be a value better suited for serving as a subsidiary claim against an unfair term, and not as a principal, self-sufficient one. Claims lodged in Civilian jurisdictions, therefore, will probably have a higher chance of success when they are based on specific legislation aimed at curtailing abuses, and not on such ethereal moral values.

The Civilian methods to tackle contractual unfairness in the absence of specific legal rules, seem to do so "*by stealth,"* by resorting to *"legal fiction*[s]."[739] Although this might be useful at first, it carries the risk of "*introducing artifice into the law"* and lowering certainty and predictability.[740] A general system of unconscionability, like the one present in American law under UCC §2-302 and, to an extent, German law under §138 BGB, seem to offer a much higher protection and usefulness than their more abstract counterparts.

Finally, although we know that devoting space to human dignity seems ill-suited to a work dealing mostly with commercial contracts, there are good reasons for it. With an increasing move towards corporate personhood, with some specifically granting corporations rights that can only be defined as "*human* rights," it might only be a matter of time before other such rights are also recognized. If we accept that a company possesses a right to free speech, then other rights, which commentators would argue emanate from our "human dignity", will soon follow. If a term, therefore, could be considered unconscionable against a person for reasons of depriving him of one of his fundamental rights, or because it violates his "human dignity", there may be no reason why such a term, based on the same considerations, should be held valid against a corporation.

---

[738] Quoted in BRAND, F. D. J., 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution: notes', 2009, 126 *South African Law Journal*, no. 1, p. 89. *See* also PRETORIUS, C.-J., 'The Basis of Contractual Liability in Dutch Law', 2004, 37 *Comparative and International Law Journal of Southern Africa*, no. 3, p. 387 ("[t]*his provision* [Article 6:248-2] *sanctions the setting aside of express provisions where enforcement would be unjust in the circumstances. However, it seems that the word unacceptable (onaanvaardbaar) indicates that such action should be reserved for exceptional circumstances*"). For some comments on the rather limited interpretation that has been given to this norm, *See* VIËTOR, D. A. & WIJNSTEKERS, B. W., 'Het Redelijkheidsbeding in Commerciële Contracten', 2013, 4 *Tijdschrift Overeenkomst in de RechtsPraktijk*, no. 8.

[739] ANGELO, A. & ELLINGER, E. P., 1992, supra note 176, p. 502. *See* also BROWNE, M. N. & BIKSACKY, L., 2013, supra note 107, p. 246 (arguing that France, unlike Germany, Australia and the United States, lacks *"a general unconscionability doctrine,"* and so must resort to *"a patchwork of provisions"* in order to protect parties *"against contractual unfairness in similar ways as other countries do under the scope of their unconscionability law"*).

[740] ANGELO, A. & ELLINGER, E. P., 1992, supra note 176, p. 502.

Chapter 6
Choice of Court Agreements

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

Justice Hugo Black.[741]

6.1 Introduction

An essential part of a free society is the ability of the people to obtain satisfaction through the judicial system. Indeed, it is the power to resort to the courts that allows people to avoid the use of violence as a means to solve conflicts, ensuring that a fair, independent and just third party will, in the end, lay down the law.

Even beyond the realm of public law, where we can easily picture the importance of an independent system in charge of, for example, imparting criminal justice, the role of the judicial system is essential. In contractual matters, for example, it is the knowledge that the parties can enforce each other's obligations through the courts that allows the market to grow and flourish. It is obvious that if the parties had themselves to enforce each other's obligations, by means of direct physical action or coercion, the weaker elements in our society, those with less power, would soon find themselves unable to obtain any kind of redress. Furthermore, if the courts could not be counted on for enforcement of contractual obligations, it is difficult to imagine how any kind of market could exist. If the parties cannot be certain that the other will fulfill her obligations, then there will be little to no incentive to contract, or to comply with one's own obligations. Contracting and enforcement would quickly become nothing more than a Darwinian social construct under which only the strong, those who can push the other, would survive.

And yet, despite all of the above considerations, contractual practices often move away from the default rules in regards to jurisdiction over the contract, and establish different venues to solve the conflicts. Some do so by selecting a specific court within a given

[741] Cited in ALLEN, F. A., 'Griffin v. Illinois: Antecedents and Aftermath', 1957, 25 *The University of Chicago Law Review*, no. 1, p. 152.

judicial system (a "choice of court"), while others do it by means of selecting an independent arbitral tribunal (an "arbitration clause").[742]

While, in principle, the choice of an independent court (be it one that is part of the judiciary or an independent arbitral tribunal) should not, at all, affect the rights of the parties to a contract, the reality is actually more complex. A clause by which jurisdiction is specifically given to another court will often have a severe impact on the rights and obligations of the parties. Even in those cases in which the independence of the tribunal is not at stake, the fact of the matter is that the court before which the parties make their cases, will often play a significant role in the outcome of the dispute. Judicial proceedings are not like mathematical formulas, where the result of a given problem will be the same regardless of the mathematician solving it, and so what the parties can obtain (if anything) will be heavily dependent on where the bench is located. After all, *"the forum chosen may be extremely inhospitable to one party, so much so that litigation may not be pursued at all."*[743]

Just like it happens with any other clause in a contract, forum selection clauses can also be the result of unfair contractual practices. Both parties to the contract will often be in very different positions in regards to their bargaining power, and so one of them might be able to impose a certain jurisdictional clause upon the other. Coupled with the fact that a clause might be buried amidst several, barely readable clauses, written in complex legal jargon, a jurisdictional clause has the power to affect the outcome of a case, to the point of making one of the parties' rights virtually irrelevant. *"On that score, for example, it can be argued that the consent reflected in a forum-selection clause is unlikely to be genuine, and may often be the product* [...] *of unequal bargaining power."*[744]

In this chapter, after a brief overview of how jurisdictional clauses have reached their current status as hallmarks of contracting, we look at the risks that they present in regards to fairness. On the basis of the doctrines analyzed in previous chapters regarding unfair clauses, we wage on the dispute as to whether jurisdictional clauses are to be accepted as merely examples of the market's desires (following the idea that a contract's clauses are part of its price), or whether the blanket acceptance of their validity might actually pose a threat to fairness.

---

[742] When speaking about forum selection, monikers abound. Beyond "forum selection clause", some commentators refer to them as "jurisdiction clause," "choice of forum provisions," "consensual adjudicatory provisions," and many others. Unless otherwise stated, these terms should be understood as equal for the purposes of this work. Although an arbitral tribunal is, indeed, a forum, our analysis of forum selection will deal mostly with courts in a given jurisdiction, and not so much with alternative dispute resolution. Because of this, unless the context makes it clear or it is otherwise stated, our references to "forum selection" should be understood as not including arbitration.

[743] SOLIMINE, M. E., 'Forum-Selection Clauses and the Privatization of Procedure', 1992, 25 *Cornell International Law Journal,* p. 52.

[744] ibid., p. 52.

6.2 Benefits of Forum Selection Clauses

Predictability is one of the most important goals for the parties to a contract. The contract is, after all, no less than the manifestation of their desire to give some modicum of permanence to their private relations. It is, in other words, a "public" statement of their desire to work together. Be it a contract of sale, a rental agreement, or a contract of carriage, what the parties want is to know exactly what will happen in every stage of the contractual formation and performance. As LEDERMAN put it:

> *"Parties who memorialize agreed-upon rights and obligations in contracts generally do so to impose enforceability on their agreements. A written contract assists somewhat in clarifying the parties' expectations."*[745]

As contracts become more complex, the costs of performance increase, and the transactions cross state and national borders, predictability becomes more than a simple desire, and actually turns into a vital concern for the parties.[746] When very expensive products are at stake, or one of the parties is contracting with a large number of clients, knowing not only how the performance will take place, but also what to expect if a dispute arises, becomes essential. Limitations of liability, liquidated damages, choice of law, and forum selection, are all examples of clauses that the parties add in the hopes of minimizing the uncertainty that is inherent to businesses.[747]

Forum selection provisions are one of the most important tools that the parties can employ in order to increase the certainty regarding the rights and duties emanating from their agreements, as well as to reduce and allocate the risks inherent to the contract.[748]

---

[745] LEDERMAN, L., 'Viva Zapata: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases', 1991, 66 *New York University Law Review*, no. 2, p. 422.

[746] TRAYNOR, R. J., 'Is This Conflict Really Necessary', 1958, 37 *Texas Law Review,* p. 674.

[747] REILLY, J. M., 'Enforceability of Choice of Forum Clauses', 1971, 8 *California Western Law Review*, no. 2, p. 324. *See* also BECKER, J. D., 'Choice-of-Law and Choice-of-Forum Clauses in New York', 1989, 38 *International and Comparative Law Quarterly*, no. 1, p. 167 (noting the role of choice of law clauses in reducing uncertainty) and ZAPHIRIOU, G. A., 'Choice of Forum and Choice of Law Clauses in International Commercial Agreements', 1977, 3 *International Trade Law Journal*, no. 2, p. 311 (arguing that both forum selection and choice of law provisions *"provide reasonable predictability"* in the event of a dispute).

[748] DEMPSEY, J., 'Forum Selection Clauses in Attorney-Client Agreements: The Exploitation of Bargaining Power', 2011, 114 *West Virginia Law Review*, no. 3, p. 1196. *See* also GILBERT, E. P., 'We're All in the Same Boat: Carnival Cruise Lines, Inc. v. Shute', 1992, 18 *Brooklyn Journal of International Law*, no. 2, p. 599 (calling these clauses "*one of the most important and effective devices parties can use in an attempt to bring stability and certainty to a contractual agreement*") and MARCUS, D., 'The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts', 2007, 82 *Tulane Law Review*, no. 3, p. 974 (stating that these clauses, which have *"an increasingly central role in American civil justice,"* are used in order to "*hedge against the expensive and uncertain vagaries of litigation*" so as to "*spell out in advance of any dispute how a lawsuit would proceed should their relationship break down*"). As GOLDMAN notes:

They aim to avoid the great inconveniences that would arise if a suit could *"be maintained in any court that has jurisdiction"*.[749] These clauses seek to grant jurisdiction to the courts of a certain country or place, excluding all others that might otherwise be equally or more competent to hear the case. They are based on the assumption that a court will refuse to entertain proceedings brought in contravention of the clause, and that it will then defer to the parties' choice of forum in their contract.[750]

Forum selection clauses are an essential tool to minimize the risks to which the parties expose themselves. Indeed, they allow the parties to prepare themselves for unforeseeable contingencies, associated with an eventual breakdown of the contractual bond. Furthermore, their supporters claim that they also promote business transactions, particularly in an international context, since it is in that area where, as Lee notes, "*a lack of certainty and foreseeability can place great burdens upon the parties involved*."[751]

What is more, forum selection clauses allow the parties to prevent the risks of litigating in hostile forums, something that, in the case of international businesses, ensures that the

---

"By guaranteeing that all litigation is in the same state, not only is predictability enhanced, but efficiencies may be created through consolidation of actions and reliance on the same local counsel. By including such clauses in standard form contracts, transaction costs are reduced."

GOLDMAN, L., 'My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts', 1991, 86 *Northwestern University Law Review*, no. 3, p. 700.

[749] CUTLER, M. R., 'Comparative Conflicts of Law: Effectiveness of Contractual Choice of Forum', 1985, 20 *Texas International Law Journal*, no. 1, p. 97. *See* also JUENGER, F. K., 'Supreme Court Validation of Forum-Selection Clauses', 1972, 19 *Wayne Law Review*, no. 1, p. 50 ("[a] *transaction which cuts across state or national boundaries is fraught with legal risks. Expansive notions of long-arm jurisdiction and the befuddled state of the conflict of laws create the unwelcome possibility of litigation in a foreign court applying unfamiliar rules."*), COSTELLO, F. W., 'The Enforcement of Forum Selection Provisions in International Commercial Agreements: : M/S Bremen v. Zapata Off-Shore., (U.S. Sup Ct. 1972)', 1972, 11 *Columbia Journal of Transnational Law*, no. 2, p. 453 ("*The best way to avoid jurisdictional controversies in litigation arising out of international contracts is, clearly, to have judicial forums selected in advance*") and LEDERMAN, L., 1991, supra note 745, pp. 422–423 ("*In a multi-state or international agreement* [...] *it may be impossible to predict where a plaintiff will file suit. To reduce this un- certainty, control litigation costs, and minimize potential tactical advantages to plaintiffs, sophisticated parties may* [include a forum selection clause]").

[750] FARQUHARSON, I. M., 'Choice of Forum Clauses - A Brief Survey of Anglo-American Law', 1974, 8 *International Lawyer (ABA)*, no. 1, pp. 85–86.

[751] LEE, Y., 'Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts', 1997, 35 *Columbia Journal of Transnational Law*, no. 3, p. 663. On that note, LAGERMAN adds that in international commercial contracts these clauses are *"desirable and necessary"* since they *"promote stability of transactions, encourage trade by eliminating uncertainty of where a dispute will be resolved and give effect to the manifested intent of the parties"* (LAGERMAN, L. O., 'Choice of Forum Clauses in International Contracts: What Is Unjust and Unreasonable?', 1978, 12 *The International Lawyer*, no. 4, p. 779). *See* also GILBERT, E. P., 1992, supra note 748, p. 597 (arguing that forum selection clauses *"tend to lessen the complexity"* of the transactions and *"result in a greater feeling of confidence"* between the parties) and RAPOPORT, J., 'Warsaw, Montreal, and the US Department of Transportation: Consumer Protection for Forum Selection', 2012, 77 *Journal of Air Law and Commerce*, no. 3, p. 248 (suggesting that the use of forum selection clauses, by reducing uncertainty, *"ultimately benefits consumers in the form of lower prices"*).

competitive advantages obtained from entering foreign markets are not neutralized in litigation.[752] Indeed, these clauses allow the parties to

> *"select a desirable, perhaps neutral, forum in which to litigate disputes. Such planning permits orderliness and predictability in contractual relationships, obviating a potentially costly struggle at the outset of litigation over jurisdiction and venue. Preselecting a forum also reduces the possibility of parallel lawsuits between parties in different fora."*[753]

Thanks to their flexibility, these provisions also allow the parties to tailor the dispute resolution mechanism based on their own particular needs, for example by choosing a forum experienced in the subject matter of their agreement, or by using them as a complement to a choice-of-law provision.[754] Because of this, they have become a common part of business agreements.[755] What is more, as a consequence of the growth of international transactions and trade, they have become an almost essential element of this type of contracts.[756]

Proponents of forum selection clauses argue that both the potential plaintiff and the potential defendant benefit from them. The defendant knows that he can only be sued in a specific forum (assuming the forum selection is exclusive), and is therefore not left at the mercy of a plaintiff who might try to obtain strategic advantages by selecting a forum that might jeopardize his defense. The potential plaintiff, on the other hand, through the operation of this clause, is freed from finding a suitable forum where he can exercise his rights and enforce the judgment, safe in the knowledge that the defendant will not (or at least *should not*) be able to contest the jurisdiction of the chosen court.[757] Additionally, these clauses also allow the parties to prepare in advance for an eventual dispute, by being able to take into consideration the costs of potential litigation when they are negotiating the contract.[758] What is more, by reducing the costs associated with the risks inherent to

---

[752] BRITTAIN JR., J. T., 'Foreign Forum Selection Clauses in the Federal Courts: All in the Name of International Comity', 2000, 23 *Houston Journal of International Law*, no. 2, p. 306.

[753] SOLIMINE, M. E., 1992, supra note 743, pp. 51–52. SOLIMINE also notes that not only are these clauses regularly enforced, but also that *"lawyers are now routinely encouraged to place* [them] *in* [the] *contracts they prepare."*

[754] GILBERT, J. T., 'Choice of Forum Clauses in International and Interstate Contracts', 1976, 65 *Kentucky Law Journal*, no. 1, p. 3.

[755] GILBERT, E. P., 1992, supra note 748, p. 597.

[756] HERNANDEZ-GUTIERREZ, M. I., 'Forum-Selection and Arbitration Clauses in International Commercial Contracts: Does the New York Convention Call for a Heightened Enforceability Standard?', 2009, 18 *Dalhousie Journal of Legal Studies*, no. 1, p. 55.

[757] LEE, Y., 1997, supra note 751, pp. 664–665.

[758] Since many of the reported benefits deal with the ability of the parties to make an assessment, at the time of negotiation, of possible costs in case of a dispute, special care should be taken when they are analyzed. As we have seen, people are not very good at predicting negative outcomes, since they are plagued by a number of cognitive biases that prevent them from acting as rationally as they think. And so, while it is undeniable that the

the uncertainty of the forum, the drafting party can *"presumably"* pass the savings on to the other.[759]

Forum selection clauses can also play an important role at the time of negotiation, as they might force the interested party, on the basis of a *quid pro quo* bargain, to concede certain terms in exchange of choosing the court. This interested party, whether seeking to retain jurisdiction in his home turf, or select a foreign tribunal in a third country, might be willing to concede many other points in the contract, aware of the many benefits that come with forum selection. As JUENGER posed:

> *"If counsel is able to negotiate a forum-selection clause designating the courts of his home state, he is assured of full control over any disputes which may arise. There are obvious advantages in litigating in a familiar setting, quite apart from the avoidance of the added expense and inconvenience inherent in long-distance suits. If the transaction is international in character, designation of the home forum mitigates the further problems posed by differences in language and conceptual framework. But even if a foreign tribunal and foreign law are chosen, certainty as to the situs of adjudication enhances predictability, and a quid pro quo can be exacted for the willingness to meet the other party on its home ground.* [...] *If proper precautions are taken, the mere possibility of keeping lawsuits at home may be less valuable than the secure knowledge that a particular forum, and no other, will decide all controversies which may arise."*[760]

Among others, the United States Supreme Court has been clear in recognizing the importance of forum selection clauses in regards to predictability of contractual relations.[761] It was with this in mind, for example, that in *Scherk v. Alberto-Culver Co.* the Court stressed that:

> *"A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is* [...] *an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a*

---

familiarity with a given forum, or its experience in a certain field (such as English courts for Maritime cases) cannot be underestimated, how this translates into the price of the contract is a much muddier topic.

[759] SORENSEN, M. J., 'Enforcement of Forum-Selection Clauses in Federal Court after Atlantic Marine', 2013, 82 *Fordham Law Review*, no. 5, pp. 2527–2528.

[760] JUENGER, F. K., 1972, supra note 749, p. 50.

[761] MULLENIX, L. S., 'Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court', 1988, 57 *Fordham Law Review*, no. 3, p. 294 ("[t]*he doctrine of consensual adjudicatory procedure is now well entrenched in federal practice and is widely heralded as a form of salutary progressivism. The doctrine is lauded for enhancing the values of predictability, certainty, security, stability and simplicity*").

> *dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved."*[762]

6.3 Criticisms Against Forum Selection Clauses

Many arguments have been put forward against forum selection clauses or, at least, against the way in which they are employed. A primary concern is the fact that these clauses are usually part of boilerplate agreements, and as such are often ignored or overlooked by the adhering parties. These parties may then find themselves required to travel long distances and incur large expenses if they wish to file suit against the other. These expenses and complications involved in merely having access to the court create the risk of, in effect, depriving one of the parties of an effective remedy, leaving her without real access to justice.[763] As an author noted in a commentary dealing with travel contracts:

> *"Such clauses can have a dramatic effect upon the consumer's enthusiasm in prosecuting his or her claim. Stated simply, the further away the court is, the less likely it is that the aggrieved consumer will file a lawsuit. This is because the cost of traveling to a distant court house and the cost of retaining out-of-state and, particularly, out-of-country attorneys (no contingency fee arrangements in most foreign jurisdictions) is too great to justify serious litigation. And this is, of course, the very reason why forum selection clauses are so popular with travel suppliers."*[764]

From this perspective, forum selection clauses appear as a tool that a savvy, calculating and powerful party can deploy *against* the other. Seen in this manner, depriving the other of her day in court would not be so much an unintended consequence of these clauses, but rather their real goal. By making litigation cumbersome and expensive, the drafter is thus able to dissuade most potential litigants from even trying.

---

[762] *Scherk v. Alberto-Culver Co.* [1974], 417 US, 506, p. 516 If anything, this general view has only increased over the years, with a New York court stating in a recent case that "[f]*orum selection clauses play a crucial role in ensuring predictability in contract formation*" (*Gasland Petroleum, Inc. v. Firestream Worldwide, Inc.* [May 4, 2015], 1–8, p. 7). In general, it seems safe to say that US federal courts have recognized the value of forum selection clauses, *"expanding"* their enforcement over the past several decades (RAPOPORT, J., 2012, supra note 751, p. 248). Although *Scherk* was an arbitration case, it should be kept in mind that the Court *"viewed the arbitration clause as essentially a forum-selection clause with a minor difference, because the arbitration clause 'posits not only the situs of suit but also the procedure to be used in resolving the dispute"* (MULLENIX, L. S., 1988, supra note 761, p. 316).

[763] DEMPSEY, J., 2011, supra note 748, p. 1206

[764] DICKERSON, T. A., 'Travel Abroad, Sue at Home 2012: Forum Non Conveniens & the Enforcement of Forum Selection and Mandatory Arbitration Clauses', 2012, 32 *Pace Law Review*, no. 2, pp. 432–433.

Another criticism is that forum selection clauses do not only affect the place where the trial is conducted, but also the outcome.[765] Some studies have shown that forum selection clauses tend to benefit the defendant, with outcomes being much more defendant-friendly in the pre-selected courts, than in those where proceedings were started in contravention to the clause.[766] Evidently, the drafter of a forum selection clause (like any other clause in the contract) will have his own interests in mind, and, as a result, will pick the court that benefits him the most. Because of this, as DEMPSEY notes,

> *"courts should be leery of forum selection clauses because they can serve as a vehicle for a sophisticated party who is knowledgeable of the benefits of a forum selection clause and willing to exploit the other party's lack of the same knowledge."*[767]

The argument that forum selection clauses save resources is also heavily criticized, as it might overlook the greater costs that they create. Critics point out that the savings obtained in preventing long pre-trial discussions about the venue might not be large enough to justify setting aside "*the more fundamental goal of enforcing rights and securing the equitable administration of justice."*[768]

PURCELL, in his very critical analysis of some American decisions enforcing forum selection clauses, argues that the problem is that these clauses, particularly when used in a consumer setting, "*create an egregious disproportionality."*[769] The reason for this being that whatever savings are perceived by the weaker party will likely be insignificant compared to the cost of, for all practical purposes, not being able to bring suit at all.[770] This problem, as he argues, is exacerbated by the inclusion of these clauses in the fine print of the contract, where the adhering party will almost certainly be unaware of them.

> *"Highly technical, apparently inconsequential, and rarely noticed or understood, they suddenly become -at a crucial and perhaps devastating time for the individuals and families involved- a substantial obstacle to suit and a powerful force pressing them to abandon their claims or to discount them substantially. The law should not*

---

[765] MARCUS, D., 2007, supra note 748, p. 975 ("[e]*mpirical studies have repeatedly confirmed that where cases proceed markedly impacts substantive outcomes"*).

[766] DEMPSEY, J., 2011, supra note 748, p. 1206. DEMPSEY cites a study where *"the plaintiff win rate dropped from [fifty-eight] to [twenty-nine] percent for cases that were transferred from plaintiffs to defend- ant's chosen forum, despite the fact that federal rules ensure application of the same law after a case is transferred."*

[767] ibid., p. 1206.

[768] PURCELL, E. A., JR., 'Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court', 1992, 40 *UCLA Law Review*, p. 431.

[769] ibid., p. 514.

[770] For an opposing view, *See* SORENSEN, M. J., 2013, supra note 759, p. 2528 ("[c]*ourts and commentators have noted, 'the right to litigate in one forum or another has an economic value that parties can estimate with reasonable accuracy," and it is arguably superior for the parties to allocate the costs associated with that right via contract"*).

> *sanction market failures that lead to such radical disproportionalities and compromise the essential integrity of the nation's system of civil justice."*[771]

The very real concern on the part of these critics is that when the bargaining power disparities are large enough, these clauses will force the weaker party to give away too many of his rights. This becomes particularly relevant when the forum selection is used not to designate a court but rather a for-profit arbitral venue, where commercial considerations may play a role in the verdict.[772] A study on the use of arbitral provisions on Social Networking Sites (SNS), for example, showed that through these clauses

> *"providers systematically foreclose consumer rights, violating the majority of* [...] *minimum consumer due process standards. SNS fail nearly every test of consumer due process fundamental fairness by creating a one-sided legal universe where users have no meaningful rights because they lack any practical way of obtaining a remedy. Arbitration clauses are the classic illustration of a private justice system where SNS can sidestep the possibility of punitive damages, jury verdicts, class actions, and consequential damages. Tort law is being subsumed by this radical extension of contract law."*[773]

The commercial benefits that are allegedly rendered by these provisions have also been called into question, particularly for not minding the way in which forum selection clauses actually affect human behavior. In particular, proponents ignore that most cases will never reach a court, since they will often be settled privately by the parties; also, that geographical moves can represent a real deterrent for a party to seek relief by the courts, placing her at a great disadvantage in comparison to the more powerful party, who is not constrained by such costs. Finally, proponents also overlook the fact that forum selection clauses are often drafted in a way that maximizes the leverage of the drafting party in the claims process.[774] If proven true, all of these factors would mean that forum selection clauses may not actually enhance predictability and certainty, but rather simply create obstacles for the weaker party to obtain redress.

---

[771] PURCELL, E. A., JR., 1992, supra note 768, pp. 514–515.

[772] HARRINGTON, J., 'To Litigate or Arbitrate-No Matter-The Credit Card Industry Is Deciding for You', 2001, 2001 *Journal of Dispute Resolution*, no. 1, pp. 104–105 (mentioning the case of American credit card companies that become "repeat costumers" of certain arbitral centers).

[773] KOENIG, T. H. & RUSTAD, M. L., 'Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses', 2014, 65 *Case Western Reserve Law Review*, no. 2, p. 410. On the pervasiveness of arbitration provisions affecting consumers on the Internet *See* also CANIS, E., 2015, supra note 295, p. 128 ("[f]*or many of these clickwrap agreements, it is quite common for companies to try to include a provision that mandates forced arbitration. In fact, large companies, such as Facebook, have been in the news for such clickwrap Terms of Services and specifically for these provisions that attempt to force consumers to give up their right to sue*").

[774] PURCELL, E. A., JR., 1992, supra note 768, pp. 441–442.

While the benefits of forum selection might appear to be self-evident, their inherent risks must also be taken into account. Like any other clause in a contract, particularly one in which the rights of the parties are potentially jeopardized, forum selection clauses need to be carefully analyzed in order to determine whether they are truly the result of a real and free agreement. Particularly when we deal with contracts in which the bargaining power of the parties places one of them at the mercy of the other, whether in a consumer or a commercial setting, courts must be very careful when they determine whether or not such term should be enforced.

6.4 Forum Selection Clauses and Public Policy

Although nowadays the legitimacy of forum selection provisions is hardly a divisive issue, with courts in most of the world enforcing them as an essential part of international commerce, this has not always been the case.[775] On the contrary, courts have historically taken the position that agreements removing a case from their jurisdiction was against public policy.[776]

This historical rejection comes as a result of the very way in which forum selection clauses work. On the one hand, they work by consensually granting jurisdiction to a court that originally did not have it; on the other, they force the parties *not* to sue in any jurisdiction but the one they named, including courts that would otherwise *have* jurisdiction.[777] This is a matter of prorogation and derogation of jurisdiction, two sides of the same coin.[778] If

---

[775] RAPOPORT, J., 2012, supra note 751, p. 248 ("[c]ourts *in virtually every country around the world recognize the validity of such clauses and the important role they play in modern commerce"*).

[776] For the same reasons that "unconscionability" and "good faith" have been derided as useless for legal purposes, there are those who criticize the use of "public policy" as a legal argument**.** MCGEE, for example, argues that

> *"The public policy/public interest argument is a weak one* [...]. *There is no such thing as a 'public' interest because 'public' is just a collective term for a group of individuals, and individuals have different interests. If individual interests could be quantified and added together, we might be able to arrive at some approximation of what the majority wants in a particular case. But then we would be degenerating into a utilitarian approach, where individual rights fall by the wayside in the interests of majoritarianism."*

MCGEE, R. W., 1993, supra note 722, p. 358.

The problem with this line of thinking is that it seems to suggest that everything should be allowed, as long as nobody is financially or economically hurt in a direct and immediate fashion. Although it is true that certain terms are hard to properly define, such a position seems indefensible, as it suggests that society should have no guiding moral values influencing its institutions.

[777] RICHMAN, W. M., 'Carnival Cruise Lines: Forum Selection Clauses in Adhesion Contracts', 1992, 40 *The American Journal of Comparative Law*, no. 4-

[778] HARRIS, J., 'Contractual Freedom in the Conflict of Laws', 2000, 20 *Oxford Journal of Legal Studies*, no. 2, p. 249. Although we will use them for the sake of simplicity, it should be noted that *"prorogation"* and *"derogation"* are terms most commonly associated with Civil Law systems, and not so much with those belonging to the Common Law tradition (on this issue, *See* MULLENIX, L. S., 1988, supra note 761, pp. 329–332 and GILBERT, J. T., 1976, supra note 754, p. 5).

the parties agree to conduct proceedings in a court that otherwise does not have jurisdiction over the dispute, then there is a *prorogation* of jurisdiction, since the parties are the one conferring jurisdiction by consent to this court. On the flip side, the court that would have otherwise had jurisdiction to hear the case is thus deprived of it, by means of a *derogation* of jurisdiction by the consent of the parties.[779]

The ability of private parties to confer jurisdiction by consent does not have a particularly troubled history. Both in Common as well as Civil Law systems it has been long accepted that the parties to a contract are indeed able to confer jurisdiction to courts that would have otherwise been unable to hear the conflict.[780] Disputes have arisen, however, by the other side of this issue, the ability of the parties to "waive" the jurisdiction of a court by private agreement, i.e. their ability to *derogate* the jurisdiction of a court.[781]

An interesting difference on the issue of *derogation* and *prorogation* emerges between systems of the Common Law and the Civil Law families, since they traditionally dealt with these agreements in completely different ways. As FARQUHARSON explained:

> *"The civil law, constructed on the foundation of the Roman law of obligations, had developed* [by the 19th century] *a sophisticated commercial law based upon the concept of 'party autonomy.' The starting point of the civil law jurisdiction was the principle that the parties' choice of forum should, subject to a few exceptions, always be given effect. England, on the other hand, had retained almost feudal legal concepts until the Industrial Revolution made necessary a more flexible commercial law. The change greatly differed from the civil law. One factor attributed as an important reason for this difference is that in England the judiciary played (and continues to play) a more significant role in the formulation of law. Along with this larger role, there was the desire of the judiciary to guard its right to jurisdiction."*[782]

Some commentators have argued that the term "derogation" is not entirely accurate, since it is not that the otherwise competent court loses its jurisdiction, but rather that, by enforcing the forum selection clause, chooses not to exercise it.[783] This was, for example,

---

[779] REILLY, J. M., 1971, supra note 747, p. 324. *See* also GILBERT, J. T., 1976, supra note 754, p. 5.
[780] BECKER, J. D., 1989, supra note 747, p. 171.
[781] GILBERT, J. T., 1976, supra note 754, p. 6.
[782] FARQUHARSON, I. M., 1974, supra note 750, p. 88.
[783] *See*, for example, SOLIMINE, M. E., 1992, supra note 743, p. 54 ("[t]*he 'ouster' concept, for example, misconceives the real issue, which is whether a court should abstain from exercising jurisdiction in a case in favor of a forum- selection clause"*); DAVIES, M., 'Forum Selection Clauses in Maritime Cases', 2002, 27 *Tulane Maritime Law Journal*, no. 2, p. 368 (*"some views of the proper operation of forum selection clauses suggest (mistakenly, in the author's view) that they deprive the court of jurisdiction. If that is the right analysis of the operation of a forum selection clause, it follows that a moving party relying on such a clause truly challenges the court's jurisdiction, rather than merely asking the court not to exercise it. The better view is, however, that a moving party relying on a forum selection clause must acknowledge that the court has jurisdiction and must argue that the clause gives the court reason not to exercise that jurisdiction"*); and LEDERMAN, L., 1991, supra note 745, pp. 428–429 ("*this categorization* [of forum selection clauses ousting the

the position put forward by the United States Court of Appeals for the Second Circuit in *Muller v. Swedish American Line,* where the Court, enforcing a forum selection clause, stated that:

> *"*[T]*he parties by agreement cannot oust a court of jurisdiction* […]*; notwithstanding the agreement, the court has jurisdiction. But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented."*[784]

GILBERT has also argued that speaking of "conferring" jurisdiction, or "ousting" a court of jurisdiction, is incorrect. In his view,

> *"*[i]*f the* [forum selection] *agreement is enforced, it cannot truly be said that jurisdiction has been conferred or ousted by the parties. Jurisdiction is exercised or withheld only by force of the law that gives effect to the parties' agreement. If this analysis is accepted, it is still permissible to speak of the 'conferring' or 'ousting' of jurisdiction by contract so long as we do not allow this terminology to mislead us into thinking that parties can undermine or augment the powers of states or courts when they bargain away merely their own legal privileges."*[785]

While GILBERT's position might seem reasonable at first, in reality it appears to be more of a case of cognitive dissonance and of Orwellian doublespeak. As MULLENIX argues:

> *"*[It] *represents some fancy, linguistic mumbo-jumbo that does violence to a common understanding of the English language. In truth, when a court enforces a forum-selection clause it is in derogation of its own jurisdiction and deprives that court of its ability to adjudicate the legal claims of the disputing parties. Since* [nowadays] *forum-selection clauses are prima facie valid unless proven otherwise, the original forum has, as a practical matter, no choice but to yield its jurisdiction to the selected forum. Surely, for those courts that view forum-selection clauses as jurisdictional with the concomitant remedy of dismissal, this effectively constitutes an ouster of jurisdiction."*[786]

Certainly, there is a case to be made that the courts that are "ousted" are, actually, exercising their jurisdiction when they decline to exercise it. This is, as a matter of fact, the most common opinion. At the same time, however, it seems like a complicated and

---

jurisdiction of the courts] *is fallacious: forum-selection clauses cannot limit the subject matter jurisdiction of courts, since private parties have no power to abrogate statutorily conferred jurisdiction"*).

[784] *Wm. H. Muller & Co. v. Swedish American Line Ltd.* [1955], 224 F. 2d, 806–808, p. 808. *See* also SCHREIBER, H. W., 'Appelability of a District Court's Denial of a Forum-Selection Clause Dismissal Motion: An Argument against Cancelling out the Bremen', 1988, 57 *Fordham Law Review,* p. 466

[785] GILBERT, J. T., 1976, supra note 754, p. 5

[786] MULLENIX, L. S., 1988, supra note 761, p. 331

artificial solution to a fairly straightforward situation. Forum selection clauses, beyond any linguistic and philosophical debates that might be had about them, do indeed deprive the non-chosen courts of jurisdiction. If not in theory, definitely in practice. The issue then becomes whether it is reasonable and convenient to allow the parties to, by private agreement, have such a massive effect on what is actually an issue of public order.

A balancing test between the benefits and the drawbacks of forum selection clauses clearly shows that their use is tremendously convenient. Indeed, even though valid criticisms exist, the benefits that they report to businesses, particularly in the international stage, are sufficient to justify allowing and even encouraging their use. At the same time, however, we should keep in mind that the judicial system is, at the end of the day, the only assistance that those victimized by others can resort to. Because of this, while forum selection clauses in contracts between parties of similar bargaining power should be readily accepted by the courts, they should be more skeptical about their use in imbalanced situations.

If one of the parties is able to effectively leave the other without any real chance of obtaining relief, the damage caused by such a clause goes beyond any discussion about "derogation" and "prorogation." It then becomes an issue dealing with the fundamental right of having access to an impartial system that can resolve our grievances. Whether it is being used against a consumer or a small or medium business, courts should tread carefully in any situation in which the will of the strong was imposed upon the weak.

Chapter 7
Forum Selection in the United States

"Equal justice under law is not merely a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society .... It is fundamental that justice should be the same, in substance and availability, without regard to economic status."

Justice Lewis F. Powell Jr.[787]

7.1 Development of Forum Selection in the United States[788]

The idea that litigants can choose in advance the court that will hear their disputes, as well as the law that will govern it, enjoys *"widespread approval"* in federal courts.[789] This was not always the case, however, since until the second half of the 20th Century, American courts, both at a federal and at a state level, showed a *"marked hostility towards choice of forum clauses."*[790] They refused to dismiss cases that were brought in violation of these agreements, arguing that it was not permissible for someone to oust a court of jurisdiction.[791][792] Based on this understanding of forum selection, federal and state courts refused to enforce these clauses, considering them against public

[787] Cited in ZIETLOW, R. E., 'Exploring a Substantive Approach to Equal Justice under Law', 1998, 28 *New Mexico Law Review*, no. 3, p. 411.

[788] Due to our focus on international disputes, and although a review of both domestic and transnational cases will be made, special attention will be placed in transnational and interstate cases. Although many of the same principles apply, inherently domestic disputes, like those pertaining to labor and consumer law, might follow different rules.

[789] MULLENIX, L. S., 1988, supra note 761, p. 293.

[790] DELAUME, G. R., 'Choice of Forum Clauses and the American Forum Patriae; Something Happened on the Way to the Forum: Zapata and Silver', 1972, 4 *Journal of Maritime Law and Commerce*, no. 2, p. 295. *See* also SORENSEN, M. J., 2013, supra note 759, p. 2529 ("*American courts, both state and federal, were nearly unanimous in their refusal to enforce forum-selection clauses*") and MULLENIX, L. S., 1988, supra note 761, p. 294 ("*the current doctrine of consensual adjudicatory procedure represents a wholesale abandonment of a 100-year taboo against party autonomy in procedural matters*").

[791] DELAUME, G. R., 1972, supra note 790, p. 296.

[792] DEMPSEY, J., 2011, supra note 748, p. 1199.

policy.[793] As the Supreme Court of Wisconsin ruled in the 1874 case of *Insurance Co. v. Morse*:

> *"Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot* [...] *be tried in any other manner than by a jury of twelve men, although he consents in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."*[794]

The United States Court of Appeals of the 5th Circuit restated this approach in the 1958 case of *Carbon Black Export, Inc., v. The SS Monrosa,* where the Court stressed that there was

> *"*[a] *universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced."*[795]

This was the so-called "ouster doctrine," and according to which "*a court properly vested with jurisdiction could not be ousted by the acts of a private party*."[796] This was truly a public law issue, as the courts clearly saw forum selection clauses as a tool through which the parties could go against the public policy, as manifested in the jurisdictional rules established in the law. Additionally, as the cited case of *Insurance Co. v Morse* shows, the view was that the right of a person "*to resort to any forum which had jurisdiction,"* could not be bartered away, nor could it be restricted by any special legislation.[797]

Forum selection clauses were thus seen as against public policy because they could result in avoiding the application of the rules and norms that would have otherwise applied to the conflict.[798] With this rationale in mind, courts where cases were brought in contravention of a forum selection clause, refused to surrender the action to the selected

---

[793] GOLDMAN, L., 1991, supra note 748, p. 702.
[794] *Home Insurance Co. v. Morse* [1874], 87 US, 445–459, p. 451.
[795] *Carbon Black Export Inc. v. The SS Monrosa* [1958], 254 F. 2d, 297, p. 300.
[796] SORENSEN, M. J., 2013, supra note 759, p. 2529.
[797] BERGMAN, G. M., 'Contractual Restrictions on the Forum', 1960, 48 *California Law Review*, no. 3, pp. 438–439.
[798] SCHREIBER, H. W., 1988, supra note 784, p. 465.

forum, reasoning that "*a result which would be distasteful by their own judicial standards must be void as against the public policy of their own jurisdiction..*"[799]

Other reasons given by the courts in their refusals to enforce the choice of forum provisions seemed questionable, and were often hard to classify, merely referencing previous decisions but not explaining why it was appropriate to continue following them.[800] This created a significant lack of consistency in the case law, with some decisions seeming to have been grounded on the disparity of the bargaining power of the parties, others on reasons of convenience of not relegating a local to a foreign forum, and some others in completely different reasons altogether.[801]

By 1964 the situation in America had been marked by a majority of cases in which forum selection clauses had not been enforced by the courts, as well as some outliers also present in the case law where the clauses had been more or less enforced. This lead to one commentator noting that the one thing that could be said with certainty was that "[i]*n the United States the effect of a choice of forum clause dealing with future controversies is uncertain.*"[802] It was a fairly chaotic situation where, in addition to the judicial hostility

---

[799] HIMEL, S., 'Contracts - Jurisdiction - Absent a Strong Showing of Unreasonableness or Undue Influence, Parties' Contractual Selection of Forum in International Transactions Will Be Valid and Enforceable', 1973, 3 *Georgia Journal of International and Comparative Law*, no. 1, p. 202.

[800] REILLY, J. M., 1971, supra note 747, p. 327.

[801] GILBERT, J. T., 1976, supra note 754, p. 9. GILBERT also puts forward the idea that the courts' historical disdain for these clauses might have been grounded not so much on legal reasoning, but rather on what were once practical factors. He argues that when the courts were paid based on the amount of cases they heard, enforcing these provisions would have represented a threat to their livelihood, and that this original rejection was inherited by their successors, even after this economic motivation was removed (*See* also JUENGER, F. K., 1972, supra note 749, p. 51 and BRITTAIN JR., J. T., 2000, supra note 752, p. 309). On the issue of bargaining power, already in 1856 the Supreme Court of Massachusetts, in what for a long time became the leading case on the topic, was clear on its rejection of forum selection clauses. Indeed, in the case of *Nute v. Hamilton Mutual Insurance*, the Court illustrated the fear that existed that these clauses could eventually become customary (in this case, in insurance contracts) and irreparably affect legal symmetry. As the Court stated:

> *"The rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience. Such contracts might be induced by considerations tending to bring the administration of justice into disrepute; such as the greater or less intelligence and impartiality of judges, the greater or less integrity and capacity of juries, the influence, more or less, arising from the personal, social or political standing of parties in one or another county. It might happen that a mutual insurance company, in which every holder of a policy is a member, and of course interested, would embrace so large a part of the men of property and business in the county, that it would be difficult to find an impartial and intelligent jury."*

Nute v. Hamilton Mutual Insurance Co. [1856], 72, 174–185, p. 184.

For background information regarding the *Nute* case and its decision, *See* also REILLY, J. M., 1971, supra note 747, pp. 325–326 and GILBERT, J. T., 1976, supra note 754, p. 12.

[802] REESE, W. L. M., 'The Contractual Forum: Situation in the United States', 1964, 13 *American Journal of Comparative Law,* p. 187.

towards these clauses, there was also a lack of consistency among the different jurisdictions.[803]

The outlier cases where the forum selection clauses had been enforced (in one way or another) contributed to the uncertainty. Indeed, some courts seemed to allow for the indirect enforcement of forum selection clauses, resorting to doctrines like that of *forum non conveniens*.[804] This was the case in, for example, the 1955 case of *Muller v. Swedish American Line*.

In *Muller,* the Muller Company, the cargo interest in a contract of carriage, commenced proceedings in New York against Swedish American Lines, the carriers of a cargo of cocoa beans between Sweden and Philadelphia. The defendants moved to dismiss the suit, pointing to a clause contained in the bill of lading that referred any dispute arising from the contract to Swedish courts, under Swedish law. The District Court for the Southern District of New York dismissed the suit, a decision that was later affirmed by the Court of Appeals for the Second Circuit, based on the "*reasonableness of the forum selection agreement.*"[805]

The Court of Appeals reasoned that since the selection of the Swedish forum did not violate the liability provisions of the US COGSA, as it did not involve a lessening of the liability of the carrier (the court argued that Swedish courts applied *"the same measure of damages"* as their American counterparts), the only criteria should then be the reasonableness of the forum selection. In this case, since the vessel was of Swedish ownership, had been built in Sweden and even had a Swedish crew, then it was perfectly reasonable to assume that proceedings would not be hindered if they were to be conducted in Sweden.[806] What is more, the Court refused to entertain the action brought in contravention of the clause expressly mentioning that the added costs of litigating in Sweden were merely *"incidental to the process of litigation,"* and could not be understood as lessening the liability of the carrier.[807]

While the *Muller* decision was later overruled by the 1967 case of *Indussa Corporation v. S.S. Ranborg*, this was not a ruling based on the reasonableness criteria established in *Muller*, but rather on the interpretation of the liability provision of the US COGSA.[808] Even though later cases, like *Geiger v. Keilani,* expressly mentioned that the *Muller*

---

[803] HIMEL, S., 1973, supra note 799, p. 201.
[804] DEMPSEY, J., 2011, supra note 748, p. 1200.
[805] REILLY, J. M., 1971, supra note 747, p. 327. The Court even dismissed (perhaps wrongly) the idea that there was an "*absolute taboo"* in American law against forum selection clauses, although it recognized that there was indeed a certain *"general hostility"* against them (*Wm. H. Muller & Co. v. Swedish American Line Ltd.* [1955], p. 808).
[806] ibid., p. 808.
[807] ibid., p. 807.
[808] *Indussa Corporation v. S.S. Ranborg* [1967], 377 F. 2d, 200–205. *See* also REILLY, J. M., 1971, supra note 747, p. 328. On the *Indussa* case, *See* page 416 infra.

rationale should apply in cases that were not ruled by the US COGSA, the authority and strength of the *Muller* decision was severely damaged by *Indussa*.[809]

7.2 *The Bremen* and the Acceptance of Forum Selection

The ideological rejection of forum selection clauses in America started its true erosion in the late 1960's and early 1970's (even if, as we have seen, some decisions go back to the mid 50's), when a minority of courts started to enforce forum selection clauses.[810] In doing so, and following the ideas popularized by the *Muller* decision in 1955, these courts adopted a standard of reasonableness in order to determine whether a forum selection clause should be enforced, instead of simply assuming that it was *prima facie* unenforceable for reasons of public policy.[811]

The reasons behind the ouster doctrine were also losing a large part of their justifications, particularly after the passing of express legislation allowing for arbitration agreements.[812] This created a truly bizarre situation, since parties that had agreed to submit their disputes to an arbitral tribunal would be able to enforce such a clause, while those who had agreed to submit their disputes to a court, would not be able to do so. And so, for example, courts would allow parties in Florida to *"seek justice before the U.S.S.R. Chamber of Commerce Foreign Trade Arbitration Commission in Moscow,"* but not to do defer their affairs to a court in Washington.[813]

The winds of change became even stronger with the 1971 American Law Institute's Restatement (Second) of Conflict of Laws, which also favored enforcement.[814] As it established in §80:

---

[809] ibid., p. 328.

[810] Some authors point at the opinion of Judge HAND in the 1949 case of *Krenger v. Pennsylvania R.R. Co.* as giving momentum to rejection of the ouster doctrine (BRITTAIN JR., J. T., 2000, supra note 752, p. 310). As he stated in that case:

> *"There is of course force in what my brother Swan says: that a man, who has a choice of where to sue upon an existing claim, ought to be allowed to make an irrevocable choice before he actually sues; but is there any greater reason why he should not be able to make the same choice before the claim has arisen? Whatever the grounds for denying him the privilege in the second case, seem to me to deny it in the first. In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all;* [...] *they are invalid only when unreasonable.* [...] *What remains of the doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist."*

Krenger v. Pennsylvania R. Co. [1949], 174 F. 2d, 556–562, pp. 560–561.

[811] SCHREIBER, H. W., 1988, supra note 784, p. 467.

[812] BRITTAIN JR., J. T., 2000, supra note 752, pp. 324–325.

[813] JUENGER, F. K., 1972, supra note 749, p. 53.

[814] COSTELLO, F. W., 1972, supra note 749, p. 452. *See* also SOLIMINE, M. E., 1992, supra note 743, pp. 54–55 ("*a trend toward enforcing such clauses was an emerging, if still minority, view. The trend was reflected in the late 1960s by*

> *"The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."*

In this section, the Restatement was paying special attention (albeit in different terms) to the original discomfort that existed regarding forum selection clauses, based on the understanding that they somehow deprived the not-selected courts of jurisdiction. As the Restatement noted in the comment to this section:

> *"Private individuals have no power to alter the rules of judicial jurisdiction. They may not by their contract oust a state of any jurisdiction it would otherwise possess. This does not mean that no weight should be accorded a provision in a contract that any action thereon shall be brought only in a particular state. Such a provision represents an attempt by the parties to insure* (sic) *that the action will be brought in a forum that is convenient for them. A court will naturally be reluctant to entertain an action if it considers itself to be an inappropriate forum. And the fact that the action is brought in a state other than that designated in the contract affords ground for holding that the forum is an inappropriate one and that the court in its discretion should refuse to entertain this action. Such a provision, however, will be disregarded if it is the result of overreaching or of the unfair use of unequal bargaining power or if the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action. On the other hand, the provision will be given effect, and the action dismissed, if to do so would be fair and reasonable."*[815]

It is important to note that at this time, despite the increasing number of courts that recognized the enforceability of forum selection clauses, the large majority of courts still followed the traditional view.[816] Only once the Supreme Court established a clear rule on the matter did the situation finally change for good. Indeed, it was in the seminal case of *M/S Bremen v. Zapata Off-Shore Co.*, that the tides finally turned in American law regarding enforcement of forum selection clauses.[817] In a breakthrough, 8 to 1 decision, the Supreme Court established the notion that forum selection clauses are to be considered as *prima facie* enforceable, unless they are shown to be unfair or unreasonable. Although this did not represent a completely new creation (as we have seen, *Muller* had included such reasonableness test), and the Court was actually quite restrictive in the

---

the American Law Institute's revision of the Restatement of Conflict of Laws calling for choice-of-forum clauses to be enforced unless they were 'unfair or unreasonable'") GOLDMAN notes that even before this date there were already some signs pointing towards acceptance, even going all the way back to 1949. He concedes, however, that *"the majority of jurisdictions adhered to the traditional view"* (GOLDMAN, L., 1991, supra note 748, p. 702).

[815] Restatement (Second) of Conflict of Law Section 80.

[816] SCHREIBER, H. W., 1988, supra note 784, p. 467.

[817] MARCUS, D., 2007, supra note 748, p. 975 ("[t]*he era of contract procedure arguably dawned with The Bremen* [...]").

application that it sought to established for forum selection clauses (in light of the very unique facts of *The Bremen*), it served as the springboard for a whole new era in American contract law.

The Bremen involved a contract between Unterweser Reederei, GmBH, a German corporation, and Zapata Off-Shore Company, an American corporation, to tow a drilling rig owned by Zapata from Louisiana to a point in the Adriatic Sea off the coast of Italy. The contract of towage, which was the result of a bidding process solicited by Zapata, included the following terms:

> *"Any dispute arising must be treated before the London Court of Justice."*[818]
>
> "[The vessel and its] *masters and crews are not responsible for defaults and/or errors in the navigation of the tow."*
>
> *"Damages suffered by the towed object are in any case for account of its Owners."*[819]

After the rig was damaged during a storm in the Gulf of Mexico, Zapata commenced an admiralty suit in Florida against Unterweser. The defendant moved to dismiss, arguing that the suit had been brought in contravention to the forum selection clause included in the contract. Both the Florida Court and the Court of Appeals rejected the defendant's argument, restating the dominant position at the time that "*agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy, and will not be enforced*."[820]

Reviewing the defendant's appeal, the Supreme Court called the ouster doctrine (that a forum selection clause deprives the court of jurisdiction) a "*vestigial legal fiction*", and held the clause to be fully enforceable. The Court based its decision, in among others, a full rejection of the predominant ouster doctrine, arguing that the traditional understanding of forum selection clauses

> *"appears to rest at* [its] *core on historical judicial resistance to any attempt to reduce the power and business of a particular court, and has little place in an era when all courts are overloaded and when businesses, once essentially local, now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals."*[821]

And so, with this rationale in mind, the Court vacated the lower Court's decision, ruling that in order to comply with *"the legitimate expectations of the parties, manifested in their freely negotiated agreement,"* the forum selection had to be enforced, and the plaintiff's suit

---

[818] *The Bremen v. Zapata Off-Shore Co.* [June 12, 1972], 407 US, 1, p. 2.
[819] ibid., p. 24 *See* also GOLDMAN, L., 1991, supra note 748, p. 702.
[820] *The Bremen v. Zapata Off-Shore Co.* [June 12, 1972], p. 6.
[821] ibid., p. 12.

dismissed.[822] Marking the beginning of a new era in American law, the Court considered that

> "[Forum-selection clauses are] *prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances* [...] *A freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power* [...] *should be given full effect."*[823]

Primarily, the Court supported its decision on its previous ruling on *National Equipment Rental v. Szukhent*, where the Court had ruled that "*it is settled... that the parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether*."[824] Also, the Court took into consideration the Restatement (Second) of Conflict of Laws and classic notions of freedom of contract.[825] Finally, the Court even made a passing reference to comparative law, mentioning that enforcing forum selection clauses was the approach "followed in other common law countries, including England."[826]

Beyond the (sometimes questionable) legal and doctrinal arguments put forward by the Court in its decision to justify the massive change represented by *The Bremen*, it seems beyond any doubt that its true foundations laid elsewhere. Indeed, the Court demonstrated a (perhaps understandable) sensitivity to the changing face of commerce,

---

[822] The Court also ruled on the issue of an exculpatory clause present in the agreement, and which the plaintiffs argued would be illegal under American law, but enforceable in the chosen forum. The Court rejected this argument (SOLIMINE, M. E., 1992, supra note 743, p. 56).

[823] *The Bremen v. Zapata Off-Shore Co.* [June 12, 1972], p. 10

[824] *National Equipment Rental, Ltd. v. Szukhent* [1964], 375 US, 311, pp. 315–316 In this case,

> *"the question in issue was the effect of a clause in a sales contract, by which the defendants authorized an agent in the state of New York to receive service of process. The Court said that there was no reason to deny giving effect to this authorization, especially since the agent used reasonable diligence in informing the defendants of the pending suit."*

FARQUHARSON, I. M., 1974, supra note 750, p. 97.

[825] GOLDMAN, L., 1991, supra note 748, p. 703 Placing the legal foundation of *The Bremen* in *National Equipment Rental, Ltd. v. Szukhent* is rather curious (MULLENIX calls it downright "*inappropriate*"), since it did not involve a forum selection clause, but rather the designation of an agent for the service of process. Furthermore, considering that at the time of *Szukhent* the general view among US courts was still of rejecting forum selection clauses, the fact that *"a conclusive rule of jurisdiction by contractual agreement should appear by fiat in Szukhent was surprising, indeed"* (*See* MULLENIX, L. S., 1988, supra note 761, pp. 308–311). Furthermore, even though *"the Supreme Court in* [*Szukhent*] *upheld the right of the parties to designate an agent, thereby accomplishing the same thing as a choice-of-forum clause, no court ever extended an interpretation so far* [until the decision in *The Bremen*]" (FARQUHARSON, I. M., 1974, supra note 750, p. 97).

[826] *The Bremen v. Zapata Off-Shore Co.* [June 12, 1972], p. 11 On forum selection in England *See* Chapter VIII.

as well as the importance that international trade would have for America, basing a big part of its decision on policy considerations.[827] For example, the Court noted that:

> *"For at least two decades, we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that, once tended to confine a business concern to a modest territory no longer does so. Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the Carbon Black case have little place, and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."*[828]

The Supreme Court also noted that selecting a forum allows for the elimination of uncertainties for the parties to a contract. Because of this, the court stated that enforcing such a clause *"is an indispensable element in international trade, commerce and contracting"*.[829]

To its credit, the Supreme Court went out of its way to highlight the unique and international elements of the contract at the center of *The Bremen*, as well as how it had been the object of careful negotiation by the parties:

> *"In this case* [...] *we are concerned with a far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea. In the course of its voyage, it was to traverse the waters of many jurisdictions. The Chaparral could have been damaged at any point along the route, and there were countless possible ports of refuge. That the accident occurred in the Gulf of Mexico*

---

[827] MULLENIX, L. S., 1988, supra note 761, p. 312 ("[t]*he linchpin of The Bremen's approval of forum-selection clauses, however, lay in policy considerations rather than doctrinal support*"). *See* also SCHREIBER, H. W., 1988, supra note 784, p. 468 (arguing that *The Bremen* rested substantially on *"grounds of freedom of contract and commercial efficiency*). DELAUME explains how, by refusing to enforce the forum selection clause, the Court of Appeals had *"showed a total disregard for the necessities of international business relations and the principle of party autonomy."* Because of this alleged "*backward step"* taken by the Appellate Court, he praises the Supreme Court decision that overturned it based on these policy considerations (DELAUME, G. R., 1972, supra note 790, pp. 301–302).

[828] *The Bremen v. Zapata Off-Shore Co.* [June 12, 1972], pp. 8–9.

[829] ibid., pp. 13–14.

> *and the barge was towed to Tampa in an emergency were mere fortuities. It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes arising during the tow.* [...] *There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations."*[830]

> *"The choice of that forum was made in an arm's length negotiation by experienced and sophisticated businessmen, and, absent some compelling and countervailing reason, it should be honored by the parties and enforced by the courts."*[831]

These comments were not mere platitudes, as the Court was concerned with ensuring that a distinction would be made between, on the one hand, the type of agreement that existed in *The Bremen* and, on the other, the run-of-the-mill contracts (international or otherwise) that people might find themselves into. As a matter of fact, the Court drew a clear line between these "ordinary" contracts and the one that was the object of the case, noting that:

> *"We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum. In such a case, the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause. The remoteness of the forum might suggest that the agreement was an adhesive one, or that the parties did not have the particular controversy in mind when they made their agreement; yet even there, the party claiming should bear a heavy burden of proof. Similarly, selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum."*[832]

---

[830] ibid., pp. 13–14. The last part of this paragraph has been interpreted by some as meaning that *"forum clauses* [are] *of the very substance of contracts"* (e.g. STARING, G. S., 'Forgotten Equity: The Enforcement of Forum Clauses', 1999, 30 *Journal of Maritime Law and Commerce*, no. 3, p. 408), as opposed to a procedural issue. This is a questionable reading (albeit not necessarily mistaken) as in this passage the Court does not seem to have been trying to make a declaration about *all* forum selection clauses, but rather to make it clear that *in this particular contract*, the forum selection clause had been an essential part of the negotiation.

[831] *The Bremen v. Zapata Off-Shore Co.* [June 12, 1972], p. 12. *See* also GOLDMAN, L., 1991, supra note 748, p. 703 (*"the Court, believing the parties conducted their negotiations with the consequences of the forum selection clause figuring prominently in their calculations, implied that nonenforcement of forum selection clauses would create a windfall to one party and unfairly penalize the other"*).

[832] *The Bremen v. Zapata Off-Shore Co.* [June 12, 1972], p. 17 *See* also GEHRINGER, A., 'After Carnival Cruise and Sky Reefer: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions', 2000, 66 *Journal of Air Law and Commerce*, no. 2, p. 639 ("[t]*he Court stressed* [...] *that the choice of forum* [...]*was made in an arm's length negotiation by sophisticated businessmen*") and LIESEMER, J. A., 'Carnival's Got the Fun and the Forum: A

By making forum selection clauses *prima facie* valid, unless they are proven to be unreasonable, the Court in *The Bremen* changed the face of American law. In order to prove this "unreasonable" character, the resisting party would have to demonstrate that the clause violated a strong public policy, or that its real effect was to deprive her of her day in court. As the Court stated:

> *"*[I]*t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain."*[833]

While this reversal of the burden of proof might seem unfair at first (and there are certainly those who consider this "prima facie" validity to be unjust) the truth is that it does make at least some sense. It would be unreasonable to expect the courts to approach contracts from a position in which their enforcement must be somehow justified by the parties. Except for the most blatant cases of illegality or violation of public policy (prostitution and murder-for-hire contracts come to mind) we cannot expect the courts to demand the interested parties to *prove* that the contract should be enforced. This was, however, precisely the situation that existed in the pre-*Bremen* era, where the burden was placed on the petitioners (those interested in enforcing the clause) to prove that the chosen forum was more convenient than the "default" forum.[834] This situation shows that, in *The Bremen*, the Supreme Court was right, at least in principle, in stating that the terms of the agreement are to be considered as *prima facie* enforceable, even if they include a forum selection clause, unless the resisting party can prove that they are unreasonable.

By reversing the burden of proof, the Court sought to prevent similarly-sized parties, in a contract that was freely bargained for, to try to escape their agreements for mere convenience. As LAGERMAN has noted, *"in a freely negotiated international commercial contract the parties ought to be able to foresee the amount of inconvenience which will result from litigating in the chosen forum"*.[835] Because of this, it should indeed be the party that resists the application of the forum selection clause who should demonstrate that it would be unreasonable to hold her to her bargain. The reasonableness, therefore, *must* be presumed, since the parties to a freely bargained for contract had been in a position to

---

New Look at Choice-of-Forum Clauses and the Unconscionability Doctrine after Carnival Cruise Lines, Inc. v. Shute', 1991, 53 *University of Pittsburgh Law Review*, no. 4, p. 1026 (*"*[t]*he Bremen Court pointed out that the agreement at issue was not a form contract with boilerplate language"*).

[833] *The Bremen v. Zapata Off-Shore Co.* [June 12, 1972], p. 18.

[834] HIMEL, S., 1973, supra note 799, p. 204.

[835] LAGERMAN, L. O., 1978, supra note 751, p. 782.

calculate their risks and costs in case of a dispute, and still chose to select a specific contractual forum.

7.3 *The Bremen's* "Reasonableness" Test

As we have seen, the Court in *The Bremen* did not intend to create an absolute presumption of validity for forum selection clauses. Instead, the Court sought to condition the validity of these clauses to a reasonableness test.

> *"Thus, forum selection clauses were invalid and unenforceable if a party could show that enforcement of the clause would be unreasonable or unjust; if the clause was the result of fraud or overreaching; if enforcement would contravene a strong public policy of the state in which the suit was brought; or if the parties who sued would be deprived of their day in court because the forum selected in the contract would be extremely difficult and inconvenient."*[836]

On the basis of this test, the burden of proof was now on the parties resisting the enforcement of the clause to prove that the clause itself was "unreasonable." This is no easy feat, with the Court itself recognizing that the resisting party *"carries a heavy burden of proof to overcome the strong presumption that the contractual choice is reasonable."*[837]

Based on both *The Bremen* itself, as well as the cases that have followed it, it is possible to recognize some of the criteria that an America court should take into consideration when deciding whether to deny the enforcement of a forum selection clause. These are whether the clause causes substantial inconvenience for one of the parties; whether it deprives the party of an effective remedy; and, finally, whether it is the result of an unconscionable bargain.

7.3.1 Substantial Inconvenience

What the presumption of reasonableness means for the resisting party is that she will have upon her the burden of proving that the selected forum is substantially inconvenient. It will not be, therefore, the job of the court to weigh in the convenience or inconvenience of the contractual forum, as it will be the party seeking to prevent the enforcement of the clause the one that will have to demonstrate the inconvenience.[838]

---

[836] MULLENIX, L. S., 'Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction', 1992, 27 *Texas International Law Journal*, no. 2, p. 338.
[837] LAGERMAN, L. O., 1978, supra note 751, p. 781.
[838] ibid., p. 782.

The party seeking to prove this substantial inconvenience faces an uphill battle, as the burden of proof established by *The Bremen*, as it has been interpreted by the courts, is quite high.[839] The very facts of *The Bremen* show exactly how high this burden is, when we consider that, as Justice DOUGLAS noted in his dissent,

> *"the casualty* [motivating *The Bremen*] *occurred close to the District Court, a number of potential witnesses, including respondent's crewmen, reside in that area, and the inspection and repair work were done there. The testimony of the tower's crewmen, residing in Germany, is already available by way of depositions taken in the proceedings."*[840]

Clearly, these arguments failed to impress his colleagues on the bench; neither were they impressed by the fact that the District Court was *not* inconvenient to hear the case. What was required of the resisting party, therefore, was not only proving that this forum was convenient, but also that litigating in the contractual forum would have been greatly inconvenient.

It is worth noting that despite how high this burden is, some courts have been sympathetic to situations in which the judicial proceedings themselves would be very difficult to conduct if the forum selection was enforced, even if only for geographical reasons. This was the case in in *Copperweld Steel Company v. Demag-Mannesmann-Boehler*, where a Pennsylvania District Court refused to enforce a forum selection clause included in a construction contract for a plant in Pennsylvania, and which granted exclusive jurisdiction to a German court. In its decision, the Court reasoned that enforcing this clause would jeopardize the proceedings:

> *"The casting plant, the performance of which is in dispute, is located here. We foresee the necessity to examine the plant in detail. The plant was constructed by a Pennsylvania firm, all of whose employees are here. Did the defect occur in construction? All of the people who operated the plant are here. Did they operate it improperly? All of the plant's customers are here. If they refused the product, why did they do so? How can these people be made available in Germany? There is no process there to compel their attendance at trial even if they could be transported to Germany. What of the language difficulties? Of course, the German engineers will be*

---

[839] In *Roach v. Hapag-Lloyd*, a California District Court enforced a German forum selection clause, even though the facts showed that there was some degree of inconvenience in conducting the proceedings in Germany. The Court noted that although it was true that, for example, the witnesses that would need to give their statements in the proceedings were located in America, this alone was not enough to meet the burden established by *The Bremen* of *"clearly show*[ing]" that the clause was unreasonable. The Court weighed the fact that the bill of lading in question was issued in Germany, and that the parties were themselves German, and determined that, although it was an "*extremely close question*," the clause should be enforced (on this issue, *See*, generally, *Roach v. Hapag-Lloyd* [1973], 358 F. Supp., 481 and LAGERMAN, L. O., 1978, supra note 751, pp. 783–784).

[840] *The Bremen v. Zapata Off-Shore Co.* [June 12, 1972], p. 23.

> *inconvenienced and they will have language difficulties we assume, but we think it will be of some advantage to them to have the contractor and the operating people available for obvious reasons.*
>
> *We remain convinced that in this particular case plaintiffs could not adequately try their case if forced to proceed in Germany and thus perhaps could not obtain a fair and complete hearing not because of any lack of sincerity or competence of the German Courts which we assume to be as fully adequate as our own, but because of the obvious impracticality of conducting the litigation in Germany."*[841]

Courts will usually set a particularly high burden when it comes to commercial parties in international contracts, since such parties are expected to have foreseen any eventual inconvenience associated with the selected forum.[842] Although this is reasonable when it comes to similarly-sized parties, it would certainly not be convenient to deny relief to a party simply because it is a commercial entity dealing internationally. The power differences among commercial parties are just as big as they can be in other contractual settings, and thus a small merchant might find itself litigating in a distant, completely inconvenient forum, simply because there was no opportunity to dicker over the terms of the agreement. Despite some calls for nuance, however, findings of substantial inconvenience remain rare, even outside of a commercial setting.[843]

7.3.2 Denial of an Effective Remedy

Within this criterion, a court might refuse to enforce the forum selection clause if "*the chosen state has not empowered its courts to hear this type of actions or if the defendant is not subject to its service of process. Also, the particular chosen court may lack subject matter jurisdiction over the claim*."[844] Other reasons might include uncertainty as to whether the defendant would appear in the chosen forum, the probability that the plaintiff would be denied a remedy, and the possibility that it would be impossible to enforce a judgment issued by the forum.[845]

This criterion is based on an interpretation of the *real* meaning of the parties' agreement. Evidently, the parties would not have intended to prevent disputes from being resolved,

---

[841] *Copperweld Steel Co. v. Demag-Mannesmann-Boehler* [1972], 347 F. Supp., 53, pp. 54–55. The decision was later affirmed in *Copperweld Steel Co. v. Demag-Mannesmann-Bohler* [May 25, 1978], 578 F. 2d, 953. *See* also GRUSON, M., 'Forum-Selection Clauses in International and Interstate Commercial Agreements', 1982 *University of Illinois Law Review*, no. 1, p. 182.
[842] LAGERMAN, L. O., 1978, supra note 751, p. 782.
[843] BUXBAUM, H. L., 'Forum Selection in International Contract Litigation: The Role of Judicial Discretion', 2004, 12 *Willamette Journal of International Law and Dispute Resolution*, no. 2, p. 194.
[844] LAGERMAN, L. O., 1978, supra note 751, p. 783.
[845] COSTELLO, F. W., 1972, supra note 749, p. 454.

and so it would be unjust to enforce a clause that would bring *that* as a result. This sentiment was reflected in a comment in the Model Choice of Forum Act of 1968, and which stated that:

> *"*[This] *limitation* […] *will almost surely be in accord with the intentions of the parties. They can hardly have intended to require the plaintiff to bring suit in a state where he could at no time have obtained effective relief*."[846]

This issue was reviewed by the Louisiana Court of Appeals for the 4th Circuit in *Calzavara v. Biehl & Co.*[847] In this case, the plaintiff, a US citizen brought a suit in the United States against the defendant, an American company, for the breach of contract resulting from the defendant not honoring his ticket to be a passenger aboard a vessel. The contract contained a clause that all disputes *"shall be sustained in the Court of law of Venice."*[848] Ruling the clause unenforceable, the court noted that:

> "[The] *plaintiff is a citizen of the United States residing in New Orleans and defendant is a Louisiana corporation domiciled in the Parish of Orleans. To hold that plaintiff can bring his action against the defendant only in Venice, Italy would be equivalent to holding that he cannot bring the action against the defendant anywhere. Obviously, the courts of Italy could not acquire effective jurisdiction over the defendant."*[849]

7.3.3 Unconscionability

In *The Bremen*, the Supreme Court emphasized the fact that the agreement between the parties had not been the result of an unconscionable bargain. It was, as the Court noted, "*a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power."*[850] The meaning of this passage is rather straightforward: If the clause had indeed been the product of an unconscionable bargain, then it would not have been considered valid.[851]

---

[846] REESE, W. L. M., 'The Model Choice of Forum Act', 1969, 17 *The American Journal of Comparative Law*, no. 2, p. 295. The importance of the Model Choice of Forum Act in *The Bremen* should not be overlooked, as it is part of the background that existed when the case was decided, and which also represented the winds of change in terms of enforcing forum selection clauses (*See,* generally, NADELMANN, K. H., 'Choice-of-Court Clauses in the United States: The Road to Zapata', 1973, 21 *The American Journal of Comparative Law*, no. 1).

[847] *Calzavara v. Biehl & Company* [1966], 181 So. 2d, 809–811.

[848] ibid., p. 810.

[849] ibid., pp. 810–811 *See* also *Lejano v. K.S. Bandak* [1997], 86 So. 2d, 158–172 (noting that the reasonableness of a forum selection clause is determined by the accessibility of the parties to the selected court).

[850] *The Bremen v. Zapata Off-Shore Co.* [June 12, 1972], p. 10.

[851] The Model Choice of Forum act reflected this sentiment in Section 3, number 4 and 5, stating that a forum selection clause should not be enforced if

As we saw in previous sections, the motivation that rests behind the refusal to enforce unconscionable bargains is that "*in situations of unequal bargaining power, there is no real agreement between the parties. The weaker party is forced to take the unfavorable clause with his bargain or there would be no contract at all.*"[852]

In *Matthiessen v. National Trailer Convoy, Inc.*, a decision predating *The Bremen,* a Minnesota District Court analyzed the issue of fairness and reasonableness of forum selection clauses. In its decision, the Court reason that if the provision was not "*equally bargained for,*" then it can *"be characterized as unreasonable."*[853] It was following that logical that in 1985 the Supreme Court, in *Burger King Corp. v. Rudzewicz*, stated that

> "[w]*here* [...] *forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,'* [...] *their enforcement does not offend due process."*[854]

If, therefore, the clause is contained in a contract that was not "*freely negotiated,*" or the clause itself was not the product of a free bargain, then there is an offense to due process. The clause should not be enforced.

In a fairly recent case, the Minnesota Court of Appeals also expressed this sentiment regarding free bargaining. The Court reasoned that forum selection clauses in contracts of adhesion, or which were the result of, inter alia, bargaining power disparities, should not be enforced, stating that:

> "[A] *factor that would cause a forum-selection clause to be unenforceable is its inclusion in an adhesion contract.* [...] *An adhesion contract is a 'take-it-or-leave-it' contract that is the product of the parties' unequal bargaining power.* [...] *Other factors to consider include the parties' sophistication, bargaining power disparity,*

> *"(4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; o r*
> *(5) it would for some other reason be unfair or unreasonable to enforce the agreement."*

REESE, W. L. M., 1969, supra note 846, p. 295.

[852] LAGERMAN, L. O., 1978, supra note 751, p. 785 *See* also GILBERT, J. T., 1976, supra note 754, p. 36 ("[t]*he fear of the courts* [...] *is that the absence of equal bargaining power might indicate that the weaker party did not freely consent to the choice of forum clause. If he wanted the goods or services, or whatever the economically superior party offered, he was compelled to accept the terms dictated by the other party. Consequently, there was no real agreement and the presumption of due consideration is shaken*").

[853] *Matthiessen v. National Trailer Convoy, Inc.* [1968], 294 F. Supp., 1132, p. 1135.

[854] *Burger King Corp. v. Rudzewicz* [1985], 471 US, 462, p. 472 *See* also *St George Investments LLC v. QuamTel, Inc.* [March 3, 2014] Westlaw, Unreported.

> *opportunity for negotiation, opportunity to readily obtain the product elsewhere, and the product's status as a public necessity."*[855]

7.4 *Carnival Cruise* and the Expansion of *The Bremen*

The text of the Supreme Court's decision in *The Bremen* makes it clear that the rule established therein was not intended to be absolute nor should it receive widespread application. Instead, this rule required a great deal of nuance from the courts, as it recognized that not all contracts are the same.[856] As we saw before, the Supreme Court made sure to highlight the relative uniqueness of the contract in *The Bremen*, demonstrating a reluctance to simply create a one-size-fits-all rule, expecting courts to pay attention to the type of contract at hand in any given case.[857] As we will see, however, a nuanced application is precisely what did *not* happen.[858]

When *The Bremen* was decided, and in light of its very peculiar facts, there was very little clarity among commentators as to whether it "*was announcing a federal common law rule*

---

[855] *Lyon Fin. Ser., Inc. v. Film Funding, Inc.* [May 15, 2001] Westlaw, Unreported, p. 3. In rejecting the resisting party's defense, the Court stated that their failure to present "*any evidence of unequal bargaining power*" or of a "*lack of opportunity for negotiation*" meant the clause should be enforced.

[856] Even favourable commentators at the time, while celebrating the decision, acknowledged its limited scope in regards to the facts of the case. *See* , for example, FARQUHARSON, I. M., 1974, supra note 750, p. 98 ("[t]*he Supreme Court conditioned this acceptance upon arm's length negotiation in a commercial setting*") and HIMEL, S., 1973, supra note 799, p. 206 ("[i]*t must be assumed that parties to an arms-length transaction are capable of considering all aspects of a proposed trial forum and of negotiating an agreement which will be satisfactory to all parties concerned*"). Commenting on the case several years later, SOLIMINE also conceded this point, stating that *"given the importance in The Bremen of facilitating international trade* [...] *one might argue that The Bremen does not establish an across-the-board federal common law rule. Rather, it can be viewed as restricted to cases in the international context"* (SOLIMINE, M. E., 1992, supra note 743, p. 57).

[857] MULLENIX noted how "[t]*he fact that The Bremen involved an international towage contract was crucial to the Court's adoption of consensual jurisdiction, because this approach 'reflect[ed] an appreciation of the expanding horizons of American contractors who seek business in all parts of the world*'" (MULLENIX, L. S., 1988, supra note 761, p. 312). This, however, did not stop its ruling from expanding, even though its very supporters had seen such expansion as negative. For example, while celebrating the decision reached by the Court, a commentator at the time noted the possible risks that could come as a result of a wide application of *The Bremen* rule, stating that:

> *"Even outside the contract of adhesion field, abuse of such clauses is widespread. In today's economy, equal bargaining power cannot be 'presumed'. Zapata will render a disservice to sound development of the law if it leads to a choice-of-court-clauses epidemic."*

NADELMANN, K. H., 1973, supra note 846, p. 134.

[858] BRITTAIN JR., J. T., 2000, supra note 752, p. 320 ("[t]*he facts of the case appeared to limit the scope of The Bremen to admiralty cases. However, the courts generally agreed that its principles were to be applied to all cases involving forum selection clauses. After The Bremen, the lower courts quickly adopted the reasonableness test to determine the validity of forum selection clauses*"). *See* also GOLDMAN, L., 1991, supra note 748, pp. 704–705 ("[a]*lthough Bremen arose in admiralty, lower courts universally applied its teachings in diversity and federal question cases. Many state courts also followed the Bremen prima facie validity rule*").

binding on all courts in all cases, or one with merely persuasive force outside the admiralty context."[859] After all, since it was a decision that arose "*under the federal courts' admiralty jurisdiction in the context of international commercial contracts*," it had no real "*binding effect on state courts*."[860] Furthermore, and as we have seen, the Court had not intended to create a "*blanket approval to all forum selection clauses*," having limited this acceptance to those that were just and reasonable.[861] As BECKER explained in 1989:

> *"Although the decision in Bremen was a declaration of federal maritime law, the case has had very far-reaching effects for the validation generally of exclusive choice-of-forum clauses in international contracts. The conditions of Bremen have not been forgotten, however. A clause presented to an excluded forum that is the result of a bargain struck unfairly or fraudulently, or that offends a strong public policy or statute of the forum, or that chooses a seriously inconvenient forum for the controversy, or is otherwise unreasonable, remains open to attack. Hence, notwithstanding Bremen, a federal district court may use its statutory powers to carry on with a case brought in violation of a forum-selection clause when the foreign forum is deemed unreasonable"*[862]

Notwithstanding these reservations, however, the new doctrine quickly expanded beyond its original constraints.[863] As MULLENIX noted, *"federal courts routinely and uncritically import The Bremen's rule on forum-selection clauses into the full range of domestic cases. It is rare that a federal court even questions The Bremen's applicability to domestic cases based in*

---

[859] SOLIMINE, M. E., 1992, supra note 743, p. 56.

[860] GOULD, M., 'The Conflict Between Forum-Selection Clauses and State Consumer Protection Laws: Why Illinois Got It Right in Jane Doe v. Match.com', 2015, 90 *Chicago-Kent Law Review*, no. 2, p. 684. *See* also LEDERMAN, L., 1991, supra note 745, pp. 430–431 ("[t]*he Bremen was decided in admiralty jurisdiction and thus is not binding in other areas of federal common law. It also is possible to read the decision as limited to cases involving international agreements*"). On the other side of the argument, while recognizing that *The Bremen* had a limited scope of application, COSTELLO hoped that the case would actually have a more expansive application, arguing that:

> *"While strictly applying only to federal courts sitting in admiralty, the Supreme Court's adoption of the modem approach in* [The Bremen] *should nevertheless serve as the necessary imprimatur for a more universal application of principles behind the modern approach to international forum selection in American courts."*

COSTELLO, F. W., 1972, supra note 749, p. 453.

[861] LAGERMAN, L. O., 1978, supra note 751, p. 779.

[862] BECKER, J. D., 1989, supra note 747, p. 173.

[863] Already in 1977 ZAPHIRIOU noted how even though "*the Bremen decision applies to federal courts sitting in admiralty, it has been generally hailed as laying down the proposition that there is a strong presumption in favor of a choice of forum with regard to all commercial contracts and that the heavy burden is on the defendant to show that the clause is unreasonable*" (ZAPHIRIOU, G. A., 1977, supra note 747, p. 321).

federal question or diversity jurisdiction."[864] The same happened in state courts, where *"The Bremen had a pervasive precedential effect."*[865]

The Bremen established a very strong presumption in favor of the enforceability of forum selection clauses, and which only became stronger as time passed. The question for many decisions that followed *The Bremen* was not whether the case was applicable, which was taken as a given, but rather *"on whether a party could establish an exception to the prima facie validity rule"* that the Supreme Court had created.[866] As a consequence of this case:

> *"A strong public policy, not just any public policy, is needed to justify overcoming the presumption in favor of such clauses.* [...] *Even when the state supports a public policy that undermines forum clauses, courts have upheld forum selection clauses despite the underlying federal or state policies that may be threatened. Courts have even found that upholding the forum selection clause may be a greater interest than the interest that the state has in supporting that particular policy."*[867]

The Bremen thus marked a new era for the Supreme Court and, by extension, American law. Succeeding cases, "*supported party autonomy by enforcing arbitration clauses and settlements and, in dicta, continued to speak favorably of forum-selection clauses*."[868] Party autonomy became one of the most fundamental values to be protected by the courts, even at the expense of the weaker parties. As MULLENIX noted:

> *"The Bremen and its progeny effectively supersede conventional standards for jurisdiction, venue, transfer and forum non conveniens, imposing variegated standards for forum selection not contemplated by those rules or doctrines. Indeed, the imposition of contract principles on forum selection rules has, in many instances, stood jurisdictional principles on their head: traditional deference to the plaintiff's choice of forum must yield to the defendant's invocation of contract law, while conversely a defendant must yield due process protections when the plaintiff seeks enforcement of a forum-selection provision."*[869]

---

[864] MULLENIX, L. S., 1988, supra note 761, p. 313. *See* also SCHREIBER, H. W., 1988, supra note 784, p. 468 ("*federal courts have read the decision* [in *The Bremen*] as *broad support for upholding forum-selection clauses generally*").
[865] SOLIMINE, M. E., 1992, supra note 743, p. 56. SOLIMINE notes this expansive effect of *The Bremen* even though *"the case is restricted to admiralty with international overtones." See* also COVEY, A. E. & MORRIS, M. S., 'The Enforceability of Agreements Providing for Forum and Choice of Law Selection', 1983, 61 *Denver Law Journal*, no. 4, p. 839 ("[a]*lthough the Bremen Court specifically limited its holding to federal district courts sitting in admiralty, the ruling and rationale of the Bremen decision has been applied by the courts to forum selection clauses generally*").
[866] GOLDMAN, L., 1991, supra note 748, p. 705.
[867] JACKSON, E., 'Civil Procedure - The Enforceability of Forum Selection Clauses under M/S Bremen v. Zapata off-Shore Co.', 2001, 25 *American Journal of Trial Advocacy*, no. 2, p. 379.
[868] SOLIMINE, M. E., 1992, supra note 743, p. 57.
[869] MULLENIX, L. S., 1988, supra note 761, pp. 302–303.

The precedential value of *The Bremen* was originally restricted to commercial contracts. This is the only logical way in which the case could be interpreted, as the very facts of the case separated it from those dealing with other types of agreements. In its decision, the Supreme Court itself had noted the unique characteristics of the parties in *The Bremen*, including their relatively equal bargaining power, and so it seemed logical to restrict its application only to similar transactions. Indeed, the references that the Supreme Court did in *The Bremen* to the arm's length dealing that had taken place, show that the Court *"did not envision a disparity in bargaining power"* that would result in *"depriving a citizen of her jurisdictional rights."*[870] The Court had reviewed a case involving two similarly-sized, sophisticated parties, and interpreted their contract accordingly. Such a differential treatment of this type of contracts *vis à vis* those in which the power dynamics were more asymmetric were needed *"to ensure that the power and freedom to contract remain*[ed] *a viable and legally enforceable mechanism for allocating risks in commercial transactions."*[871]

In the immediate aftermath of *The Bremen*, the courts recognized the importance of this differential treatment, and handled the precedential value of the case accordingly. Indeed, even after *The Bremen* was decided, consumer contracts were subjected to a different standard altogether. As courts continued to emphasize the fact that forum selection clauses were enforceable because commercial parties were *not* unsophisticated consumers, they implicitly recognized that *The Bremen* could not be applied in a consumer setting.[872] In fact, several cases explicitly addressed this issue, stating that

> *"individual clauses in such contracts* [were] *unfair, and therefore unenforceable, because the contract chose a forum far from the plaintiff, violated some public policy, or failed to give conspicuous notice of the forum clause. In short, even after Bremen, there was every reason to believe, and commentators uniformly assumed, that forum clauses in consumer adhesion contracts were invalid."*[873]

7.4.1 The *Carnival Cruise* Decision

The shift in American law came in 1991 as a result of the famous (and often infamous) case of *Carnival Cruise Lines, Inc. v. Shute*.[874] Here the facts *"rather squarely and starkly asked*

---

[870] KIRBY, J. M., 'Consumer's Right to Sue at Home Jeopardized through Forum Selection Clause in Carnival Cruise Lines v. Shute', 1991, 70 *North Carolina Law Review*, no. 3, p. 904.
[871] GREEN, M. Z., 'Preempting Justice through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer', 1992, 5 *Loyola Consumer Law Reporter*, no. 4, p. 112.
[872] GEHRINGER, A., 2000, supra note 832, p. 646 (noting that before *Carnival Cruise* the courts tended to invalidate forum selection clauses in consumer contracts).
[873] GOLDMAN, L., 1991, supra note 748, pp. 706–707.
[874] *Carnival Cruise Inc., v. Shute* [1991], 499 Supreme Court Reporter, 585–605 The facts of the case, *See* MULLENIX, L. S., 1992, supra note 836, p. 338.

the Court to determine whether such [forum selection] *clauses are enforceable when used in domestic commercial-consumer contracts, that is, whether The Bremen principles applied to consumer contracts.*"[875] Despite the fact that *The Bremen* seemed to be fairly clear on this matter, the Court managed to fumble that task, and answer in the affirmative. Indeed, as Borchers notes:

> *"*[In *The Bremen*] *The Court* [...] *recognized* [...] *that not all forum selection agreements are worthy of enforcement. The Bremen rule took into account that in some cases inequality of bargaining power can make enforcement unjust. In* [... *Carnival Cruise*] *however, the Supreme Court disregarded these limitations."*[876]

While *Carnival Cruise* is far from being the *worst* decision by the United States Supreme Court (*Dennis v. United States*, *Korematsu v. United States, Hammer v. Dagenhart*, *Dred Scott v. Sandford* and *Bowers v. Hardwick* will forever hold that "honor") it is undoubtedly one of the least illuminated moments of this distinguished forum.[877] As an author has rightly pointed out, *"*[i]*f there was ever a case demonstrating that the law is an ass, surely this must be it."*[878]

The facts of the case were fairly simple:

> *"Like millions of Americans every year, Eulala Shute took an excursion on a cruise ship. The Tropicale, operated by Carnival Cruise Lines, Inc.* [...] *took Mrs. Shute and her husband from Puerto Vallarta, Mexico, to Los Angeles. While off Mexico, she was injured during a tour of the galley. Eventually she [and her husband] brought suit against Carnival in federal court in the state of Washington, her place of residence, to recover damages for personal injuries. The ticket provided by Carnival, however, had a forum-selection clause directing that all litigation must be pursued in a court in the state of Florida, Carnival's principal place of business."*[879]
>
> *Since the Shutes received the terms of the contract (including the forum selection clause) after they had paid the full price, as pre-printed terms on their tickets, they argued that the forum selection had not been "freely bargained for", and therefore could not be enforced. Furthermore, they argued that since they were both physically*

---

[875] ibid., p. 338.
[876] BORCHERS, P. J., 'Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform', 1992, 40 *American Journal of Comparative Law*, no. 1, p. 149
[877] MULLENIX, L. S., 1992, supra note 836, pp. 325–326. *See* also, generally, MULLENIX, L. S., 'Carnival Cruise Lines, Inc. v. Shute: The Titanic of Worst Decisions', 2011, 12 *Nevada Law Journal*, no. 3. KNAPP took a more moderate view, saying that while it is clearly not the worst decision, it was indeed *"a bad decision for the parties, for the court, and for the future of contract law*" (KNAPP, C. L., 'Contract Law Walks the Plank: Carnival Cruise Lines, Inc. v. Shute', 2011, 12 *Nevada Law Journal*, no. 3, p. 553).
[878] MULLENIX, L. S., 2011, supra note 877, p. 552.
[879] SOLIMINE, M. E., 1992, supra note 743, p. 51. For some more background information about the Shute family, *See* also LIESEMER, J. A., 1991, supra note 832, p. 1025.

> *and financially incapable of litigating their case in Florida, enforcing the clause would effectively deprive them of their "day in court."*[880]
>
> *Each ticket, "an accordion-folding affair consisting of a cover page and three additional 'pages' on the reverse side", included in a minuscule type the terms of their "agreement".*[881] *The face of each ticket, on its left-hand lower corner, contained the following admonition:*
>
> *"SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT-ON LAST PAGES 1, 2, 3"*

The terms provided, in the relevant parts:

> *"3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.*
>
> *8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.*
>
> *16. The Carrier shall not be liable to make any refund to passengers in respect of* [...] *tickets wholly or partly not used by a passenger."*[882]

By the time the plaintiffs received the tickets, and this was not contested, the Shutes were in no position to negotiate or bargain over the terms; what is more, they "*had been unaware of this* [forum selection] *clause when they reserved the trip and paid their money*."[883] They had already paid the fare in full and, in accordance with clause 16 above, if they decided not to accept these terms and reject the tickets, they would not be entitled to a refund.[884] They had been, to put it simply, trapped into a contract they had no real opportunity to agree to.

---

[880] *Carnival Cruise Inc., v. Shute* [1991], p. 585.
[881] MULLENIX, L. S., 1992, supra note 836, p. 331.
[882] *Carnival Cruise Inc., v. Shute* [1991], p. 1524 *See* also GEHRINGER, A., 2000, supra note 832, p. 641.
[883] STURLEY, M. F., 'Strengthening the Presumption of Validity for Choice of Forum Clauses', 1992, 23 *Journal of Maritime Law and Commerce*, p. 132.
[884] In their Reply Brief for the Petitioner, at 9 nº 6, Carnival Cruise contested this, arguing that the Shutes would have been able to cancel their contract. According to their brief:

> *"Respondents erroneously state, in this regard, that the ticket contract prevents refunds in the event a passenger objects to the forum selection clause.* [...] *Paragraph 16(a) of the ticket contract forbids refunds for unused tickets after a cruise, but the brochure provided to prospective passengers makes clear that refunds are available to passengers who cancel a reasonable period before the cruise.* [...] *The Shutes received the brochure.* [...]

The plaintiffs argued that Carnival Cruise had availed themselves to the laws of Washington by, for example, advertising their products there and working with travel agents in the region. As a result, they argued, the exercise of personal jurisdiction by the plaintiff was not unreasonable and, therefore, the forum selection clause could not be enforced. It was a constitutional issue, dealing with whether the contacts that Carnival Cruise had with the state of Washington were sufficient to require them to defend their case there, or whether the forum selection clause had to be enforced.

At first, the plaintiffs were not successful, as the court for the Western District of Washington granted Carnival Cruise's motion to dismiss. The Court ruled that it lacked personal jurisdiction based on the fact that, in their view, the defendants did not meet the "minimum contacts" requirement to be subjected to its jurisdiction. Dismissing the case on the lack of personal jurisdiction alone, the Court did not rule on whether the forum selection clause was valid.

The Court of Appeals for the Ninth Circuit reverted the ruling of the District Court, concluding that Carnival Cruise had, indeed, "*purposely availed*" themselves to *"the benefits and protections of Washington law by soliciting business there and* [that] *the Shutes' claims 'arose out of' its activity in the state*."[885] Furthermore, and even though the District Court had not ruled on the matter of the validity of the forum selection clause, the Court of Appeals decided on the issue, distinguishing the case from *The Bremen*. The Court reasoned that the latter case "*involved a large, complex commercial contract between two sophisticated parties*," where "[t]*here was no evidence* [...] *that the parties were in an unequal bargaining position*," a situation that clearly did not arose in *Carnival Cruise*.[886] On the contrary, this was a case between an experienced commercial party and a consumer, with

---

> *The final page of the brochure, captioned 'General Information,' states that a seven-day cruise (such as the one taken by Respondents) can be cancelled between 16 and 45 days before sailing with a $100 penalty, and between 3 and 15 days before sailing with a $200 penalty. The brochure advises 'the purchase of trip cancellation insurance from your travel agent.'"*

Carnival Cruise's defense seems flimsy at best. Even if we were to concede that Carnival Cruise would honor this cancellation mentioned outside of the contract (we can certainly picture them alleging privity of contract), it is hard to understand why the parties would have to be subjected to a penalty, or to pay for an insurance, in case they disagreed with the terms that were provided to them after they acquired the tickets. What Carnival Cruise did is to say that not only did the Shutes have absolutely no say in the terms of their agreement, but that they would actually be punished if they did not agree to them. The Shutes, in other words, could only lose, regardless of what they decided. How the Supreme Court managed to overlook this is, truly, beyond comprehension. *See* also ibid., p. 132 ("*Carnival claimed that the Shutes would have received a ticket partial refund if they had canceled the cruise with at least three days notice*") and GILBERT, E. P., 1992, supra note 748, p. 612 ("*the clause making the ticket non-refundable places the average passenger in a no-win situation.* [...] *passengers must either risk having to file suit in Florida or forfeit their money*").

[885] STURLEY, M. F., 1992, supra note 883, p. 133

[886] *Shute v. Carnival Cruise Lines* [1990], 897 F. 2d, 377, p. 388 *See* also GEHRINGER, A., 2000, supra note 832, p. 645 (noting how the "sophistication" of both parties that was present in *The Bremen* did not arise in *Carnival Cruise*).

plenty of evidence of "*the sort of disparity in bargaining power that justifies setting aside the forum selection provision*."[887] As the Court of Appeals stated:

> *"First, there is no evidence that the provision was freely bargained for. To the contrary, the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis.* [...] *Even if we assume that the Shutes had notice of [the] provision, there is nothing in the record to suggest that the Shutes could have bargained over this language. Because this provision was not freely bargained for, we hold that it does not represent the expressed intent of the parties, and should not receive the deference generally accorded to such provisions."*[888]

Following the test established in *The Bremen*, the Court of Appeals determined that the forum selection clause was indeed "*so gravely difficult and inconvenient*" that its enforcement would mean that the plaintiffs would "*for all practical purposes be deprived of* [their] *day in court*."[889] On the basis of this, the Court added that,

> *"enforcement of the forum selection clause would be greatly inconvenient to the plaintiffs and witnesses. There is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida. We therefore decline to enforce the forum selection provision in this case."*[890]

By the time the case reached the United States Supreme Court, the general consensus was that the Court would review the issue of personal jurisdiction, which had been the core of the decisions of the lower courts. Surprising everyone, however, the Supreme Court did something completely different.[891] Invoking the Ashwander rule, which states that "*the Court will avoid deciding constitutional questions unless absolutely necessary and will not rule on constitutional grounds if narrower grounds for a decision exist*," the Justices did not rule on the constitutional matter of personal jurisdiction, opting instead to dwell on the issue of the validity of the forum selection provision.[892]

Although, just as the Court of Appeals had done before, the Supreme Court referenced *The Bremen* in its assessment of the forum selection clause, it actually reached the exact opposite result. While it appeared to acknowledge the important differences between the facts of *The Bremen* and those of *Carnival Cruise*, the Supreme Court actually ignored these differences, despite supposedly taking them into consideration to make a refined application of the rules of *The Bremen*. For example, the Court admitted that, unlike the

---

[887] *Shute v. Carnival Cruise Lines* [1990], p. 388.
[888] ibid., pp. 388–389.
[889] ibid., p. 389.
[890] ibid., p. 389.
[891] STURLEY, M. F., 1992, supra note 883, p. 134.
[892] MULLENIX, L. S., 1992, supra note 836, p. 339 For the *Ashwander* rule, *See*, generally, SCHAUER, F., 'Ashwander Revisited', 1995, 1995 *The Supreme Court Review*.

contract at stake in *The Bremen*, which had been thoroughly negotiated by parties of similar power,

> "[the Shute's] *passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other cruise lines.* [...] *In this context, it would be entirely unreasonable for us to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line."*[893]

Despite this admission, and even though it recognized that *The Bremen* had to be "*refined*" in order to be applicable to a contract such as this, in reality the Supreme Court simply shoehorned the facts of *Carnival Cruise* into *The Bremen* rule, and declared the forum selection clause to be fully enforceable.[894]

What the Court did in its analysis was, to put it simply, admit that it is well known that consumers like the Shutes cannot modify their contracts, that they have no real equality in regards to the bargaining power and, therefore, "*tough luck*."[895] To make matters worse, despite speaking about "refining" the doctrine to apply it to this type of (consumer) contracts, the Court missed the opportunity to evaluate the many criteria that had been developed by lower courts to assess the reasonableness of a forum selection clause, and actually added more factors that need to be analyzed when a court is confronted with this type of clauses.[896] In reality, the Court only paid lip service to the idea of refining *The Bremen*, and just applied it whole cloth.

---

[893] *Carnival Cruise Inc., v. Shute* [1991], p. 593.

[894] ibid., p. 593 ("*In evaluating the reasonableness of the forum clause at issue in this case, we must refine the analysis of The Bremen to account for the realities of form passage contracts*").

[895] MULLENIX, L. S., 1992, supra note 836, p. 345 *See* also LIESEMER, J. A., 1991, supra note 832, p. 1026 ("[t]*he Shute Court obliterated this distinction* [between negotiated agreements and form contracts] *when it enforced a boilerplate forum clause that was included on a standard form cruise ticket*"). *See* also GILBERT, E. P., 1992, supra note 748, p. 598 ("[t]*he Court's almost reflexive enforcement of the cruise ticket forum clause contravenes public policy by grouping domestic commercial consumer contracts with international commercial contracts between sophisticated business entities*").

[896] Among the many factors that, at the time *Carnival Cruise* was decided, lower courts had taken into consideration to assess the reasonableness of a forum selection clause, are*:*

> *"(1) inconvenience to the parties, (2) fraud, (3) undue influence, (4) overweening bargaining power, (5) mistake, (6) coercion, (7) lack of consideration, (8) unconscionability, (9) adhesion, (10) inequality of bargaining power, (11) public policy, (12) injustice, (13) availability of remedies in the chosen forum, (14) governing law, (15) conduct of the parties, (16) identity of the law governing construction of the contract, (17) place of execution of the contract, (18) place where the transactions have been or are about to be performed, (19) location of the parties, (20) convenience of the prospective witnesses, and (21) accessibility of evidence."*

In regards to the plaintiffs' argument that the forum selection clause represented a substantial inconvenience for them, since they would be unable to pursue litigation in the selected Florida forum, the Court was less than sympathetic. The majority opinion argued that the plaintiffs had failed to satisfy the "*heavy burden of proof* […] *required to set aside the clause on grounds of inconvenience*," and that therefore they could not resist the enforcement on those grounds.[897] For both procedural and substantive reasons, the Court was completely wrong on this.

7.4.2 The Procedural Flaws of *Carnival Cruise*

From a procedural point of view, the Court imposed on the plaintiffs a burden that, up to that point, they had not been required to carry. It is important to remember that the District Court that had originally dismissed the plaintiffs' claim had done so based on the fact that "*Carnival Cruise Lines' contacts with Washington state were insufficient to support an assertion of personal jurisdiction*."[898] This dismissal, based on constitutional, not contractual, grounds, meant that the issue of the substantive inconvenience caused by the clause was not dispositive at the trial level, meaning that the plaintiffs had never found themselves in need to improve the factual record on that regard.

By demanding more evidence of their inconvenience, the Supreme Court penalized the Shutes for not doing something they had simply not been required to do before. Furthermore, "*the Shutes had no reason to believe their factual record was inadequate, especially since the district court never considered the forum-selection clause issue in rendering its decision to dismiss the case on Carnival's summary judgment motion.*"[899] Because of these procedural reasons, it was not a surprise that there was not a better record of the circumstances surrounding the forum selection clause and the inconveniences that its enforcement would cause.

Instead of clarifying the situation, the Court just "*muffled the analysis further*" (MULLENIX, L. S., 1992, supra note 836, p. 347).

[897] *Carnival Cruise Inc., v. Shute* [1991], p. 595.

[898] MULLENIX, L. S., 1992, supra note 836, p. 333 *See* also STURLEY, M. F., 1992, supra note 883, p. 138 ("[T]*he Shutes were given no opportunity to prove their inability to proceed in Florida*") .

[899] SOLIMINE does not acknowledge this procedural problem at all, and considers the Court's findings altogether appropriate since, in his view, there was *"no evidence in the record* [demonstrating] *that the plaintiffs or their potential witnesses would be inconvenienced, or that Florida courts would be a hostile forum"* (SOLIMINE, M. E., 1992, supra note 743, p. 84).

7.4.3 The Substantive Flaws of *Carnival Cruise*

From a substantial point of view, the Court was wrong, or at least acted unfairly, when it dismissed the idea that the forum selection clause represented a substantial inconvenience for the plaintiffs. As the Shutes had stated in their affidavit at the district level, both health and economic reasons prevented them from being able to conduct the proceedings in Florida. Even though the Court had no qualms in reaffirming some of the defendant's points, without a shred of evidence having been put forward to substantiate them, it is certainly unfair that the Court was not as tolerant towards the plaintiff.[900] Furthermore, and unlike what happened with some of the contentions put forward by the defendants to enforce the clause, at no point did the Supreme Court even try to deny that, as the Court of Appeals had stated,

> *"the Shutes, their health care provider, and at least one of the witnesses to the accident all reside in Washington. At least one other witness resides in California, and it is unclear where other possible witnesses reside. As between Washington and Florida, the two states which are capable of exercising jurisdiction, Washington is the more efficient forum."*[901]

In its attempt to supposedly "refine" *The Bremen*, the Court also held that Florida could not really be considered inconvenient, since it was not a "*remote alien forum*."[902] This is a deliberately shortsighted reading of *The Bremen*, and which clearly does not go into its real and otherwise obvious meaning. Not only did the Court consider the almost 5 thousand kilometers separating Florida from Washington to be "not remote enough," but also overlooked the fact that "remoteness" is a relative term. For all intents and purposes, conducting the trial in Florida was, for the plaintiffs, almost no different from conducting in a court of Mogadishu, Somalia. Just as they would have been unable to travel to the

---

[900] Despite the Court's nonchalant dismissal of the issue of inconvenience raised by the plaintiffs, there was at least *some* record of the problems that would affect the Shutes if the clause was enforced.

> *"The record contained the uncontroverted, albeit self-serving, affidavit of Mrs. Shute stating that she was in the hospital and could not travel and that the expense of proceeding with the lawsuit in Florida would be prohibitively burdensome, both financially and physically."*

GOLDMAN, L., 1991, supra note 748, p. 710.

[901] *Shute v. Carnival Cruise Lines* [1990], p. 387 To his credit, Justice Marshall, in his dissent, acknowledged this, stating:

> *"It is safe to assume that the witnesses—whether other passengers or members of the crew—can be assembled with less expense and inconvenience at a west coast forum than in a Florida court several thousand miles from the scene of the accident."*

Carnival Cruise Inc., v. Shute [1991], p. 603.

[902] ibid., pp. 594–595. This was a reference to *The Bremen*, where the Court had distinguished the contract between the parties from "*an agreement between two Americans to resolve their essentially local disputes in a remote alien forum." The Bremen v. Zapata Off-Shore Co.* [June 12, 1972], p. 17.

African continent to pursue Carnival Cruise's responsibility, they were unable to do so in Florida.

In its ruling, the Court showed an absolute disregard for the plight of the plaintiffs and, by resorting to a literalist interpretation of *The Bremen*, left them in an absolute state of defenselessness. As GILBERT argued:

> *"There is little doubt that being forced to travel across the continental United States to resolve a slip-and-fall case would constitute serious inconvenience. Furthermore, although the majority disagreed, the Court of Appeals did find evidence that the Shutes were physically and financially unable to litigate in Florida. Admittedly, one party's inconvenience is another party's convenience, but an individual faced with suing a large corporate defendant in a distant state is very likely to be deterred. Indeed, only the most financially well-off passenger would be able to overcome the hurdles of high costs and inability to secure witnesses in a distant forum."*[903]

Significantly, this was not the first time the Carnival Cruise company had been sued for injuries suffered by passengers aboard one of their ships, nor was it the first time that disputes arose over their forum selection clause. In fact, the record shows that many of the cases in which the forum selection clause was enforced simply disappeared altogether.

> *"This may mean that trial was held in Florida but no judicial opinion was published, or it may mean that the parties settled the case without going to trial, or it may mean that the plaintiff simply abandoned the case because trial in Florida would have been prohibitively burdensome. Empirical research in the international context shows that a significant proportion of personal injury plaintiffs who are unable to sue in their original forum either settle for much less than they had anticipated receiving after trial or abandon the case completely, and to a lesser extent that conclusion is probably valid in the domestic context as well."*[904]

The truth is that there was no refining of *The Bremen*. The Court applied the rule of *The Bremen* in full, despite the obvious factual differences, and actually expanded its applicability well beyond its original constraints. In reality, the Court in *Carnival Cruise* didn't use *The Bremen* so much as a precedent, but rather as "*a stepping-stone to a now-factored and much more far-reaching result*."[905]

---

[903] GILBERT, E. P., 1992, supra note 748, pp. 623–624.
[904] STURLEY, M. F., 1992, supra note 883, p. 140.
[905] KNAPP, C. L., 2011, supra note 877, p. 555 In regards to the expansion of *The Bremen*, *See* also STURLEY, M. F., 1992, supra note 883, p. 146 (*"if the clause in Carnival Cruise Lines is enforceable against the Shutes, it is hard to see why any other boilerplate choice of forum clause in an adhesion contract will not be similarly enforceable under the same reasoning"*) and GILBERT, E. P., 1992, supra note 748, p. 598 (arguing that the *Carnival Cruise* decision was unfair, disregarded precedent, and *"failed to defend the consumer whom Congress has sought to protect"*).

7.5 Justifying *Carnival Cruise*

In order to justify enforcing the forum selection clause, the Supreme Court put forward a number of reasons. By doing this, the Court appears to have hoped to defend the practice of companies that include this type of provision in their contracts.[906] In essence, the Court argued that:

a. Since cruise lines travel to many places, and carry passengers from many locales, forum selection clauses allow them to limit their exposure to being sued in a plethora of jurisdictions.

b. Forum selection clauses reduce uncertainty regarding where suits must be brought and defended, thus conserving judicial resources.

c. There was no "fraud or overreaching", nor any "bad-faith motive", since Carnival Cruise's principal place of business was indeed in Florida.

d. Passengers benefit from these clauses, since they allow the company to reduce their prices.

This reasoning is so unsatisfactory, that it is worthy to analyze each of these justifications in full.

7.5.1 Companies Cannot be Exposed to Being Sued in Many Jurisdictions

The first question that can be put forward against this logic is, quite simply, "why?"; why should the Court benefit the defendants in a claim such as this? Why should the burden be laid upon individual injured plaintiffs, ostensibly to the benefit of the defendants? Why, in other words, should the courts (freed from supposedly clogged dockets) and defendants (freed from being sued in many jurisdictions) benefit at the expense of the plaintiffs? These are all questions that the Supreme Court did not even try to answer.[907] Indeed, the Court seems to have put the convenience of the judicial system, as well as that of the defendants, as a priority, without even trying to explain why this was a fair decision. As GOLDMAN has explained:

> *"The Shute majority implicitly, if not explicitly, based its decision on principles of economic efficiency. One's first impulse is to respond 'efficiency schmiciency, it's just not fair, it's just not right.'"*[908]

[906] KNAPP, C. L., 2011, supra note 877, p. 559.
[907] MULLENIX, L. S., 1992, supra note 836, p. 342.
[908] GOLDMAN, L., 1991, supra note 748, p. 701.

The type of rhetoric that was used by the Supreme Court in *Carnival Cruise*, as well as by some of the courts that followed its lead, tends to side on the dramatic, arguing that refusing to enforce forum selection clauses would lay a serious burden on the defendants.[909] MULLENIX, with her characteristically caustic style, has mocked this dramatic line of arguments, saying:

> *"Who among us* [...] *has not been moved by the Court's conclusion that a defendant may not be sued in a distant forum, away from its home, because this 'has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.' And who among us has not been inspired by the Court's observation that 'the foreseeability that is critical to due process analysis' is whether the defendant should have 'reasonably anticipate[d] being hauled into court there.'"*[910]

Sarcasm aside, the problem with the rationale of the courts on this issue is that it does not seem to go both ways. While they seem to bend over backwards to protect the defendants, "*on the underlying rationale that because plaintiffs have the initial choice of forum, defendants need some countervailing fairness protection*," it does not use the same zeal in cases in which a powerful corporate defendant, contracting with "*Grandma and Uncle Irv*," gets to decide in advance where it will be sued.[911] After all, if the logic is that the forum selection clause should be enforced because otherwise the defendant could end up being dragged to a forum where he could not have reasonably expected to appear, then it calls to reason that a plaintiff should also be protected if he ends up in a forum where he could not have reasonably expected to appear, having only nominally agreed to a forum selection clause, which he could not read or understand, let alone negotiate.

The Court's explicit reference to the fact that Carnival Cruise's vessels call in many ports, and are as such exposed to litigation in a variety of fora, adds very little to the discussion and, once again, brings us to put forward the question: "So what?" After all, whether Carnival Cruise could potentially be subjected to litigation in different jurisdictions is not, in and of itself, reason enough to deprive the plaintiffs of a convenient forum. Furthermore, it fails to explain why it would actually be fairer to force the defendants to travel to whatever court the defendants virtually forced them to confer jurisdiction to, by means of a take-it-or-leave-it clause. And yet, this is precisely what the Supreme Court did; using Carnival's "plights" as their justification, the majority of the Justices took it upon themselves to deem that any complications that could be brought upon the plaintiffs was justified, as long as it meant benefitting the defendants. Although,

---

[909] GILBERT, E. P., 1992, supra note 748, p. 622 (explaining that, in *The Bremen,* "[t]*he first factor cited is that forum clauses enable cruise lines to limit the fora where they are sued. This factor obviously benefits the cruise line")*.
[910] MULLENIX, L. S., 2011, supra note 877, p. 551.
[911] ibid., p. 551.

ostensibly, the Court tried to balance the interest of the plaintiffs with those of the defendants, arguing that the plaintiffs did in fact see some benefit from being dispossessed of their day in court, we will soon see that this logic also failed to pass muster.

The Court was confronted with two possibilities. One of them was declaring that forum selection clauses in the consumer context were not enforceable, due to the bargaining power disparities, and the other was enforcing them.[912] While the former involved placing the costs on the companies, the latter involved placing them on the consumers. What the Supreme Court did was making "*a policy choice that it is better for injured consumers than large companies to bear these costs*."[913] MULLENIX said it best when, in the immediate aftermath of Carnival Cruise, she wrote:

> *"Carnival Cruise Lines was an easy case. It was based on the humblest, most uncomplicated, garden-variety slip-and-fall tort ever to grace the federal courts. It involved a pure, paradigmatic adhesive consumer contract, complete with non-negotiable, tiny, boilerplate print. Nonetheless, in spite of the utter simplicity of its facts, seven Justices managed to get Carnival Cruise Lines wrong.*
>
> *Carnival Cruise Lines made bad law. In holding that particular forum-selection cause enforceable, the Supreme Court gave its broad stamp of approval to forum-selection clauses generally as a method for establishing jurisdiction. However, in spite of their persistently touted virtues, forum-selection clauses can be unfair and insidious. The result in Carnival Cruise Lines was unfair because under existing precedent, and as a matter of pure contract law, courts should not enforce adhesive consumer forum-selection clauses. Yet, this is precisely what the Supreme Court did."*
> [914]

The position taken by the Supreme Court demonstrates a pro-defendant bias that cannot be explained on reasons of justice and fairness, particularly in cases such as this, when a powerful defendant is allowed to exploit a term imposed on a weaker plaintiff. While the Court went out of its way to consider the burdens that the defendant might have to carry if sued in a "foreign" forum, it did not show the same empathy towards a plaintiff

---

[912] GEHRINGER, A., 2000, supra note 832, p. 644.

[913] STURLEY, M. F., 1992, supra note 883, p. 141. STURLEY adds that the savings that companies enjoy as a result of enforcing the clauses come *"at the cost of ignoring the plaintiffs' interest in avoiding a forum where it would be inconvenient or unfair to require them to prosecute their suits – the same sort of interest that defendants claim when moving for forum non conveniens relief or objecting to personal jurisdiction."*

[914] MULLENIX, L. S., 1992, supra note 836, pp. 325–326 Similarly, GEHRINGER noted how even though the Court realized that *"a form passenger contract is a contract of adhesion, and therefore must to be scrutinized more carefully than a freely reached contract between parties of equal bargaining power,"* it failed to adequately consider consumer protection (GEHRINGER, A., 2000, supra note 832, p. 645.

litigating in those same conditions. It was a case where the weaker was punished to benefit the powerful.

7.5.2 Savings from Forum Selection Clauses are Passed to the Adhering Party

Here the Court was quoting the oft-cited (albeit often unsourced) line of reasoning that savings from contracts of adhesion are passed to the adhering parties. According to MULLENIX, this "*adds embarrassing insult to the injury of a loss of the right to choose a forum. Apart from the justices, are there any consumers naive enough to buy this reduced-fare theory?*"[915]

Indeed, as if repeating a mantra, the Supreme Court regurgitated the idea that consumers benefit from pre-printed terms such as forum selection clauses. Without as much as citing a single reference, the Court stated:

> *"*[I]*t stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.*[916]

There are two serious problems with the Court's assertion on this point. First, and as we have seen, there is a significant dispute as to whether or not savings that are the consequence of boilerplate contracts are actually passed to the consumer. Second, and most importantly, in *Carnival Cruise* there was nothing to indicate that the Carnival Cruise company had indeed offered lower prices as a result of its forum selection clauses. It was, basically, a case of wishful thinking. KNAPP illustrated the irrationality of this idea, arguing:

> *"At this point, we leave contract law-both 'classical' and 'modern' behind, and enter the Looking Glass world of contract-law-and-economics. We are invited to assume that merely because a firm realizes savings by denying to those it has wronged appropriate access to a convenient forum for redress of their injuries, it will pass those savings along to its customers. Apparently we are expected to imagine a hypothetical Professor Farnsworth, CEO of a global transportation business, exclaiming to his staff, 'Good News, everyone!! We have successfully avoided a lot of lawsuits, so now we can reduce our prices!!'* [...] *Of course, companies may compete on the basis of price, temporarily or otherwise, in a fashion which does benefit their*

[915] MULLENIX, L. S., 'Supreme Court Review: Analysis: Forum-Shoppers Should Discover a Wider Market', 1991, 13 *The National Law Journal,* p. 4.
[916] *Carnival Cruise Inc., v. Shute* [1991], p. 594

> *customers. But to assume that in fact this will be the result if we enable a company to avoid liability for its wrongful actions is to make an unjustified leap of faith."*[917]

This affinity for magical thinking demonstrated by the majority of the Justices seems to have made them unable to even contemplate the possibility that some of these alleged savings would not actually be passed to the other parties, but would just be reinvested in the company itself or just passed to the shareholders. The Court *wants* to believe in the intrinsic goodness of those companies that resort to forum selection clauses in their contracts, but does not seem to be able to justify its claim. Basically, the Court overlooked the fact that

> *"companies are able to impose forum-selection clauses on consumers only because of a massive market failure and, further, that sanctioning such market failures will lead to widespread inefficiencies, inequitable redistribution of wealth, and quite likely a reduction in total social wealth. Moreover,* [...] *whatever 'savings' companies gain from forum-selection clauses will result not from increased efficiencies but, on the contrary, from increased inefficiencies and higher transaction costs in the litigation process that serve to redistribute, not maximize, wealth. Thus, the Court's consideration of the economic impact of forum-selection clauses* [...] *is arbitrarily limited to one presumed benefit and ignores numerous other likely and highly undesirable consequences."*[918]

Another problem with the Court's idea that the savings are passed to the consumer is that it is an incomplete assessment of market economics. The Court ignored that its approval of these "savings-via-terms" (knowing that said terms were never read, understood or bargained-for) serves as the starting shot for a race to the bottom, "*since it provides contract drafters with a profit incentive to include low quality (non-salient) terms in their pre-drafted forms. In other words, competition will actually cause firms to draft worse terms in their form contracts."*[919]

At best, the economic rationale of the Court "*is subject to and lacking empirical proof. At worst, economic reality is the opposite of what the Court believes it to be."*[920] The fact of the matter is that, unless evidence is put forward, and *"without information on the competitiveness of the market in question,"* the idea that the adhering parties will receive

---

[917] KNAPP, C. L., 2011, supra note 877, p. 560.

[918] PURCELL, E. A., JR., 1992, supra note 768, p. 432.

[919] CHING, K. K., 2015, supra note 196, p. 9. *See* also FREILICH, A. & WEBB, E., 2013, supra note 399, p. 140 (*"Despite the many benefits of a competitive market, there is little incentive for businesses to compete on the basis of fair terms"*).

[920] CHING, K. K., 2015, supra note 196, p. 9. SOLIMINE, although supporting the Court's decision in *Carnival Cruise*, characterized the method of the Court as engaging in *"Chicago School economic analysis"* (SOLIMINE, M. E., 1992, supra note 743, p. 59).

some economic benefit from these clauses *"only 'stands to reason' if you want it to."*[921] What is more, taken to its logical conclusion, what the Court seems to be saying is that as long as the passengers receive a reduced fare (or some other consideration), any clause, including absolute exculpatory clauses, would, or should, be enforceable.[922] Of course, this is nonsensical, as it would definitely lead to a widespread use of virtually absolute disclaimers of liability and tremendously draconian clauses, justified by some theoretical reduction in the price.

The analysis and the (alleged) balancing test made by the Supreme Court in regards to the forum selection clause in *Carnival Cruise* is thus asking the plaintiffs to trust those same defendants they blame for their injuries. The Court is, in so many words, explaining to them that the fact that they will not be able to obtain any redress for their injuries (since, as they showed, they would be financially unable to pursue the case in the chosen forum) is in a way compensated by an alleged lower price in their tickets. It is truly a case of adding insult to injury.

Even if we were to concede that the forum selection clause does, indeed, allow the company to pass its savings to the consumers, it is much harder to concede that these savings are high enough to compensate for their loss of rights.[923]

> *"The costs of such increasingly widespread and more seriously inadequate compensation-fewer and less successful rehabilitations, more seriously damaged family relationships and structures, lowered aggregate social and economic productivity, reduced faith in the nation's legal institutions, and added burdens of care directly and indirectly imposed on governments, private institutions, and the public at large-will likely outweigh whatever 'savings' otherwise result. Contrary to the Court's assumption, then, forum-selection clauses -expanding the areas in which inefficient social arrangements may flourish- seem likely to be wealth-destroying rather than wealth-maximizing."*[924]

---

[921] SHELL, G. R., 'Fair Play, Consent and Securities Arbitration: A Comment on Speidel', 1996, 62 *Brooklyn Law Review*, no. 4, p. 1374. SOLIMINE disagrees with this contention and, in his defense of *Carnival Cruise,* he argues (regurgitating the Court's reasoning) that *"such clauses contained in standard form contracts confer ex ante benefits to the litigants by providing certainty as to jurisdictional issues, and by conferring savings (spread out among all such contracts) realized by the cruise line in limiting the places where it can be sued."* Surprisingly, aware of the flimsy ground in which assertions stand, he goes on to say that "[p]*resumably, price elasticity studies in the relevant market served* ***might*** *confirm or deny the Court's speculation on the latter point"* (SOLIMINE, M. E., 1992, supra note 743, p. 83 (emphasis added)).

[922] GILBERT, E. P., 1992, supra note 748, p. 623.

[923] *See* KIRBY, J. M., 1991, supra note 870, pp. 905–906 ("*Even assuming that all the savings are passed on when the cruise's legal costs are lowered, passengers who are risk averse are better off without the clause. Therefore, considering the relatively high burden of having an individual conduct litigation across the country, there are sufficient grounds in Shute to find substantive unfairness*").

[924] PURCELL, E. A., JR., 1992, supra note 768, p. 490.

If contractual terms are to be seen simply as part of the price that is paid by the buyer, then what happened in *Carnival Cruise* is that the Supreme Court overestimated the benefit received by the plaintiffs, and underestimated the cost of the term. Without a single shred of evidence, the Court told the plaintiffs, "this is for your own good."

7.5.3 Certainty on Jurisdiction Saves Time and Judicial Resources

It is surprising to see that the Supreme Court would say, without a hint of irony, that a forum selection clause, like the one included in the plaintiffs' tickets, actually reduced uncertainty and saved judicial resources.[925] If anything, the *Carnival Cruise* decision is an example of exactly the opposite. In fact, as MULLENIX notes, the procedural history of the case

> *"is somewhat noteworthy if for no other reason than that it took five years and six trips up and down the state and federal court systems to finally dismiss the case on jurisdictional grounds. The procedural history of Carnival Cruise Lines belies the purported utility of forum-selection clauses. Moreover, the lengthy haggling over jurisdiction that occurred in Carnival Cruise Lines undercuts the chief supporting rationale that such provisions provide for certainty as to the place of suit and hence less demand on judicial resources to resolve threshold jurisdictional questions."*[926]

Despite the claims of certainty and expediency (that the Court was certainly not alone in making) the truth seems to be that forum selection clauses often fail to achieve their goal, actually creating an additional hassle to the litigation. As a matter of fact, it is often the case that "*the battle about jurisdiction is a surrogate for the battle about liability, with the case settling once the jurisdictional dispute is over*."[927] In other words, it is not that the clause actually gives more certainty to the legal relationship, but rather that instead of flooding

---

[925] This was not the first time the Supreme Court praised forum selection clauses for saving judicial resources. In fact, in the 1988 case of *Stewart v. Ricoh*, Justices KENNEDY and O'CONNOR considered that the benefits rendered by these clauses were so strong that "[c]*ourts should announce and encourage rules that support private parties who negotiate such clauses*" (cited in SCHREIBER, H. W., 1988, supra note 784, p. 464).

[926] MULLENIX, L. S., 1992, supra note 836, pp. 332–333 *See* also LEDERMAN, L., 1991, supra note 745, p. 424.

[927] DAVIES, M., 2002, supra note 783, p. 367. *See* also MULLENIX, L. S., 1992, supra note 836, p. 342 ("*the validity of forum-selection clauses is now one of the most frequently litigated jurisdictional issues in the lower federal courts. Moreover, because unsuspecting plaintiffs will invariably be caught unaware of a fine print provision, this trend to litigate over forum-selection clauses will continue unabated*"), SPARKA, F., *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis*, 2010, Springer Science & Business Media, p. 8 (arguing that the benefits of forum selection clauses regarding a decrease in costs and the increase predictability "*remain contentious, as many legal disputes concern the validity of choice of forum clauses*." He notes, however, that "*since those disputes would otherwise likely be about jurisdiction anyway, arguably at least no additional litigation is generated*") and DAVIS, N. J., 2007, supra note 232, pp. 589–590 (noting that when *clickwrap* agreements are litigated, disputes tend to focus on procedural matters like forum selection and arbitration, not substantial issues).

the courts with disputes over the subject matter of the case, the parties end up just discussing the forum that should hear the dispute, preventing the parties from actually finding an appropriate solution to their grievances.

> *"Instead of ensuring the certainty of forum selection, Carnival Cruise Lines has ensured a thriving satellite industry in challenging such clauses. All this litigation is excellent for the corporations who always win because courts uniformly enforce the provisions; and it is great for the lawyers on both sides because they earn their livelihood whether they win (the corporations) or lose (the plaintiffs). But it is really unfortunate for the poor, clueless schlemiel or schamozzel who is faced with the choice to either spend a raft of money litigating in distant Kankanee; spend a raft of money arguing against the forum selection clause (and then losing); or give up their grievances altogether."*[928]

The truth is that forum selection clauses do not necessarily conserve judicial resources, at least not in the way the Supreme Court hoped they did. They are not a magical device that, almost miraculously, puts an end to uncertainty regarding the competent forum. If anything, these clauses manage to conserve resources simply by precipitating

> *"the dismissal of many lawsuits altogether that are then never reinstituted in the defendant's choice of forum. The lawsuits simply go away. And this does not include the lawsuits never brought at all – those in which a prospective plaintiff belatedly discovers the restrictive forum-selection clause and decides not to challenge its validity."*[929]

For the Supreme Court, then, it was an issue of "out of sight, out of mind."

Finally, even if we were to concede that the forum selection clause in *Carnival Cruise* actually increased the certainty and predictability of the contract (although it did not), it is worth asking whether the price paid for that certainty was too high. Since this certainty came at the expense of the plaintiffs' ability to obtain redress for their injuries, it seems to be that the price was excessive, and that the Court should not have granted its approval.

7.5.4 No Fraud, Overreaching or Bad Faith.

In *Carnival Cruise* the Court seems to have misunderstood what contractual unfairness actually means, adding a new and unnecessary requirement to deem an agreement or a term unfair. In ruling the forum selection valid, the Court "*seemingly interpreted unfairness*

---

[928] MULLENIX, L. S., 2011, supra note 877, p. 552. MULLENIX explains that the Yiddish words *"schlemiel"* and *"schamozzel"* mean *"an ineffectual person who bumbles through life"* and *"an unlucky person"*, respectively.
[929] MULLENIX, L. S., 1992, supra note 836, p. 343.

to require [a] *bad faith inclusion of a clause designating a distant forum solely to discourage legitimate claims*."[930] Since the Carnival Cruise company had its principal place of business in Florida, and many of its cruises set sail precisely from that state, the Court reasoned that, therefore, there was no malice and no fraud.

The Court, however, ignored the fact that malice or bad faith are not necessary to prevent the enforcement of an unconscionable clause. As it was stated in *Williams v. Walker-Thomas Furniture Co.*, unconscionability is determined by the "*absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party*".[931] It is therefore dependent on an objective analysis of the terms and their effects, regardless of the mindset that the drafting party might have had at the time the contract was made.

It was following precisely this line of reasoning that, in his dissent, Justice STEVENS made an explicit reference to the finding of unconscionability in the *Williams* decision, suggesting that the rule set on that case should have also been applied in *Carnival Cruise*. Justice STEVENS saw that, just as in *Williams*, this was a case in which "*a party of little bargaining power, and hence little real choice*", signed a *"commercially unreasonable contract with little or no knowledge of its terms*," which resulted in an absence of any real consent, so that *"enforcement should be withheld."*[932]

The bargaining power disparity evident in *Carnival Cruise* is precisely of the kind that the unconscionability doctrine deals with. After all, the case was about *"an industry-wide contract heavily weighted in favor of one party that is offered on a take-it-or-leave-it basis."*[933] It was a contractual relation where virtually all the bargaining power was held by Carnival Cruise, with the only choices left for the Shutes being saying "yes" or "no" to a contract they were not even able to read.[934]

---

[930] GOLDMAN, L., 1991, supra note 748, p. 709.

[931] *Williams v. Walker-Thomas Furniture Company* [1965], p. 449.

[932] *Carnival Cruise Inc., v. Shute* [1991], pp. 600–601. Justice STEVENS had already raised the alarm about the slippery slope that was created by decisions that simply enforced forum selection clauses. In *Mitsubishi Motors v. Soler Chrysler-Plymouth,* for example, a case dealing with an arbitration clause, Justice STEVENS argued in his dissent that:

> *"The Court's repeated incantation of the high ideals of 'international arbitration' creates the impression that this case involves the fate of an institution designed to implement a formula for world peace. But just as it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes, so is it equally unwise to allow a vision of world unity to distort the importance of the selection of the proper forum for resolving this dispute."*

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc [1985], 473 US, 614–666, p. 665. *See* also MULLENIX, L. S., 1988, supra note 761, p. 318 (referring to the dissents in post-*Bremen* cases, and the possibility of a *"slippery-slope"*).

[933] MULLENIX, L. S., 1992, supra note 836, p. 355.

[934] Rather bizarrely, SOLIMINE argues that the Shutes were not "*completely without bargaining leverage*," since, for example, "numerous cruise passengers, assuming they were ex post offended by the forum selection clause,

The issue of readership was also analyzed (and dismissed) by the Court in a very unsatisfactory manner. The Court justified the enforcement arguing that the plaintiffs had been properly informed of the forum selection clause, and that this had actually been conceded by the plaintiffs themselves. In stating this, what the Court did was to demonstrate an almost absolute inability to understand irony, as well as serving as a warning to lawyers that they should always write in a clear and unambiguous manner, since the courts might not be the right audience for detecting nuances.

To reach the bizarre conclusion that the Shutes had actually been informed of the terms, the Court referenced a Brief presented by the plaintiffs which stated that they did not "*contest the incorporation of the provisions nor [sic] that the forum selection clause was reasonably communicated to the respondents,* ***as much as three pages of fine print can be communicated***."[935]

What the plaintiffs were clearly arguing in their Brief, and which the Court obviously failed to comprehend, was that although they had indeed received the terms (after the tickets had been paid for), it is hard to maintain that simply presenting three pages of fine print to (legally) unsophisticated people can truly be considered a "reasonable communication." Since the Court did not condition its assessment to the length of the terms, we can conclude that if Carnival Cruise had sent the tickets with an attached 50-page document containing the terms and conditions, the Court would have reached the exact same conclusion. After all, if the Court considered that it was a reasonable communication to simply mail the terms after the payment had been made, then the length should not be an issue. [936]

---

conceivably could publicize the matter and bring pressure to bear on the cruise lines" (SOLIMINE, M. E., 1992, supra note 743, pp. 83–84). Even if we ignore the fact that at the time there were not that many possibilities for consumers to create far-reaching grassroots organizations (at least compared to the possibilities granted by the advent and massification of the Internet) it is difficult to see what power the Shutes would have had at the time of buying the tickets just because they could have, conceivably, created a consumer group. After all, every single consumer, all around the world, theoretically has the same possibility, and yet nobody would claim that the fact that maybe they could create a movement of dissatisfied consumers actually gave them more power at the time of negotiation. As a matter of fact, SOLIMINE himself concedes that "*this sort of sanction will only benefit a future class of consumers, of whom people like the Shutes may not be members –unless they travel on cruise lines on a regular basis*."

[935] *Carnival Cruise Inc., v. Shute* [1991], p. 590 (emphasis added).

[936] This was also the point raised by GOLDMAN, who caustically argued that assuming that all the terms can simply be enforced

> *"represents the triumph of economic theory over reality. Its premise, that freedom of contract maximizes societal wealth because the parties to a contract know what is best for them, simply is inapposite for secondary terms in consumer contracts. Consumers do not read or understand the subordinate terms of their contracts and, therefore, do not, as a group, voluntarily and knowingly adopt the obligations and duties contained therein. The subordinate terms of the contract are just not a reflection of consumers' self-interests. To pretend otherwise is to live in a fantasy land.*

With its decision, the Court overlooked the fact that in reality there was "*no evidence of consent to or even notice of the forum stipulation*." [937] In light of this, the Court "*supported its decision to enforce the clause entirely with arguments related to its own assumptions regarding economic efficiency*."[938]

Based solely on the way in which the clause was communicated to the Shutes, the Court should have concluded that, at the very least, there was strong evidence of procedural unconscionability, and then analyze whether its content could also be considered substantially unconscionable.[939] The Court, however, failed to do this, opting instead to ignore the problem in which the Shutes were placed by forcing them to accept the terms only after the contract had been signed. It negated the fact that by then the Shutes were not in a position to rationally analyze the terms that were included with their tickets, nor did the Court even entertain the notion that at no point, at the time of the contract, did the Shutes even contemplate the possibility that a forum selection clause would be included. It was a surprising, non-salient term, that the Court somehow decided deserved to be enforced. The Shutes were the victims of a savvy merchant that exploited nor only their ignorance, but also their inherent mental biases, and instead of protecting them, the Supreme Court punished them even further.[940]

In his dissent, Justice STEVENS (joined by Justice MARSHALL), also questioned the line of reasoning followed by the Court to assume the terms had been communicated. Justice STEVENS explained that, in reality, "*only the most meticulous passenger is likely to become aware of the forum selection provision*," driving his point home by appending a copy of the terms, as presented to the plaintiffs. He then added that "*many passengers, like the respondents in this case* [...] *will not have an opportunity to read paragraph 8* [where the forum selection clause was placed] *until they have actually purchased their tickets*."[941]

By enforcing such a non-negotiated, take-it-or-leave-it, unread, and one-sided clause, the Court actually undermined the legitimacy of forum selection. Consensual jurisdiction is, of course, based on *consent*; both parties need to *agree* on the fact that they are conferring jurisdiction to a certain forum. In the case of *Carnival Cruise*, as well as in the plethora of

---

> ...[C]*onsumers' failure to read or understand the subordinate terms of their contracts is rational economic behavior, that economic efficiency favors placing the risk of distant litigation on the seller, and that the costs of government intervention in the forum selection clause context are de minimis. Thus, neither normative judgments about consumers' responsibility for their conduct nor enlightened economic reasoning can support the Supreme Court's prima facie validity rule for forum selection clauses in consumer contracts."*

GOLDMAN, L., 1991, supra note 748, pp. 740–741.

[937] SHELL, G. R., 1996, supra note 921, p. 1373.

[938] ibid., p. 1373.

[939] KNAPP, C. L., 2011, supra note 877, p. 558.

[940] On how heuristics played a role in the Shutes actions, *See* CHING, K. K., 2015, supra note 196, p. 15.

[941] *Carnival Cruise Inc., v. Shute* [1991], p. 597.

unbalanced and unfair clauses that have been enforced using *Carnival Cruise* as precedent, there is no consent. *"Two minds don't meet; rather, one mind prevails."*[942] In its attempt to uphold the so-called agreement between the parties, and treating the forum selection clause as just any other contractual provision, due process values were sacrificed. The result of this was a massive change in the landscape of American contract law:

> "[T]*he entire basis for enforcement of these clauses is through the application of contract principles, and forum-selection clauses automatically shift the jurisdictional question from the constitutional to the contractual. Due process is simply no longer a concern. Forum- selection clauses radically transform the jurisdictional rhetoric. The linchpins of the analysis become consent and contractual sanctity, not affiliating circumstances or traditional notions of fair play and substantial justice."*[943]

7.6 The Legacy of *Carnival Cruise*

While at first it might appear that focusing on *Carnival Cruise* is the equivalent of kicking a dead horse, it is quite the opposite. After all, despite the many criticisms that have been leveled against this decision, it has still served as the foundation for many following cases. Just like *The Bremen* before it, it has gone well beyond its original boundaries in admiralty jurisdiction, with courts expanding its application far beyond.[944] As KNAPP notes, it has been

> *"touted by many courts and commentators as a prime exemplar of the so-called 'rolling' contract, in which one party is bound not only to terms of which she-in theory, at least-could have been aware at the time she initially manifested her*

---

[942] MULLENIX, L. S., 1992, supra note 836, pp. 357–358. As noted by BLOCK:

> *"Mutual assent which is essential to the formation of a binding contract must be manifested by one party to the other. Such mutual assent cannot be based on subjective intent, but must be founded on an objective manifestation of mutual assent to the essential terms of the promise. In other words, the entry of the parties into a contractual relationship must be manifested by some intelligible conduct, act, or sign… The meeting of minds, which is essential to the formation of a contract, is not determined by the secret intentions of the parties, but by their expressed or manifested intentions."*

BLOCK, D., 2001, supra note 228, p. 231.

[943] MULLENIX, L. S., 1992, supra note 836, p. 366.

[944] In 1991, in the immediate aftermath of the *Carnival Cruise* decision, LIESEMER theorized that, like *The Bremen*, *Carnival Cruise* would soon go beyond its otherwise restrictive (admiralty) borders. He was soon proven right (LIESEMER, J. A., 1991, supra note 832, pp. 1026–1027). *See* also MULLENIX, L. S., 1992, supra note 836, p. 367 (arguing in the immediate aftermath of *Carnival Cruise* that "*it probably is true that neither The Bremen nor Carnival Cruise Lines will be confined to their admiralty jurisdiction basis. The history of The Bremen supports this prognosis; if anything, lower federal courts, and many state courts, widely rely on The Bremen to enforce forum-selection clauses in the full spectrum of contractual arrangements prevalent in every aspect of daily life. Without doubt, Carnival Cruise Lines, also an admiralty action, will be widely cited as endorsing the justice and utility of forum-selection clauses*").

> *general assent to the transaction, but to any terms the other party sees fit to add either before, during or after what we used to consider as the process of 'contract formation.' 'Terms-in-the-box' contracts, 'shrinkwrap' contracts, 'click-wrap' contracts, 'scroll-down' terms, 'terms to-be-added-or-changed-later' -all of these involve a kind of 'contracting' in which one party not only dictates the terms, it may even retain the power to change them later, and to do so in ways which the other party is effectively powerless either to anticipate or to avoid. Both in the world of paper contracts and in the world where contracts are only 'virtual,' contract law is seemingly moving inexorably toward a state in which neither the presence nor the absence of actual consent has any real significance."*[945]

While the facts of the case should not have allowed a wide application of the doctrine, the principles and justifications presented by the Court in *Carnival Cruise* made this possible. The Court, in essence, put forward an argument that seems to validate every agreement through which a powerful party might try to pre-select the forum in the contract.

> *"*[T]*he majority pointed to three factors that made the Carnival Cruise clause 'reasonable' the risk of suit in multiple fora, simplification of the jurisdictional inquiry, and the possibility of reduced transactional costs being passed on to the consumers. These factors amount to no real limitation on enforcement. Every large enterprise runs the risk of suits in multiple fora; every forum selection agreement simplifies the jurisdictional inquiry if enforced; reduced transaction costs always hold the theoretical possibility of consumer benefit."*[946]

The problem here is that, as some commentators have noted, the *Carnival Cruise* decision destroyed the limits that *The Bremen* had established, allowing for a total transformation of forum selection clauses. This is a transformation that converts them from *"instruments of economic freedom to instruments of economic oppression."*[947]

---

[945] KNAPP, C. L., 2011, supra note 877, pp. 561–562. The case of "rolling contracts", those in which one of the parties retains the right to make unilateral changes to the terms, is particularly troublesome, since it places on one of the parties (particularly those in an especially weak position) the duty to constantly review the new terms in order to simply detect the changes. Online agreements are good example of this; as WOODWARD explains, highlighting the already mentioned irrationality of even bothering to read the terms (although, as we have seen, they might end up being enforced):

> *"Even if one were to read and attempt to understand [for example] Apple's iTunes Terms of Service when first installing the software, can anyone reasonably expect a careful read for changes on the third or sixteenth update of the software? More importantly, if the terms can be changed at the vendor's will (or at least between updates), what sense does it make to read them even the first time?"*

WOODWARD JR, W. J., 2015, supra note 134, p. 927.

[946] BORCHERS, P. J., 'Forum Selection Agreements in the Federal Courts after Carnival Cruise: A Proposal for Congressional Reform', 1992, 67 *Washington Law Review*, no. 1, p. 74.

[947] ibid., p. 94. NEUBORNE goes as far stating that this virtually limitless enforceability of forum selection clauses (among other terms included in *"imposed contracts"*) has *"the effect of diluting the real-world value of post-Lochner*

An example of this expansive application of *Carnival Cruise* appears, among many others, in *Caspi v. Microsoft Network, LLC*, where the Appellate Division of the Superior Court of New Jersey affirmed a District Court decision that enforced a forum selection clause included in a *click-wrap* agreement.[948] Making an express reference to the *Carnival Cruise* decision, the Court in *Caspi* considered that the clause, included amid several pages of fine print presented to the users of the Microsoft Network, was analogous to the situation that affected the Shutes, and thus fully enforceable. As the Court reasoned:

> *"The scenario presented here is different because of the medium used, electronic versus printed; but, in any sense that matters, there is no significant distinction. The plaintiffs in Carnival could have perused all the fine-print provisions of their travel contract if they wished before accepting the terms by purchasing their cruise ticket. The plaintiffs in this case were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement."*[949]

The Court then added that since the forum selection clause was presented in the exact same way as the other terms of the contract (e.g. same typeface, size, etc.):

> *"To conclude that plaintiffs are not bound by that clause would be equivalent to holding that they were bound by no other clause either, since all provisions were identically presented. Plaintiffs must be taken to have known that they were entering into a contract; and no good purpose, consonant with the dictates of reasonable reliability in commerce, would be served by permitting them to disavow particular provisions or the contracts as a whole."*[950]

Despite the undeniable power of the *Carnival Cruise* decision, some dissenting cases do exist. This dissention becomes particularly relevant in those cases where forum selection clauses (and the public policy of enforcing them) come into direct conflict with laws aimed at protecting certain categories of contractual parties. A good example of this comes from consumer protection legislation, which often comes into direct conflict with blanket enforcement of terms.

In *Jane Doe v. Match.com*, a female user of the dating site Match.com sued the company after the man she met on the website, a person by the name of Ryan Logan, abused and

---

reforms, leaving us, today, with a watery legal brew that I call 'Lochner Lite'" (NEUBORNE, B., 2015, supra note 100, p. 185). This comparison, which might appear exaggerated to some, makes some sense, since the protections provided by the post-*Lochner* reforms might end up being diluted by means of contracting via standard forms.

[948] *Caspi v. Microsoft Network, LLC* [1999], 732 A. 2d, 528.

[949] ibid., p. 532.

[950] ibid., p. 532. To their credit, the same Court took a different view in *Hoffman v. Supplements Togo MGT* [2011], 18 A. 3d, 210, ruling a forum selection clause unenforceable due to a lack of proper notice when the terms were, for all practical purposes, never really presented to the plaintiff.

raped her.[951] The suit was filed after the plaintiff learned that the company had actually received allegations from another user regarding Mr. Logan's behavior, as well as of a previous accusation of rape, where he had been acquitted.[952] The plaintiff sued the company based on, among others, "*negligence, willful and wanton misconduct, and violation of the Illinois Dating Referral Services Act,"* a mandatory piece of consumer protection legislation (hereafter IDRSA) that applied to dating websites.[953] Since the Illinois Court had personal jurisdiction over the defendant, who had advertised their services in that state, and that both the plaintiff as well as her attacker resided there, that is the place where she brought her claim. The terms and conditions which she had agreed on when she signed up for the services of Match.com, however, included a choice of forum provision establishing:

> *"23. Jurisdiction and Choice of Law. If there is any dispute arising out of the Website and/or the Service, by using the Website, you expressly agree that any such dispute shall be governed by the laws of the State of Texas, without regard to its conflict of law provisions, and you expressly agree and consent to the exclusive jurisdiction and venue of the state and federal courts of the State of Texas, in Dallas County, for the resolution of any such dispute."*[954]

This choice of law and forum selection clause was in apparent contravention of the terms of the IDRSA, particularly its "anti-waiver" provision, which sought to prevent the parties from contracting out of the protections granted to them by the applicable state laws.[955] Indeed, as the Court expressly stated, enforcing this provision would mean that

> *"Match.com users in Illinois would lose protections that the Illinois legislature created for them through enacting* [the] *IDRSA."*[956]

The Illinois Court took a rather novel approach to this private international law issue, different from the one used in several other American jurisdictions, deciding first the validity of the contract as a whole under the law of the forum. Only then did the Court analyze whether the forum selection clause should be enforced. Courts in other jurisdictions who have heard claims against the same company, however, have first

---

[951] Since this case remains unreported, significant portions of this section are based on GOULD, M., 'The Conflict Between Forum-Selection Clauses and State Consumer Protection Laws: Why Illinois Got It Right in Jane Doe v. Match.com', 2015, 90 *Chicago-Kent Law Review*, no. 2.

[952] ibid., p. 671.

[953] ibid., p. 672.

[954] The terms that existed at the time of the dispute can be viewed on an archived version of the site, available at Match.com, 2011, 'Terms of Use Agreement', <https://web.archive.org/web/20110113041408/http://www.match.com/registration/membagr.aspx> (last visited 25 May 2015) In their current incarnation, the clause in question was replaced by a binding arbitration agreement.

[955] GOULD, M., 2015, supra note 860, pp. 674–675.

[956] Quoted in ibid., p. 676.

enforced the forum selection clause, as a matter of public policy, leaving the contractual forum to determine the validity of the contract. This brings as a consequence that even though the terms of the agreement do not explicitly waive the provisions of the protective legislation, the enforcement of the forum selection clause, together with the application of the law selected in the contract, result in a waiver.

A decision more in line with *Carnival Cruise*, and which is more representative of the state of American law regarding forum selection, appears in *Brodsky v. Match.com*, where a New York Court enforced the same forum selection clause that was the object of the Illinois case.[957] The New York Court stated that there was a strong public policy reason to enforce forum selection clauses, so strong indeed that it was not overridden by *"New York's interest in protecting its consumers and businesses."*[958] The Court even justified its decision resorting to a logic similar to that exemplified by the Supreme Court in *Carnival Cruise*, mentioning how

> *"as a website and service provider, Match would appear to have no practical alternative than to include a forum selection and choice of law clause in its User Agreement, since otherwise Match could potentially be subject to suit in any of the fifty states arising from its website or service."*[959]

The legacy of *Carnival Cruise* has been to create a very lax standard for corporate parties to enforce their forum selection clauses against weaker parties. With a very literal and shortsighted understanding of what "notice" means, courts have understood that simply presenting a party with the terms means that those terms should be read, understood and pondered, regardless of their length or complexity. The burden that is thus placed on the adhering parties is such that their failure to comprehend dozens of clauses presented in unintelligible legalese fine print is seen as a sign of them acting negligently.

> *"In the rush to embrace a doctrine of consensual adjudicatory procedure, the federal courts have eagerly chosen the simple, neat solution. Unfortunately, the problems involved in consensual arrangements are not so tidy, and the courts have created a hodgepodge of principles and rationales to justify the doctrine.*
>
> *Neither the Supreme Court nor the lower federal courts have done an admirable job of delineating a coherent and justifiable theory of consensual adjudicatory procedure. Due process requirements that normally inform jurisdictional analysis have evaporated in favor of expediency. Courts permit contract principles to replace carefully crafted jurisdictional rules. Essentially, the courts have evaded troubling*

[957] *Brodsky v. Match.com LLC* [2009] WL, 1–5.
[958] ibid., p. 4.
[959] ibid., p. 4.

> *questions: can parties contract away fundamental attributes of sovereignty or due process protection?"*[960]

It is hard to predict what will be the future of the standards used by the courts to enforce forum selection clauses and arbitration agreements. The fear remains that in their zeal to enforce these agreements they might overlook the rights of the weaker parties to the transactions, who will then find themselves unable to obtain any real redress. While we may not yet be in a situation in which merely crossing a door might be used to imply agreement to a forum selection, as WOODWARD notes, this has not stopped some enterprises from trying:

> *"ARBITRATION NOTICE*
>
> *By entering these premises, you hereby agree to resolve any and all disputes or claims of any kind whatsoever, which arise from the products, services or premises, by way of binding arbitration, not litigation.* ***No suit or action may be filed in any state or federal court.*** *Any arbitration shall be governed by the FEDERAL ARBITRATION ACT, and administered by the American Mediation Association."*[961]

7.7 Exceptions to the Validity of Forum Selection Clauses

As we have seen, *The Bremen* established a rule, later expanded by *Carnival Cruise*, according to which forum selection clauses are presumptively valid. It is, in other words, up to the resisting party to prove that the clause should not be enforced. Following the principles set out in the *Carnival Cruise* decision, a court may use its discretion and refuse to enforce a forum selection clause if the clause in question is "unreasonable or unjust."[962] As explained by the US Court of Appeals for the Fourth Circuit, forum selection clauses will be considered unreasonable if:

> *"(1) their formation was induced by fraud or overreaching; (2) the complaining party 'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state."*[963]

---

[960] MULLENIX, L. S., 1988, supra note 761, p. 302.
[961] Cited in WOODWARD JR, W. J., 2015, supra note 134, p. 918 (emphasis in the original). Reportedly, this bizarre notice was posted, of all places, outside of a Texan burger franchise. *See* also CANIS, E., 2015, supra note 295, p. 130, citing *Consumer Reports* ("[t]*here is probably not a single adult in the United States who is not subject to at least one binding mandatory arbitration clause*").
[962] GOULD, M., 2015, supra note 860, pp. 680–681.
[963] *Allen v. Lloyd's of London* [1996], 94 F. 3d, 923–932, p. 928.

Of course, due to the "strong public policy" in favor of enforcing these clauses, any of these exceptions must be construed in a very strict and narrow manner.[964]

7.7.1 Fraud or Overreaching

A party seeking to escape a forum selection clause arguing that she was a victim of fraud is under a heavy burden. Due to the policy considerations that serve as the basis for the presumption in favor of these clauses, the standard of proof in this regard is quite high. As a result, the party is required to prove that not only was the contract itself illegally procured, but also that the forum selection clause within the agreement was specifically fraudulent.[965]

In *Brodsky*, the Court dismissed the allegations of fraud brought forward by the plaintiffs based on, among other reasons, the fact that "*general allegations that the contract as a whole was tainted by fraudulent inducement are insufficient to invalidate a forum selection clause where, as here, a plaintiff has not alleged fraudulent inducement with respect to the forum selection clause itself.*"[966] The Court reasoned that if "general" fraud was sufficient, then "*plaintiffs could easily thwart the parties' reasonable expectations regarding forum selection simply by alleging fraud in their complaint.*"[967]

The position of the courts regarding fraud was further demonstrated in the 1998 *Afram Carriers, Inc. v. Moeykens*, before the Court of Appeals for the 5th Circuit.[968] Here the Court explained that, following the instructions of the Supreme Court, forum selection clauses should be enforced "*in the interests of international comity and out of deference to the integrity and proficiency of foreign courts.*" The Court then explained that if the validity of the forum selection clause was determined by "*what we believe to be the merits of the underlying contract,*" then the stated goal of comity would be subverted, "*by making a merits inquiry that the Supreme Court has determined is best left to the forum selected by the parties.*"[969] The Court then added:

> *"Only when we can discern that the clause itself was obtained in contravention of the law will the federal courts disregard it and proceed to judge the merits. Because, in this case, we can draw an inference of an illegally obtained forum-selection clause only if we judge the merits of the contract — that is, the movants have offered no*

[964] GOULD, M., 2015, supra note 860, pp. 680–681.
[965] JACKSON, E., 2001, supra note 867, pp. 378–379.
[966] *Brodsky v. Match.com LLC* [2009], p. 3.
[967] ibid., p. 3.
[968] *Afram Carriers, Inc. v. Moeykens* [1998], 145 F. 3d, 298–305.
[969] ibid., p. 300.

> *evidence that the clause itself was obtained as a result of fraud or overreaching — we cannot disregard it on that ground."*[970]

As the Utah Supreme Court expressed in a 2014 case, the majority of US courts have taken this approach in regards to fraud, requiring that the clause itself, not just the contract in general, was procured in a fraudulent fashion.[971]

> *"In other words, the majority approach is tailored to dispel the fear that a party could avoid the enforcement of a forum selection clause "by merely alleging fraud or coercion in the inducement of the contract at issue." Thus, under this approach, all forum selection clauses are presumed to be valid, even when the validity of the entire contract is in question, and even when the validity of the contract is central to the suit."*[972]

A minority of courts, however, and with which the Utah Supreme Court actually sided, argues the opposite position. Courts in Georgia, New York and Tennessee actually tend to

> *"allow a plaintiff's claim that the contract was entered into fraudulently to be sufficient to render the forum selection clause unenforceable.* [...] *The benefit of this approach is that it protects defrauded plaintiffs from being forced to litigate fraudulent contracts in a potentially inconvenient forum not of their choosing."*[973]

Through this method, weak parties that only agreed to a forum selection clause because it was part of the package of terms that was given to them, might be able to obtain some degree of protection. Indeed, a party that is forced to travel to a distant forum only to argue that she should not even be in that distant forum, might find herself in a very difficult position. As the Utah Supreme Court noted, "*the application of this approach may also result in defrauded plaintiffs being forced to litigate a contract that is ultimately deemed fraudulent in a different forum as the result of a provision they never bargained for."*[974]

The majority position does, of course, have its merits and reasons. In principle, it makes sense that a court in which proceedings were brought in breach of a forum selection clause should not have to analyze the validity of the underlying contract. This avoids "*the task of determining whether a contract is valid at the motion to dismiss stage,"* reserving such issue *"until further discovery can be done, at which point that issue can be adjudicated on its merits with the benefit of full discovery."*[975]

---

[970] ibid., p. 302.
[971] *Energy Claims v. Catalyst Inv. Group* [2014], 325 P. 3d, 70–86, p. 84.
[972] ibid., pp. 84–85
[973] ibid., p. 85.
[974] ibid., p. 85.
[975] ibid., p. 85. From a comparative perspective, it is worth noting that this is the approach taken by the Brussels I (Recast Regulation), which establishes in the last paragraph of Art. 25:

7.7.2 Grave Inconvenience or Unfairness of the Contractual Forum

US Courts have set a very high standard for a party to prove that she has been *"deprived of her day in court"* or that the chosen forum is inherently unfair. The *Carnival Cruise* decision showed this much, by not considering that the Shutes' inconvenience in travelling from Washington to Florida was significant enough. As the Court of Appeals for the Third Circuit stated in *Dayhoff Inc. v. H.J. Heinz Co.*, the fact that "[the] *Plaintiff is unhappy, in retrospect, about the forum it designated is insufficient to warrant a finding that the clauses are unenforceable*."[976] While *Dayhoff* was a decision dealing with experienced commercial parties, the same logic is still applied in regards to more imbalanced contractual relations.

The zeal of American courts in this regard is easy to understand, as there is a concern that a party might voluntarily agree to a forum selection clause, but that might simply regret that decision once proceedings are to begin. The problem is, of course, that the language of the *Dayhoff* Court is not really applicable to forum selection clauses that come embedded in boilerplate terms, where it can hardly be said that the resisting party "*designated*" a forum, any more than she chose any of the other clauses.

As a result of this increased burden, courts will often require the presence of some additional "aggravating circumstances" in order to refuse the enforcement of the forum selection clause. Courts have been sympathetic, for example, to parties whose contracts were drafted in a language not known to them, or which forces them to litigate in a foreign country.[977]

This was precisely the situation that arose in *Sudduth v. Occidental Peruana Inc.*[978] In this case, the plaintiffs, US citizens living in Texas, had signed an employment contract with Oxy Peruana, an American company, to perform some work in the Peruvian jungle. The Spanish version of the contract, which the plaintiffs had been required to sign, included a forum selection clause submitting all disputes to Peruvian courts. The plaintiffs sued in Texas, arguing that the enforcement of the clause would have effectively deprived them of their day in court.[979]

Recognizing that the plaintiffs bore a "*heavy burden of proof*" to prove that the clause was unreasonable, the Court considered that this burden had been met, and refused to enforce the clause.[980] The Court reasoned that the *"grave inconvenience or unfairness of*

"The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid"

[976] *Dayhoff Inc. v. HJ Heinz Co* [1996], 86 F. 3d, 1287–1303, pp. 1297–1298. *See* also JACKSON, E., 2001, supra note 867, p. 379.

[977] DEMPSEY, J., 2011, supra note 748, p. 1203.

[978] *Sudduth v. Occidental Peruana, Inc.* [1999], 70 F. Supp. 2d, 691–699.

[979] ibid., pp. 693–694.

[980] ibid., p. 695.

trying the case in Peru" would indeed, for all practical purposes, deprive the plaintiffs of their day in court. The Court then distinguished this situation from the events in *The Bremen* and in *Carnival Cruise*, since in the case at hand it was two American parties that were submitting their dispute to a *"remote, alien forum."*[981]

Dealing with the issue of the "unfairness" of the selected forum, the Court then argued that while the forums selected in *The Bremen* and *Carnival Cruise* were "neutral," the Peruvian forum was not, since *"the Defendants have contracts in Peru, including a subsidiary regularly conducting business in Peru,"* which would place the increased costs of litigation solely on the plaintiffs.[982] Furthermore, the Court considered that the clear differences in the bargaining power of the parties (individuals seeking employment on the one side, and a corporation conditioning employment to the signing of the contract on the other), made it impossible to consider that this had been a truly free agreement.[983] The Court concluded that the burden that would be placed on the plaintiffs by travelling to Peru to litigate this dispute was unacceptable and unfair, as it would require *"every American party to travel to a foreign country to litigate an essentially local dispute."*[984] The Court then also denied a motion to dismiss by the defendant on the basis of *forum non conveniens*.[985]

Although the decision of the District Court in *Sudduth* is a positive one for parties seeking to escape an unbargained-for forum selection clause, it does little in the way of creating certainty. First, the Court follows a rather strange logic in its analysis of the neutrality of the Peruvian forum, seemingly arguing that the fact that one of the parties had a close connection with Peru meant that the forum was not neutral, since that party would not suffer great economic damages by litigating there. At a glance, the Court seems to be arguing that a forum will only be "neutral" if both parties are equally burdened by travelling there, so that if one of the parties is significantly closer than the other, then the forum will not be "neutral". This does not really make sense, as it would force parties to only choose foreign forums with which they are not familiar, or from which they are equally distant. What is more, the decision does little to explain why the burden of the plaintiffs in *Carnival Cruise*, travelling from Washington state to Florida, the latter being the place of business of the Carnival Cruise company, was not equally significant to consider the clause unreasonable. The same happens in the case of any consumer or small business transaction, where the bargaining power disparities would be just as severe, if not more, and where forum selection clauses are routinely enforced.

More in line with *Carnival Cruise* was the decision of a West Virginia District Court that dismissed the suit of a patient that, having had surgery in Germany, had agreed to a

[981] ibid., p. 695.
[982] ibid., p. 695 .
[983] ibid., p. 695.
[984] ibid., p. 696.
[985] ibid., p. 699.

forum selection clause in her medical services contract granting jurisdiction to German courts.[986] The Court considered that since *"a clearly worded forum-selection clause"* had been "*clearly conveyed*" to the plaintiff, then she could not escape its application solely on the basis of the "*mere inconvenience*" involved in travelling to Germany.[987] The Court in this case did not follow the ideas put forward in *Sudduth* regarding neutrality, and dismissed the proceedings brought in contravention of the forum selection clause.

Proving that the law of the chosen forum will deprive a party of her day in court is perhaps even more difficult than demonstrating the circumstances that, for example, make a trip there substantially inconvenient. As the *Brodsky* Court explained:

> *"*[I]*t is not enough that the foreign law or procedure merely be different or less favorable than' that of the forum in which plaintiffs brought their claims.* [...]
>
> *Similarly, that the applicable statute of limitations for certain claims may be shorter in [...the contractual forum] cannot* [...] *render the forum selection clause unenforceable.* [...] *Furthermore, even an expired limitations period in the selected forum would be insufficient to render the clause unenforceable. As courts in this Circuit have recognized, accepting plaintiffs' statute of limitations argument would 'create a large loophole for the party seeking to avoid enforcement of the forum selection clause* [who could] *simply postpone* [his] *cause of action until the statute of limitations has run in the chosen forum and then file* [his] *action in a more convenient forum.'"*[988]

7.7.3 Public Policy

Since *The Bremen*, the Supreme Court has been rather clear and adamant in establishing that there is a strong policy in favor of enforcing forum selection clauses.[989] The importance of this general policy is such that the party seeking to resist the enforcement will have to prove a particularly strong public policy reason if she wishes to avoid it. Exactly how restricted this public policy exception is was better expressed by the Court of Appeals for the Fifth Circuit in *Afram Carriers Inc. v. Moeyken*, where it stated:

---

[986] *Sheldon v. Hart* [2010], 114007 WL, 1–10.
[987] ibid., p. 4.
[988] *Brodsky v. Match.com LLC* [2009], p. 3.
[989] O'HARA, E. A., 'The Jurisprudence and Politics of Forum-Selection Clauses', 2002, 3 *Chicago Journal of International Law*, no. 2, p. 303.

> *"*[T]*here is a heavy presumption in favor of such clauses; these days, the barrier has been raised: A strong public policy, not just any public policy, is needed to justify overcoming the presumption in favor of such clauses."*[990]

The standard established by American courts in favor of enforcement of these clauses is so high, that some courts have even stated that *"upholding the forum selection clause may be a greater interest than the interest that the state has in supporting the particular policy"* that might be violated by its enforcement.[991] In *Shell v. RW Sturge*, for example, a plaintiff seeking to prevent the enforcement of a forum selection clause arguing that it violated the public policy of the state of Ohio was told by the Court that he had the burden of showing that this public policy "*outweighs the policies behind 'supporting the integrity of international agreements.'"*[992] In other words, the plaintiff was not only required to prove that the enforcement of the clause was against public policy, but also, and perhaps most importantly, that this public policy was somehow more important than that of enforcing the clause in question, and that his own meager dispute was more important that the integrity of the system of international contracts.

Despite the high burden placed on the resisting party, there are some cases in which public policy considerations allow her to escape enforcement. In *Williams v. America Online, Inc.,* for example, a Massachusetts Superior Court denied enforcement of a forum selection clause contained in a click-wrap agreement that would force the user to litigate in Virginia. The Court held that:

> *"Public policy suggests that Massachusetts consumers who individually have damages of only a few hundred dollars should not have to pursue AOL in Virginia."*[993]

This decision highlights the significant overlap that exists between different exceptions to enforcement. It seems to be that the same decision could have been reached by arguing that the contractual forum represented a *"grave inconvenience"* for the party in question, or even, more generally, that forcing such a voyage for a small claim was substantially unconscionable.

A similar ruling was delivered by the Appellate Term of the New York Supreme Court in *Scarcella v. America Online, Inc.,* where the Court considered that enforcement of the forum selection clause would go against the public policy goals of the state of New York. Here the Court noted that the plaintiff had sued in a small claims court, and that this court had been especially created for litigants *"as a low-cost and relatively simple forum*

---

[990] *Afram Carriers, Inc. v. Moeykens* [1998], p. 303.
[991] JACKSON, E., 2001, supra note 867, p. 379.
[992] *Shell v. RW Sturge, Ltd.* [1995], 55 F. 3d, 1227–1232, p. 1231.
[993] *Williams v. America Online, Inc.* [2001], 2001 WL, 1–4, p. 3.

available to individuals who were unable to attend court proceedings during the working day."[994] As a result, and as the Court noted:

> *"Enforcement of the forum selection provision in these circumstances would frustrate the stated legislative goal of providing a 'simple, informal and inexpensive procedure' for the disposition of small claims."*[995]

Cases such as those mentioned above seem to be in the minority.[996] A review of the case law shows that, by and large, public policy defenses against enforcement of forum selection, even in consumer cases (where protective laws exist almost all across the board) tend to fail more often than they succeed.[997]

[994] DAVIS, N. J., 2007, supra note 232, p. 593.
[995] *Scarcella v. America Online* [2005], 11 Misc. 3d, 19; *Scarcella v. America Online* [2005], 11 Misc. 3d, 19, pp. 858–859.
[996] DAVIS, N. J., 2007, supra note 232, p. 592.
[997] MULLENIX, L. S., 'Gaming the System: Protecting Consumers from Unconscionable Contractual Forum Selection and Arbitration Clauses', 2015, 66 *Hastings Law Journal*, no. 3, p. 757.

Chapter 8
Forum Selection in England

> *"The rule of law requires that any persons with a bona fide reasonable legal claim must have an effective means of having that claim considered, and, if it is justified, being satisfied, and that any persons facing a claim must have an effective means of defending themselves.*
>
> [...]
>
> *Frederick the Great supposedly said that 'Diplomacy without arms is like music without instruments'. So is the rule of law without access to the courts. If there is no, or only restricted, access to the courts, the fundamental underpinning to all forms of dispute resolution systems, such as mediation, and even arbitration, falls away."*
>
> Lord Neuberger.[998]

8.1 The Origins of Forum Selection in England

Throughout its history, the English position towards party autonomy in private international law matters has not been static. In fact, even though originally the Common Law was receptive to choice of law clauses, courts were not so tolerant of the parties' will when it came to their ability to choose the forum.[999] In principle, this rejection was grounded on the idea that the jurisdiction of the courts was "*to be subject only to public and not private control,"* meaning forum selection clauses could not deprive a court of jurisdiction.[1000]

Although these rationales echo those that were used in the United States before forum selection clauses were universally accepted, the similarities end there. Unlike their American counterparts, English courts have a long(er) history of tolerance towards the party's ability to select the forum. Indeed, the fears that, as we saw in the previous section, seemed to infect the American legal tradition, were left behind much faster on

[998] Lord Neuberger, 2013, 'Justice in an Age of Austerity', <https://www.supremecourt.uk/docs/speech-131015.pdf> (last visited 19 February 2016), pp. 9–10.
[999] GILBERT, J. T., 1976, supra note 754, pp. 7–8.
[1000] ibid., p. 8.

the other side of the Atlantic, where, "*from an early date* [courts] *have enforced contractual clauses conferring exclusive jurisdiction on foreign tribunals.*"[1001]

It was in 1796 that a forum selection clause first came to an English court, in the case of *Gienar v. Meyer*.[1002] The facts of this case, in which both litigants were foreigners, are rather clear:

> *"A ship and cargo were confiscated in an English port on its voyage back to The Netherlands. Dutch seamen sued their Dutch captain for wages due under a contract entered into in Rotterdam. The seamen's contract provided that all disputes should be settled by the courts in Rotterdam and specifically provided that the captain was not to be sued in foreign countries. In refusing to exercise jurisdiction, the [English] court pointed out that since the captain could not pay the wages with his ship and cargo confiscated, he might languish in debtor's prison for life. It was thought more reasonable to 'send the parties to their own country there to pursue their remedy.'"*
> [1003]

Strictly speaking, the *Gienar* decision seems to be more related to an issue of *forum non conveniens* than forum selection, particularly considering that the parties were not English subjects. What is more, the Lord Chief Justice commenced his decision by stating that "*no persons in this country can by agreement between themselves exclude themselves from the jurisdiction of the King's Courts,*" albeit noting that "*such an agreement between foreigners if made in their country and valid according to that law could be enforced in an English Court*."[1004] Despite these words of measure, however, subsequent decisions by the English judicature contradict his statement, as "*such contractual stipulations between British subjects who were domiciled and apparently also resident in England were on principle held valid.*"[1005]

In the seminal 1878 case of *Law v. Garrett*, English courts demonstrated their unequivocal sympathy towards forum selection, enforcing a clause that granted jurisdiction to a Russian court. The reasoning behind this, as presented by Lord Justice Baggly of the Court of Appeal, was that if the parties "*choose to determine for themselves that they will have a forum of their own selection instead of resorting to ordinary courts, a prima facie duty is*

[1001] SYKE, W. E., 'Agreements in Advance Conferring Exclusive Jurisdiction on Foreign Courts', 1949, 10 *Louisiana Law Review*, no. 3, p. 293. Writing in 1977, ZAPHIRIOU noted how he was aware *"of no case in which an English court rejected the parties' submission on the ground that it was not a convenient court,"* although he notes that in Scotland such decisions do exist (ZAPHIRIOU, G. A., 1977, supra note 747, p. 315).
[1002] *Gienar v. Meyer*, 126 E.R., 728. *See* also COWEN, Z. & DA COSTA, D. M., 'The Contractual Forum: Situation in England and the British Commonwealth', 1964, 13 *The American Journal of Comparative Law,* p. 180.
[1003] SYKE, W. E., 1949, supra note 1001, pp. 293–294. *See* also DENNING, S. M., 'Choice of Forum Clauses in Bills of Lading', 1970, 2 *Journal of Maritime Law and Commerce*, no. 1, p. 17.
[1004] GRAUPNER, R., 'Contractual Stipulations Conferring Exclusive Jurisdiction upon Foreign Courts in the Law of England and Scotland', 1943, 59 *Law Quarterly Review*, no. 3, p. 229.
[1005] ibid., p. 229.

cast upon the courts to act on such arrangements."[1006] Here the court treated the forum selection clause as if it was a submission to arbitration, holding that the arbitration statute applied.[1007] It was certainly a convoluted manner to achieve enforcement, and even based on a certain degree of fiction. An arbitration clause is not the same as a forum selection clause naming a foreign court; however, the Court of Appeal considered it a priority to respect the parties' intention as expressed in the contract, and to not allow the incongruous tolerance of arbitration on the one hand, and rejection of forum selection on the other, to get in the way of such goal.[1008]

The mindset of the English courts has been that if the parties have agreed upon something such as the contractual forum, then the courts should not be used by one of them to go against their own agreement. Of course, this general proposition is far from being an absolute rule, and exceptions do exist. However, in the same way that *The Bremen* rule in America established a *prima facie* validity *unless* strong reasons can be put forward to deny the enforcement, under English law it is also required that the resisting party puts forward *"some good reasons"* for not enforcing it.[1009] As it was stated in the 1909 case of *Kirchner v. Gruban,* a forum selection clause is

> *"an agreement by which the parties are bound and upon which the court must act, unless* ***for some good cause*** *there is reason to think that the matter ought to be determined otherwise than by the tribunal to which the parties have deliberately agreed to submit their differences."*[1010]

This was also the sentiment manifested by Lord WRIGHT in the 1939 case of *Vita Food Products Inc. v. Unus Shipping Co.*, stating:

> *"It is true that in questions relating to the conflict of laws rules cannot generally be stated in absolute terms but rather as prima facie presumptions. But where there is*

[1006] Quoted in SYKE, W. E., 1949, supra note 1001, p. 294.

[1007] FARQUHARSON, I. M., 1974, supra note 750, p. 89.

[1008] *Law v. Garrett* [1878], 8 L.R., 26–36, pp. 34–35 ("[The arbitration statute] *is expressed in very wide terms, which are not cut down by any words of reference. The scope of the Act was to discourage litigation and keep the parties before the tribunal which they have chosen*").

[1009] SYKE, W. E., 1949, supra note 1001, p. 295.

[1010] *Kirchner & Co. v Gruban* [1909], 1 Ch., 413–423, p. 418 (emphasis added). *See* also COLLINS, L., 'Arbitration Clauses and Forum Selecting Clauses in the Conflict of Laws: Some Recent Developments in England', 1971, 2 *Journal of Maritime Law and Commerce*, no. 2, p. 370. As FARQUHARSON notes, this is also the way in which English courts went around the issue of forum selection clauses "ousting" them of their jurisdiction, by appealing to the idea of party autonomy.

> *"The courts have skirted the refusal to accept the idea of party autonomy in derogation clauses by holding that the agreement will be respected on the theory that the court will not participate in a breach of contract, absent some overriding considerations of public policy. What this means in the mechanical sense is that the court will have jurisdiction to entertain all actions, but has the discretionary power to stay proceedings brought in breach of a choice of forum agreement."*

FARQUHARSON, I. M., 1974, supra note 750, p. 92.

> *an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy."*[1011]

Although this decision clearly refers to choosing the law of the contract, FARQUHARSON has argued that it is also applicable to choice of court agreements, since "*it states the principle of party autonomy, which encompasses forum-selection clauses.*"[1012]

As we have seen, and in yet another parallel with the American experience, arbitration agreements were regulated before forum selection clauses. It was in 1854 when the Common Law Procedure Act established that a court should stay proceedings when they had been instituted in contravention of an arbitration agreement between the parties, and which, as we saw, was used to enforce forum selection clauses through analogous application.[1013] Indeed, England's acceptance of choice of court agreements first became possible under the theory (if not downright fiction) that they came under the rules of the 1889 Arbitration Act. It was not until the 1944 Court of Appeal case of *Racecourse Betting Control Board v. Secretary of the Air* that this fiction was explicitly repudiated. In this case, Lord Justice MACKINNON stated:

> *"It is, I think, rather unfortunate that the power and duty of the court to stay the action was said to be under section 4 of the Arbitration Act, 1889. In truth the power and duty arose under a wider principle, namely, that the court makes people abide by their contracts and therefore will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined."*[1014]

As the above quote clearly shows, the English system, perhaps more so than others, puts a special emphasis in the party autonomy principle, favoring the enforcement of private

---

[1011] *Vita Food Products Inc. v. Unus Shipping Co.* [1939] AC, 277–301, p. 290.

[1012] FARQUHARSON, I. M., 1974, supra note 750, p. 90.

[1013] COWEN, Z. & DA COSTA, D. M., 1964, supra note 1002, p. 182. According to Article XI of this Act, under the heading "*If Action Commenced by One Party after all have agreed to Arbitration, Court or Judge may stay Proceedings*":

> *"Whenever the Parties* [...] *shall agree that any then existing or future Differences between them or any of them shall be referred to Arbitration, and any One or more of the Parties [...] shall nevertheless commence any Action at Law [..] it shall be lawful for the Court in which Action or Suit is brought* [...] *to make a Rule or Order staying all Proceedings in such Action or Suit* [...]*"*

[1014] *Racecourse Betting Control Board v Secretary for Air* [1944] Ch., 114–128, p. 126. ABALLI, A. J., JR., 'Comparative Developments in the Law of Choice of Forum', 1968, 1 *New York University Journal of International Law and Politics*, no. 2, p. 194.

agreements between the parties before other considerations.[1015] It is on the basis of this principle that, as one commentator noted, the English judicature

> *"puts the will of private parties - not the state - at the centre of choice of forum and choice of law. The principle is derived not from international law but from free will theories of contract law under which contractual obligations flow from the agreement of the parties, not the state. At the private international law level, it follows that the parties likewise should be free to choose which state's laws will govern and which authority should be vested with authority to adjudicate."*[1016]

This willingness (if not eagerness) of the English courts to enforce forum selection clauses in private contracts is particularly evident in cases where the chosen forum is located in England. Indeed, if the contract contains a clause granting jurisdiction exclusively to an English court, then

> *"once proceedings are commenced in England, it will be very difficult for the defendant to obtain a stay (or set aside an order granting leave or permission to serve out of the jurisdiction under the Civil Procedural Rules) either according to the 'natural forum' calculus of Spiliada, or by reasons of a lis alibi pendens, even where related or identical foreign proceedings are well advanced."*[1017]

Although, as we have seen, the English common law possessed a long tradition of respecting the will of the parties in regards to forum selection, it was in 1970, in the seminal case of *The Eleftheria,* that the courts, for the first time, *"set out in a comprehensive and logical manner the principles on which the court will act"* in regards to forum selection.[1018]

8.2 *The Eleftheria* and International Forum Selection

In *The Eleftheria*, an action for the damages suffered by the cargo carried aboard the M/V Eleftheria, was started in England by the cargo interest against the shipowner. *"Plaintiffs were timber merchants who carried on business in England. Defendants were Greek nationals, joint owners of The Eleftheria, a Greek ship registered in Greece, and their principal place of*

[1015] *See* BELL, A. S., *Forum Shopping and Venue in Transnational Litigation*, 2003, Oxford University Press, p. 277 ("[there is] *a strong judicial disposition in common law countries to upholding parties' bargains, including bargains in relation to jurisdiction and arbitration*").

[1016] WALSH, C., 'The Uses and Abuses of Party Autonomy in International Contracts', 2010, 60 *University of New Brunswick Law Journal)*, no. 1, p. 14.

[1017] BELL, A. S., 2003, supra note 1015, p. 280- On the *Spiliada* analysis, in matter of *forum non conveniens*, *See* SCHULZE, H. C. A., 'Forum Non Conveniens in Comparative Private International Law', 2001, 118 *South African Law Journal*, no. 4, pp. 818–819.

[1018] COLLINS, L., 1971, supra note 1010, p. 970.

business was Athens. Defendants undertook to ship timber for the plaintiffs from the Rumanian port of Galatz to London and Hull."[1019]

Due to labor troubles happening in London and Hull, the cargo was discharged in Rotterdam, the Netherlands, with the shipowner then refusing to on-carry the goods to England. Because of the shipowner's refusal, the merchant arranged for the on-carry at their own expense, bringing then an action in England against the shipowner for the losses he had suffered as a result.[1020]

The defendants filed a motion requesting a stay of the action, arguing that there was a forum selection clause in the governing bill of lading, and under which proceedings should not be brought in England.[1021] The clause in question provided:

> *"Clause 3: Jurisdiction. Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein."*[1022]

Since the plaintiffs had their principal place of business in Athens, the defendants contended that "*by the terms of clause 3 of the bills of lading this dispute falls to be decided in Greece and in accordance with Greek law*."[1023]

The defendants argued that although the Court does have "*a discretion to grant or refuse stay*," it should always grant that stay unless "*the plaintiffs establish strong grounds for refusal. The onus is upon the plaintiffs to establish such grounds*."[1024] Although the plaintiffs conceded that the onus was on them, they replied that the English forum was much more convenient for the case, and that Romanian law would have to applied by a Greek court (since the port of shipment was in Romania), which would complicate the proceedings.[1025]

Once he conceded that this was a dispute that, on the basis of the bill of lading, should be submitted to a Greek court, BRANDON J. then analyzed whether his Court should exercise its discretion to not stay the proceedings. After reviewing the available authorities on the matter, he set out the applicable principles as follows:

> *"(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a*

[1019] BARRIE, G. N., 'The Eleftheria (1969) 2 All ER 641', 1970, 3 *Comparative and International Law Journal of Southern Africa*, no. 1, p. 95.
[1020] ibid., pp. 95–96.
[1021] *The Eleftheria* [1970], 2 P, 94–106, p. 97.
[1022] ibid., p. 96.
[1023] ibid., p. 97.
[1024] ibid., p. 97.
[1025] ibid., p. 98.

> *discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."*[1026]

After reviewing the arguments put forward by the plaintiffs, and finding them unsatisfactory, BRANDON J. ruled that holding the parties to their bargain was an essential principle for English courts, and which should not be dismissed simply by considerations of convenience.[1027] Since, in his opinion, the factors put forward by both parties *"balance each other,"* he concluded that the plaintiffs had failed to overcome their heavy burden of proof, as a result of which a stay of proceedings had to be granted.[1028]

Although the Court's position might be seen as quite favorable to the enforcement of forum selection clauses, there were those who did not think it went far enough. As one commentator noted soon after the decision:

> *"The result* [in The Eleftheria] *is undoubtedly equitable and logical. If the plaintiff had discharged his onus however, and the court let the proceedings in England continue, the result would not have been equitable and would have amounted to a negation of the original intention of both parties. The fact remains that it was possible for the plaintiffs to have complied with their onus and this, as stated above, would have made a mockery of the law of contracts between persons of different states."*[1029]

[1026] ibid., pp. 99–100.

[1027] ibid., p. 103 ("[i]*t is essential that the court should give full weight to the prima facie desirability of holding the plaintiffs to their agreement.* [...] [T]*he court must be careful not just to pay lip service to the principle involved, and then fail to give effect to it because of a mere balance of convenience*").

[1028] ibid., p. 105.

[1029] BARRIE, G. N., 1970, supra note 1019, p. 97.

This criticism seems mistaken. Even though in a case like *The Eleftheria*, where the parties were both experienced merchants, holding them to their word is essential, not leaving a safety valve in place would be an error. In situations where, for example, as BRANDON J. recognized, justice may not be served in the contractual forum, or evidence may be too hard to obtain there, the courts should not grant a stay. It would not be a smart idea to force the courts to act automatically before forum selection clauses, without at least analyzing some basic factors such as those put forward in this case. The decision in *The Eleftheria* was, quite simply, the correct one.

The principles enunciated in *The Eleftheria* were later approved by the Court of Appeal in *The El Amria*, also a maritime case, and which dealt with an Egyptian vessel carrying cargo from Egypt to the United Kingdom .[1030] Upon discharge of the cargo in Liverpool, it became apparent that some of it had deteriorated during the voyage. The receivers commenced proceedings against the shipowners, who in turn applied for a stay of proceedings, relying on a forum selection clause contained in the governing bill of lading. The clause in question read as follows:

> *"Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein."*

Since the carrier had its principal place of business in Alexandria, Egypt, the shipowners argued that the appropriate court for deciding the matter would be the Commercial Court of Alexandria. When the Court sided with the plaintiffs, and refused to stay proceedings, the defendants filed an appeal.

Applying the test laid out by BRANDON J. in *The Eleftheria*, the Court of Appeal confirmed the decision, refusing to stay proceedings, on the basis that the proceedings would be just too difficult to conduct in Egypt. This based on the fact that the large majority of the evidence was located in England, and thus would not be readily available if the trial was to be conducted in Egypt. Furthermore, since the plaintiffs had also named the Liverpool port authorities in their claim (due to some delays affecting the discharge), enforcing the forum selection clause would open the door to conflicting decisions issued by the English and the Egyptian courts.[1031]

The role that *The Eleftheria* has had in English law is significant, as it highlighted the importance of complying with the terms of the contract. Even though Court in *The Eleftheria* conceded that it was possible for the plaintiff to conduct the proceedings in violation of the forum selection clause, it also made it clear that it was her duty to prove that this was necessary. It clarified, in other words, that there was a *prima facie* validity of

---

[1030] *Aratra Potato Co Ltd. v. Egyptian Navigation Co. (The El Amria)* [1981], 2 Lloyd's Rep, 119.
[1031] COLLIER, J. G., *Conflict of Laws*, 2004, Third Edition, Cambridge University Press, Cambridge, UK, pp. 97–98.

forum selection clauses, and that it was the resisting party who had the duty to convince the courts that such validity should not be upheld. The case further demonstrated the importance attached to the parties' intentions as manifested in their contracts, raising it to the level of an essential concern for the courts.

The importance given to the will of the parties in this decision is also manifested when it comes to enforcing clauses that confer jurisdiction to English courts, even when the parties do not really have any connection with that forum. Their *prima facie* validity is such, that even the Court in *The Eleftheria* mentioned such cases to illustrate that the inconvenience that they may create for the parties is not enough to jeopardize their validity.[1032] As Lord WATKINS explained in *The Hida Maru:*

> *"When people or companies who live and who have their offices in foreign countries decide, their commercial interests having become intertwined, to have any disputes which may arise between them governed by English law, and resolved by an arbitrator or a Court in England, an English Court should hesitate long before turning one of them away from its doors."*[1033]

8.3 Policy Considerations Supporting Enforcement

English courts have given a number of reasons to justify their willingness and eagerness to uphold agreements on jurisdiction. First, there is the already mentioned principle of ensuring that the terms of the contracts are abided by, *"thereby giving effect to the expectations of the parties."*[1034] As we have seen, one the considerations that lead the parties to include forum selection clauses is being able to prepare for eventual litigation, so it makes sense that the courts seek to protect that objective. The zeal demonstrated by the courts in this regard is quite clear, often showing very little sympathy for parties who seem to be trying to avoid the application of the clauses. In *The Pioneer Container*, for example, the Privy Council was not moved by the plaintiff's contention that pursuing her claim in the contractual forum would be impossible due it being time barred there, as well as being forced to provide a very large sum of money as security.[1035] As COLLIER explains:

[1032] *The Eleftheria* [1970], p. 104. Brandon J. explained that "[m]*any commercial and Admiralty disputes are tried or arbitrated in England every year, in which most or all of the evidence comes from abroad* […]*even though it causes inconvenience and expense with regard to bringing witnesses to England and examining them through interpreters*." Taking that into consideration, he found that the arguments put forward by the defendants regarding his "inconvenience" were unsatisfactory.

[1033] *Kuwait Oil Co (KSC) v. Idemitsu Tankers KK (The Hida Maru)* [1981], 2 Lloyd's Rep, 510, p. 514.

[1034] FAWCETT, J. J., 'Trial in England or Abroad: The Underlying Policy Considerations', 1989, 9 *Oxford Journal of Legal Studies*, no. 2, p. 225.

[1035] *The Pioneer Container* [1994], 2 AC, 324, pp. 348–349.

> *"Having chosen a forum, a party could not then argue that the procedures of that forum were disadvantageous, nor that the forum was inappropriate or lacked connection with the dispute. Something more is necessary."*[1036]

Second, by going against a forum selection clause the courts might inadvertently impose on a foreign litigant the *"great inconvenience"* of having to go to England to defend the suit, which in turn would encourage forum shopping.[1037] Furthermore, if an English court acts in defiance of the jurisdiction clause, it might find itself forced to apply foreign law, *"which is a time consuming and expensive matter, inconvenient both to the parties and the court."*[1038]

Third, since forum selection often comes up in an international business context, it is important that the courts protect the *"certainty which businessmen require as a prerequisite for good international business relations."*[1039] Of course, this last argument is conditioned to situations in which both parties are commercial in nature, or at least evenly matched in their bargaining power, and that they are both acting on the international stage.

The discretionary approach put forward in *The Eleftheria,* and affirmed in *The El Amria,* continues to be the law of the land, confirmed in numerous cases not only in England, but also all over the Commonwealth.[1040] In a recent High Court case, for example, after reviewing the existing authorities, the Court was clear in the state of the law in regards to forum selection:

> "[W]*here parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it."*[1041]

Despite the many similarities that exist between this approach and that present in the United States, an important difference exists in English law in regards to consumer contracts. Unlike the situation on the other side of the Atlantic, where jurisdiction clauses in consumer agreements are *prima facie* binding and enforceable, the rules in England are different. When it comes to our area of interest, international contracts, the Brussels I (Recast) Regulation, which also applies in England establishes:

> *"A consumer may sue the supplier where either is domiciled. Where the supplier is not domiciled in a contracting state but has a branch, agency or other establishment*

[1036] COLLIER, J. G., 2004, supra note 1031, p. 98.
[1037] FAWCETT, J. J., 1989, supra note 1034, p. 226.
[1038] ibid., p. 226.
[1039] ibid., p. 226.
[1040] TANG, Z., 'Exclusive Choice of Forum Clauses and Consumer Contracts in E-Commerce', 2005, 1 *Journal of Private International Law*, no. 2, p. 259.
[1041] *Impala Warehousing and Logistics (Shanghai) Co. Ltd. v Wanxiang Resources (Singapore) Pte. Ltd.* [2015] EWHC, 1–146, p. 111.

> *in a contracting state, he is deemed to be domiciled there. However, a consumer may generally only be sued where he is domiciled. He may also be sued elsewhere by agreement. But the normal rules respecting conferring jurisdiction by agreement do not apply. An agreement only confers jurisdiction over a consumer if (a) it was concluded after the dispute arose or (b) it allows the consumer to bring proceedings in a place other than those already indicated or in a member state in which both he and the supplier were domiciled or habitually resident when the contract was concluded."*[1042]

As we have seen, this type of broad protections is not available for all American consumers who, by and large, are bound by choice of court clauses included in their contracts. It is important to note, however, that these protections established in the Brussels I (Recast) Regulation extend only to consumers, and not to other so-called "weak" parties that may find themselves bound by a jurisdiction clause. As a result, forum selection clauses included in contracts with small commercial parties will be analyzed on the basis of the *Eleftheria* test, without necessarily taking into consideration the significant bargaining power discrepancies that may have existed.

8.4 Denying Enforcement of Forum Selection Clauses

As we have seen, under English law there is a strong presumption for the validity of forum selection clauses. While this rule is not absolute, and just like it happens in American law, there is a strong burden placed on the resisting party to justify why the forum selection clause should not be enforced.[1043]

Despite the apparent sanctity of these clauses, however, it is important to note that it is not as strong as it would otherwise appear. Indeed, litigation by parties seeking to determine where to litigate, in contravention of a forum selection clause, is actually quite common. As BELL notes, the existence and frequency of this type of litigation suggests four things:

> "[F]*irst, the apparent certainty yielded by exclusive jurisdiction and arbitration agreements can be overstated* [… since] *there are legitimate non discretionary arguments that may be raised as reasons why a jurisdiction or arbitration clause does not apply or should not be enforced. Secondly, some first instance courts, in particular, have not always been as faithful as they might have been to the rhetoric*

[1042] COLLIER, J. G., 2004, supra note 1031, p. 153. Although COLLIER wrote his book before the Brussels I (Recast) entered into force, the rules established in this new version did not change this consumer protection provision.
[1043] ROBERTSON, G. B., 'Jurisdiction Clauses and the Canadian Conflict of Laws', 1982, 20 *Alberta Law Review*, no. 2, p. 298.

> *of the authoritative decisions* [...] *as to the very great commercial significance of jurisdiction and arbitration agreements. Thirdly, complex multi-party transnational disputes may not always yield or lend themselves to the simplicity of the principle of enforcing two parties' agreements as to forum or mode of dispute resolution* [...] *Fourthly, and as a general proposition, the extent to which plaintiffs have been prepared to commence proceedings in the face of such clauses, and defendants, conversely, have strenuously resisted their institution, underlines* [...] *that venue is of vital importance in transnational litigation* [...] *Indeed, the very real commercial significance of arbitration and jurisdiction clauses perhaps assists in explaining why the theoretical certainty which they should afford in transnational litigation is not always evident in practice."*[1044]

Parties seeking to escape a forum selection clause can put forward a series of arguments, some of them dealing with the agreement itself, others with the circumstances surrounding the case.[1045] In essence, the grounds on which a party can base their resistance are:

a. There is no jurisdiction agreement, or it is null and void.

b. The agreement is voidable.

c. The agreement is overridden by the mandatory law of the forum.

d. The agreement is no longer binding.

e. The agreement is not exclusive.

f. The dispute falls outside the scope of the agreement.

g. The agreement should not be enforced, in exercise of the court's discretion.

8.4.1 There is No Agreement, or it is Void or Voidable.

Beyond the issue of whether or not there is a *contract* between the parties, and which goes beyond the scope of this book, it is possible for a party to argue that, specifically, the contract did not contain a forum selection clause. Since a significant portion of the case law on this issue deals with maritime cases, this is a something that will be discussed

[1044] BELL, A. S., 2003, supra note 1015, p. 282.

[1045] ibid., pp. 283–284. It should be noted that although several of the principles presented below are applicable in both national and transnational cases regarding forum selection clauses, in some issues, like labor and consumer law, there are different rules. Due to the emphasis of our work in transnational commercial litigation, we have opted to focus our attention exclusively on the rules applicable to international forum selection agreements.

later. For now, suffice it to say that this is a topic that often comes up in cases involving incorporation of one contract into another, and so on and so forth.[1046]

When it comes to the "voidability" of the jurisdiction agreement, there is no question that an agreement between the parties existed, even in regards to the forum selection clause itself. Indeed, the question here is not the existence of the agreement, but rather the fact that its existence is tainted by some sort of vice. This is the case, for example, when the agreement was the result of fraud, duress, error or overwhelming bargaining power.

English courts have shown *some* sympathy for weak plaintiffs who have "agreed" to a forum selection clause that forces them to sue abroad. In these cases, the courts have been reluctant to hold the plaintiff to his agreement, particularly when the claim is small, since they have understood that such an approach might *"in practice deny him recourse to the courts at all."*[1047] It is because of this rationale that, as a country bound by the provisions of the Brussels I (Recast) Regulation, English courts will give very limited effect, if any, to jurisdiction clauses contained in insurance, employment and consumer contracts. As we mentioned before, the problem becomes much more difficult when the agreement in question is contained in a commercial contract, since in those cases the courts are often quick to assume the parties are in more or less of an equal footing.

Notwithstanding the above, it should be noted that, unlike what happens under American law, the "overweening bargaining power" exception applied to forum selection clauses (regardless of the extreme narrowing that it suffered after the *Carnival Cruise* decision) is not at all favored by English courts, who see it as inherently uncertain. Even the "fundamental fairness" test contained in the *Carnival Cruise* decision has seen little to no acceptance in the English judicature (not so in the case of other Commonwealth nations, who recognize and apply the doctrine of unconscionability). As a result, parties seeking to use this argument to resist the enforcement of a forum selection clause, outside of consumer, insurance and employment contracts, might find little help from the courts.[1048]

Regardless of the specific vice used to attack the validity of the agreement, practitioners should bear in mind that unless the attack is launched specifically against the forum selection clause, this particular provision will continue to exist even after the avoidance of the contract. This is a consequence of the doctrine of separability or severability, and according to which

> *"jurisdiction (and arbitration) agreements are separate from the 'host' agreement in which they are found, which means that even if the substantive obligations of the*

[1046] ibid., p. 288.
[1047] BISSETT-JOHNSON, A., 'The Efficacy of Choice of Jurisdiction Clauses in International Contracts in English and Australian Law', 1970, 19 *The International and Comparative Law Quarterly*, no. 4, p. 551.
[1048] BELL, A. S., 2003, supra note 1015, p. 294.

> *contract are void or voidable, that does not of itself destroy the associated procedural obligations. The jurisdiction agreement can only be invalidated on a ground which relates to the jurisdiction agreement itself and not merely as a consequence of the invalidity of the main agreement."*[1049]

This doctrine is, by all accounts, a firmly-established principle in English law. As expressed by LONGMORE LJ of the Court of Appeal in *Deutsche Bank v Asia Pacific Broadband Wireless Communications Inc.*:

> *"This* [doctrine of separability] *is uncontroversial both as a matter of domestic law* [...] *and as a matter of European law* [...]. *It follows that disputes about the validity of the contract must, on the face of it, be resolved pursuant to the terms of the clause* [...] *It is only if the jurisdiction clause is itself under some specific attack that a question can arise whether it is right to invoke the jurisdiction clause. Examples of this might be fraud or duress alleged in relation specifically to the jurisdiction clause. Another example might be if the signatures to the agreement were alleged to be forgeries, although no authority has so far so stated. Even in such a case someone has to decide whether the signatures were in fact forged. It might well be thought that a mere allegation to that effect could not have the effect of rendering a jurisdiction clause inapplicable."*[1050]

This principle was also enshrined under Section 7 of the 1996 Arbitration Act:

> *"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."*

While no similar express provision exists in regards to jurisdiction clauses, it is understood that the Common Law also applies this rule to them. As Justice COLMAN of the High Court noted in *IFR Limited v. Federal Trade SPA*, the doctrine that applies to arbitration agreements should also, *mutatis mutandis*, be extended to forum selection clauses:

> *"Is there any relevant difference between an agreement to refer one's future disputes to arbitration and an agreement to refer such disputes to a particular court? Both agreements have the same purpose in the context of the matrix contract. So the question has to be whether the policy of the law reflects some intrinsic characteristic*

[1049] MERRETT, L., 'Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?', 2009, 58 *International and Comparative Law Quarterly*, no. 3, p. 548.

[1050] *Deutsche Bank AG & Ors v Asia Pacific Broadband Wireless Communications Inc. & Anor.* [2008], 2 CLC, 520, pp. 530–531. *See* also *Mackender and Others v Feldia A. G. and Others* [1967], 2 QB, 590.

> *of arbitration as distinct from other forms of dispute resolution. Although, with a single exception, the cases in dispute have been confined to consideration of the separability of agreements to arbitrate, there would seem to be no reason in principle why as a matter of a policy of the law it should be more desirable to preserve an arbitration agreement than to preserve a jurisdiction agreement.*
>
> [...] *I conclude that there is no conceptual basis for distinguishing the policy applicable to the effect of the jurisdiction agreement from that applicable to an arbitration agreement, and that in English law the same principle of separability therefore applies to a jurisdiction clause as to an arbitration clause."*[1051]

This doctrine of separability is based on fairly straightforward reasons, and which actually inform most of the rules regarding choice of forum. Through this doctrine, the legislator shows a strong preference for the validity of jurisdiction clauses, actually establishing much more limited grounds under which to question their validity *vis à vis* those used to attack the host agreement.[1052] This follows a simple logic, and which goes to the mindset that is presumed the parties were in at the time the contract was made. There is a certain presumption that

> *"if one were to have asked the parties to the contract whether they intended the nominated court to have jurisdiction even though the substantive contract were disputed, they would surely have given an affirmative answer, for it is improbable that they intended the court to have jurisdiction only to find that the substantive contract was valid."*[1053]

Indeed, it seems to be a fair assumption that the parties wanted the selected court to have jurisdiction in regards to *all* the possible issues that might arise regarding the contract. This general presumption that the chosen court should also rule on the validity of both the contract and of the clause itself, was also confirmed in the recent House of Lords case of *Fiona Trust v Privalov*. Here, Lord HOPE worded this issue as follows:

> *"There is no sign here* [...] *that the parties intended that the disputes which were to be determined in accordance with the laws of England and be decided by the English courts were not to include disputes about the charter's validity. The simplicity of the wording is a plain indication to the contrary. The arbitration clause which follows is to be read in that context. It indicates to the reader that he need not trouble himself with fussy distinctions as to what the words 'arising under' and 'arising out of' may mean. Taken overall, the wording indicates that arbitration may be chosen as a one-stop method of adjudication for the determination of all disputes. Disputes about*

[1051] In *IFR Limited v Federal Trade SPA* [2001] EWHC, 519.
[1052] MERRETT, L., 2009, supra note 1049, p. 549.
[1053] BRIGGS, A., *Agreements on Jurisdiction and Choice of Law*, 2008, Oxford University Press, p. 79.

> *validity, after all, are no less appropriate for determination by an arbitrator than any other kind of dispute that may arise."*[1054]

8.4.2 The Agreement Overrides the Mandatory Rules of the Forum

One of the few cases in which we find an exception to the general policy favoring the enforcement of forum selection clauses occurs when the agreement seeks to escape the application of mandatory rules. While the courts have often expressed their disapproval of being used as tools for the parties to go back on their words, or as assistants in a contractual breach, they also refuse to aid a party in avoiding the application of mandatory law by seeking a different forum. As stated by BYRNE J. in the Australian case of *Commonwealth Bank of Australia v. White*:

> *"It is undesirable that parties should, by entering into an exclusive jurisdiction agreement, be able to circumvent a legislative scheme established by parliament to protect investors purchasing interests or prescribed interests. Put more positively, the statutes creating these standards of commercial behaviour for persons doing business in this jurisdiction do not exempt foreign corporations. Moreover, the policy behind them would not be served if exemption might be achieved by inserting stipulations as to foreign law or forums."*[1055]

This is an issue that, as we will see later, often becomes relevant in regards to liability. When the law has established a mandatory liability system, setting minimum levels for which a party can be held liable, English courts will not look kindly on forum selection clauses that aim to escape their application. Although it will be analyzed in detail later, a relevant case on this topic is that of *The Hollandia*.[1056] In this case, which dealt with the liability of the carrier under a bill of lading, the House of Lords refused to enforce a forum selection clause granting jurisdiction to a court in Amsterdam, because the effect of such enforcement would have been that the liability of the carrier (regulated in England by the Hague-Visby Rules) would be lessened beyond the legal limits established under English law. As Lord DENNING stated in the appeal case that preceded the House of Lords decision:

[1054] *Fiona Trust & Holding Corp v Privalov* [2007] Bus. L.R., 1719, p. 1729.

[1055] *Commonwealth Bank of Australia v White; ex parte The Society of Lloyd's* [1999], 2 VR, 681, pp. 704–705. In this case, as explained by KEYES, "*the defendant challenged the validity of the exclusive jurisdiction clause directly, asserting that the third party which had invoked the exclusive jurisdiction clause had procured the jurisdiction agreement with a view improperly to 'shielding itself' from the effect of legislation, including the Australian Trade Practices Act and companies legislation, and that therefore the clause was void as being contrary to public policy, or unconscionable*" (KEYES, M., 'Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice', 2009, 5 *Journal of Private International Law*, no. 2, p. 202).

[1056] *The Hollandia* [1983], 1 AC, 565.

> *"The reason* [for denying the request to stay proceedings] *is because there is a higher public policy to be considered - and that is the public policy which demands that, in international trade, all goods carried by sea should be subject to uniform rules governing the rights and liabilities - and the limitation of liability - of the parties. They should not vary according to the particular country or place in which the dispute is tried out. So many persons are concerned down the chain - buyers and sellers, bankers and insurers, indorsees and consignees - that each should know what the rules are - without having to go by the small print in any particular bill of lading. Parties should not by any device, directly or indirectly, be able to contract out of the rules."*[1057]

The public policy considerations that inform the English approach towards mandatory rules, however, will not override a jurisdiction agreement when the chosen court is located in a Member State of the European Union, or in a contracting state to the Brussels or Lugano Convention.[1058] Indeed, as it was ruled by the European Court of Justice in *Sanicentral GmbH v. Collin*:

> "[Choice of court agreements that fall within the scope of the Brussels or Lugano Conventions] *must be considered valid even in cases in which they would have been regarded as void under the national law in force at the time when the contract was entered into."*[1059]

Clearly, if *The Hollandia* was to be decided today, on the basis of the *Sanicentral* decision, then the result would have been different. The House of Lords would have been bound to enforce the forum selection clause, on the basis of EU public policy.

The problem that exists in regards to mandatory rules, however, is that, as JUENGER observed, "*up to now no one has been able to delineate criteria that would tell us, with some precision, what rules qualify for the special treatment this class demands*."[1060] This creates some degree of uncertainty in the application of the doctrine, as it will often be the case that the parties will not have clarity as to which of the rules that are being overridden by their forum selection clause might be considered "mandatory enough" to warrant displacing the jurisdictional agreement. This is not a minor concern, as a failure to clearly define what is to be seen as "mandatory" could create an opportunity for parties seeking to resist a forum selection clause to simply argue that mandatory rules are being violated.

[1057] *The Hollandia* [1982] QB, 872, p. 884. Since *The Hollandia* did not distinguish between choice of court and arbitration clauses, it has been understood that its principles are also applicable to arbitration; however, recent cases seem to go against this general understanding, so that "*the principles of The Hollandia will not be applied to arbitration agreements and that arbitration agreements will be enforced irrespective of their effect on substantive obligations*" (SPARKA, F., 2010, supra note 927, p. 162).

[1058] BELL, A. S., 2003, supra note 1015, p. 296.

[1059] Case 25-79, *Sanicentral GmbH v. René Collin* [1979] ECR, 3423, p. 3431.

[1060] Cited in BELL, A. S., 2003, supra note 1015, p. 297.

Of course, the landscape is not completely blurry, and certain types of laws are seen as more likely to be "mandatory" than others. Although an American decision, the reflections presented in the dissenting opinion of Judge WISDOM in the 1970 appeal of *The Bremen* shed some light on this topic, by giving an example of such laws:

> *"In cases of bankruptcy, divorce, successions, real rights, and regulation of public authorities, for example, courts cannot remit the dispute to a foreign forum lest a foreign court render a decree conflicting with our ordering of these affairs."*[1061]

The cases that WISDOM points at are clearly those in which essential social values are concerned. While this is not an ideal method to determine *what* is mandatory, it is perhaps a step in the right direction. Furthermore, WISDOM's words are also useful in the sense that they shed some light on the reasoning behind the acceptance of mandatory rules as a way to stop the enforcement of a forum selection clause. Indeed, there seem to be some cases that can only be properly tried in a single, specific forum or jurisdiction. If, by agreement, these cases are removed from that proper forum and taken to another, then the chances of obtaining an appropriate resolution, and which does not conflict with the inherently national "*ordering of these affairs,*" are dramatically reduced.

8.4.3 The Agreement No Longer has any Efficacy

Unlike what happens in cases in which the agreement is void or voidable, when the voidability existed *ab initio*, the issue of the continuing efficacy deals with situations in which even though the agreement was valid at the onset, it lost its efficacy. This is a situation that, cases of frustration notwithstanding, mostly arises as a result of the conduct of the parties *after* they entered into the contract.[1062]

A fairly clear-cut case of a situation in which a party might find herself unable to enforce a forum selection clause occurs when through her actions, before the requested enforcement, she submitted herself to the jurisdiction of a non-chosen court. Of course, a party will not be understood to have submitted herself to this jurisdiction simply by appearing for the sole purpose of contesting the jurisdiction by seeking a stay or proceedings.[1063] The courts will understand that a party voluntarily submitted herself to their jurisdiction if, for example, they file cross-claims or a defense on the merits against the claim presented against her, since this demonstrates a willingness on her part to conduct "proper" litigation in that specific forum.[1064]

[1061] *In re Unterweser Reederei, GmbH* [1970], 428 F. 2d, 888–912, p. 906 Also cited in BELL, A. S., 2003, supra note 1015, p. 298.
[1062] ibid., pp. 302–303.
[1063] BRIGGS, A., 2008, supra note 1053, p. 314.
[1064] BELL, A. S., 2003, supra note 1015, p. 303.

This principle is also manifested in Article 26 (1) of the Brussels (Recast) Regulation, regarding implicit choice of forum, and which in the relevant part provides that:

> *"Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction* […]*."*[1065]

There is a clear desire on the part of the legislator to prevent one of the parties from using the forum selection clause as an "ace in the hole," saving it until the very last minute, in case things go awry for him. It would certainly be unfair if a party was allowed to present himself as a litigant in a proceeding, only to then backtrack his position and claim the court never had jurisdiction to hear the claim. It is precisely to prevent these problems that English courts have a rather brief window within which a party should apply for a stay of proceedings for lack of jurisdiction. In *The Biskra,* for example, SHEEN J. highlighted this notion, stating that:

> *"An application for a stay on grounds that the parties have agreed to submit the dispute to a foreign Court should be brought without delay after service of the writ."*[1066]

He would later reiterate this general idea in *The Traugutt*, where he stated that:

> *"When defendants to an action commenced in this Court seek an order that the action be stayed in order that the dispute can be resolved in a Court in another jurisdiction it is very important that their application be heard without delay so that the proceedings in the appropriate Jurisdiction can proceed."*[1067]

Following this general rule established in *The Traugutt*:

> *"The court has jurisdiction to interfere, whenever there is vexation or oppression, to prevent the administration of justice being perverted for an unjust end, and for this purpose to stay or dismiss an action or other proceedings, or to restrain the institution or continuation of proceedings in foreign courts or the enforcement of foreign judgments."*[1068]

[1065] The Brussels Regulation (Recast) replaces Council Regulation 44/2001 (Brussels 1) as of January 2015. On some of the changes, *See,* generally, DYRDA, Ł., *Jurisdiction in Civil and Commercial Matters under the Regulation No 1215/2012 – Between Common Grounds of Jurisdiction and Divergent National Rules*, in Larionova, J. et al. (eds.), *The Interaction of National Legal Systems: Convergence or Divergence?*, 2013.

[1066] Cited in BELL, A. S., 2003, supra note 1015, p. 303.

[1067] Cited in MARGOLIS, R., 'Delayed Applications for Stay of Proceedings in Shipping Cases', 1992, 13 *Singapore Law Review*, p. 170.

[1068] FARQUHARSON, I. M., 1974, supra note 750, p. 93.

The rules of *The Traugutt* were later confirmed, again by SHEEN J., in *The Sidi Bishr*, yet another maritime case, regarding an issue of *forum non conveniens*, and in which the actions of the party seeking to remove the case from the jurisdiction of the English courts could be seen as deceptive or abusive. This case dealt with a collision action in which the plaintiffs arrested the M/V Sidi Bishr in England on July 29th, 1985, four and a half years after the collision involving a sister ship of the Sidi Bishr. On October 13th of the next year, over a year after the arrest and service of the writ *in rem*, the defendant applied for a stay, arguing that England was not the most appropriate forum, and that in fact Egypt was a more natural forum for these proceedings. While the judge agreed with the contention that England was not the best forum, he declined to stay the proceedings, because the motion to stay had been presented much too late.[1069] The reasoning behind the Court's decision was simple:

> *"The parties in The Sidi Bishr had already incurred considerable costs in preparing for the action in England before the application for stay was made. In particular, both sides had filed 'preliminary acts', although pleadings had not yet been exchanged, nor had there been discovery. Also, importantly, the judge was concerned that the defendants did not seriously desire that the action be tried in Egypt; rather, he was of the opinion that the application for stay was merely a tactic to make the plaintiff's prosecution of their claim more difficult."*[1070]

Here the Court once again seems to have put as a guiding principle that the justice system cannot be used as a tool for the parties to avoid fulfilling their commitments. And so, while courts will honor and enforce forum selection clauses, they will not do so when the motivation of the party is nefarious.

While we might agree that there is a certain *moral* reasoning behind the court preventing a party to allege lack of jurisdiction much too late, whether or not *that* is the legal foundation of the decision is up for debate. Indeed, as BELL has noted, it has been made fairly clear that *"it is not open to the Court to conclude that the conduct of the defendants falls short of waiver but is so 'reprehensible' that the Court will decline to enforce the contract as a matter of discretion."*[1071] In other words, the court will not be able to "punish" the resisting party for the (im)moral connotations of her conduct by enforcing the forum selection clause, as an actual objective behavior will also be necessary.

[1069] MARGOLIS, R., 1992, supra note 1067, p. 169.
[1070] ibid., pp. 169–170.
[1071] BELL, A. S., 2003, supra note 1015, p. 305.

8.4.4 The Nature of the Jurisdiction Agreement

This exception refers to cases in which the resisting party argues that although there is a valid forum selection clause, it is not exclusive. In other words, the argument of this party will be that the forum selection clause only represents a submission to the jurisdiction of the designated court, but that it does not prevent the parties from seeking redress elsewhere.[1072] This is a fundamental distinction, since although non-exclusive agreement will mean that *if sued*, the defendant will not have any arguments against the jurisdiction of the court, it also means that the parties will be able to start proceedings in *any* other court of competent jurisdiction.[1073]

This is an issue that the drafters of the contract must be especially careful with, as failure to make their intentions clear will result in countless difficulties if they wish to seek a stay of proceedings when the other party has commenced them in the "wrong" court. Needless to say, clients can suffer great losses as a result of careless wording.

In an ideal world, parties would draft clauses that leave no room for doubt, such as the following:

> "Jurisdiction: The parties to this contract agree that the courts of the city of London shall have exclusive jurisdiction over any and all disputes that arise out or in connection to this contract."

Outside of the type of clarity exemplified in the clause above, and which leaves no doubt as to its meaning, there are no magical or foolproof formulas that one can be certain will be construed as exclusive by the courts. There are, in other words, no rules set within the English system requiring a specific language being used for a clause to be deemed "exclusive."[1074] The care that is to be displayed by the drafters is further required by the fact that, unlike the situation in other countries, under the Common Law there is no dominant presumption in regards to whether jurisdiction agreements are to be seen as exclusive or non-exclusive in case of a disagreement between the parties.

Indeed, a study of the available case law shows that when the clause is not altogether clear, it will be a matter of contractual construction or interpretation whether, based on the proper law of the contract, the submission to the jurisdiction will be considered as exclusive.[1075] The majority of cases seem to suggest that the courts are free to decide how

---

[1072] ibid., p. 305.
[1073] BORCHERS notes that Civilian commentators often refer to *"prorogation agreements"* to refer to non-exclusive clauses, and *"derogation agreements"* in the case of exclusive clauses. Due to our focus on the Common Law, we will use the exclusive/non-exclusive terminology (BORCHERS, P. J., 1992, supra note 946, p. 56).
[1074] BRIGGS, A., 2008, supra note 1053, p. 112.
[1075] BELL, A. S., 2003, supra note 1015, p. 306 .

to interpret the jurisdictional clause, based on the circumstances surrounding the contract.

This "pro-construction" position has been adopted in a number of cases. A very significant decision comes from the 1989 Court of Appeal case of *Sohio Supply Co. v Gatoil (USA) Inc.*[1076] In this case, the contract in question contained the following clause:

> *"Governing Law.*
>
> *This agreement shall be governed by the Laws of England. Under the jurisdiction of the English courts without recourse to arbitration."*[1077]

As proceedings had been started in Texas, the Court of Appeal was tasked with, among other duties, determining whether this was an exclusive jurisdiction clause. Despite the obvious absence of any word that might indicate exclusivity, Justice STAUGHTON considered that the submission was indeed exclusive, reasoning that:

> *"The question is one of the construction of this contract and nothing more. It is, I think, part of the matrix background, or surrounding circumstances, whichever term one chooses to use, that this was a contract made between sophisticated business men who specifically chose their words as to English jurisdiction for the purpose of this contract. It is not a consumer contract on a printed form, or anything like that. To my mind, it is manifest that these business men intended that clause to apply to all disputes that should arise between them. I can think of no reason at all why they should choose to go to the trouble of saying that the English courts should have non-exclusive jurisdiction. I can think of every reason why they should choose that some court, in this case the English court, should have exclusive jurisdiction. Then, both sides would know where all cases were to be tried. It may be that in some other types of case, such as a policy of insurance, there is a reason for providing for nonexclusive jurisdiction. I can see none here. I am not sure that I can detect what precisely the reason was for choosing England. The parties had chosen English law; it may be that they thought that the best place for English law to be applied was an English court; it may be that they even thought that English courts were a good thing in their own right – I do not know. It may be that they wanted to join the 28% of cases in the Commercial Court where both sides came from overseas; or it may be that they just wanted to choose a neutral forum. But in my judgment, that was their choice."*[1078]

[1076] *Sohio Supply Co v Gatoil (USA) Inc.* [1989], 1 Lloyd's Rep, 588.
[1077] ibid.
[1078] ibid. *See* also *S. & W. Berisford Plc. and Another v New Hampshire Insurance Co.* [1990], 2 QB, 631, pp. 636–637 and *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Athena)* [2006], 2 CLC, 710

It should be noted that the *Sohio* decision, as well as what it means for English law, has been interpreted in different manner. Indeed, while TANG argues that under English law the way in which the clause will be understood (whether exclusive or not) will be a matter of construction, BRIGGS argues that this is only one of several doctrines that have been embraced and adopted by the courts. TANG sees of the *Sohio* decision as establishing that "*whether or not a jurisdiction clause is exclusive depends on its true construction and whether the clause obliges the parties to resort to the relevant jurisdiction, irrespective of whether the word 'exclusive' is used.*" BRIGGS, on the other hand, argues that *Sohio* actually demonstrates that *"there is a general presumption in favour of exclusive jurisdiction if the nominated court would have had jurisdiction in any event without regarding to the clause,"* distinguishing such doctrine from those in which it has been held that this issue is a matter of construction. In our view, while BRIGGS is correct in his understanding of the decision reflecting but *one* of the different criteria that have been used by the courts, he is incorrect in suggesting that there is actually a presumption in favor of exclusive jurisdiction.[1079] Indeed, except for BRIGGS, the fact that this is a matter of construction of the contract seems to be rather settled among commentators and the courts.[1080]

Although there have been cases in which the courts have ruled that, unless the opposite is proven, the forum selection clause shall be presumed as exclusive, in the end even those cases also end up being decided based on issues of construction. What is more, English courts have not been favorable to attempts to establish a presumption of exclusivity. A good example of this comes from the case of *Deutsche Bank v. Highland Crusader*, a case that was later reversed on appeal. In this case, Justice BURTON seemed to argue for the existence of a presumption of exclusivity, stating:

> *"Where there is a contractual non-exclusive jurisdiction clause, a party will ordinarily act vexatiously and oppressively in pursuing proceedings in the non-contractual jurisdiction in parallel with proceedings in the contractual jurisdiction, unless there are exceptional reasons, not foreseeable at the time when the contractual jurisdiction was agreed."*[1081]

Justice BURTON's position was quite radical. Not only did he seem to be suggesting that forum selection clauses should be presumed as exclusive, but also that a party that does not abide by this arguably non-exclusive clause is acting *"vexatiously and oppressively."* As a

---

[1079] *See* TANG, Z. S., *Jurisdiction and Arbitration Agreements in International Commercial Law*, 2014, Routledge, p. 9; HAINES, A. D., 'Choice of Court Agreements in International Litigation:: Their Use and Legal Problems to Which they Give Rise in the Context of the Interim Text', 2002, 18 *Hague Conference on Private International Law, Preliminary Documents*, p. 9 and BRIGGS, A., 2008, supra note 1053, p. 113.

[1080] COLLIER, J. G., 2004, supra note 1031, pp. 96–97.

[1081] *Deutsche Bank AG, Deutsche Bank Securities Inc. v Highland Crusader Offshore Partners LP, Highland Credit Strategies Master Fund, Highland Credit Opportunities CDO LP* [2009] EWHC, 73.

result, the Court of Appeal went out of its way to illustrate exactly why his reasoning had been flawed. As Lord TOULSON, expressed:

> *"The starting point for considering the effect of a non-exclusive jurisdiction clause must be the wording of the clause. In terms of contract law, I cannot see how a party could ordinarily be said to be in breach of a contract containing a non-exclusive jurisdiction clause merely by pursuing proceedings in an alternative jurisdiction. It is conceivable that a jurisdiction clause which is not fully exclusive may nevertheless be drafted in such a way as to have the effect of barring parallel proceedings in certain circumstances, but that is a matter of individual contractual interpretation.* [...]
>
> *Consistently with that approach, when it comes to the question whether the interests of justice require that an anti-suit injunction should be granted, I do not consider that it would be right to start with a general presumption that parallel proceedings in a non-selected forum are to be regarded as vexatious or oppressive and that there is a burden on the party responsible for prosecuting them to make out a strong case to justify them on grounds of matters unforeseeable at the time of the contract or other exceptional circumstances."*[1082]

Settling the issue of the plaintiff's behavior being considered "vexatious," the Court then continued with the issue of the presumption of exclusivity. Lord TOULSON explained that there were several reasons why establishing such presumption would be a bad idea:

> *"First, it is equivalent or at least comes close to treating a non-exclusive clause as an exclusive jurisdiction clause once proceedings are commenced under it, whereas there is an important difference. An exclusive jurisdiction clause creates a contractual right not to be sued elsewhere, although the court has a discretion whether to enforce it* [...] *In the case of a non-exclusive clause, either party is prima facie entitled to bring proceedings in a court of competent jurisdiction. Duplication of litigation through parallel proceedings is undesirable, but it is an inherent risk where the parties use a non-exclusive jurisdiction clause.*
>
> *Secondly, I see no cogent reason why it should automatically be assumed that nomination of a non-exclusive forum should give priority or dominance to that forum over any other. It ignores all variables. The non-exclusive jurisdiction clause may in one case represent the result of specific negotiations; in another it may result from the use of a standard form of contract. In one case there may be another forum which is obviously appropriate applying the normal factors; in another case there may not be.*

[1082] *Deutsche Bank AG and another v Highland Crusader Offshore Partners LP and Others* [2010], 1 W.L.R., 1023, pp. 1051–1052.

> *Thirdly, there is the important factor of comity to consider. If the English court and the foreign court take different views about the weight to be attached to a non-exclusive jurisdiction clause, I do not see that as a sufficient reason for departing from the principle that each court should ordinarily be left to determine the suitability of the litigation before it and should be chary of attempting to interfere with the other court's decision* [...]."[1083]

The problem for parties who are preparing themselves for litigation is that knowing that the courts treat the issue of exclusivity as a matter of construction is, actually, a bit of a non-answer. Knowing that whether a certain clause will be deemed exclusive "depends of how the contracted is interpreted" sheds little light on the whole issue. As BELL explains,

> *"*[I]*t is not unusual for judges to take different interpretations of the same clause. Only the most explicit of exclusive jurisdiction clauses will be totally immune from challenge and, even then, a perceived clarity may be lost either in translation or in a decision, by the court seised, to examine only one of several language versions of the contract."*[1084]

Finally, it is important to note that this is an issue that will not arise so easily when it comes to forum selection clauses that nominate a court located in a Member State of the European Union, or in a contracting state to the Brussels or Lugano Convention. In those cases, on the basis of Article 25 (1) of the Brussels I (Recast) Regulation, there will be a presumption of exclusivity of the forum selection, unless the parties made it clear otherwise.[1085] The provision in question provides, in the relevant part:

> *"If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."*

8.4.5 The Dispute Falls Outside the Scope of the Jurisdiction Clause

In the field of maritime arbitration, BIMCO, the Baltic and International Maritime Council, proposes to its members the use of a clause that, in the relevant part, provides:

[1083] ibid., p. 1052.
[1084] BELL, A. S., 2003, supra note 1015, p. 309. *See* also BRIGGS, A., 2008, supra note 1053, p. 115 ("*For every general argument in favour of interpreting an ambiguous jurisdiction agreement as exclusive, another points in the opposite direction.*")
[1085] HAINES, A. D., 2002, supra note 1079, p. 9

> *"English Law, London Arbitration*
>
> *…*[A]*ny dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause."*[1086]

For most, the use in this clause of the determiner "*any*" is clear: *All* the disputes will be referred to arbitration. Not "some" disputes; not "most" disputes. *All* of them. As we will see, however, despite appearances of clarity, construction issues, even with clauses like this one, still arise.

A party resisting the enforcement of a forum selection clause might argue that even though the selected court (or arbitrator) might have jurisdiction, the dispute in question does not fall within the scope of the clause. In other words, that party's position would be that the specific issue at hand is not among those that the forum selection clause was aimed to address. It is a topic that often arises when the claim in question refers to not only contractual counts, but also *"non-contractual counts, whether in tort, restitution, or statutory."*[1087]

Just as it happened in regards to the exclusive or non-exclusive character of the jurisdiction clause, this is a matter of construction that must be resolved by resorting to the proper law of the contract.[1088] An example of this comes from the 1975 case of The *Sindh*. In this case, the plaintiff was seeking to escape the application of an exclusive French jurisdiction clause by framing his action in England in tort instead of contract. Facing this issue, Lord DIPLOCK stated that, indeed, this was an issue of construction, based on law of the contract:

> *"It being* […] *undisputed, that the proper law of the contract which included the exclusive jurisdiction clause, was French; it being undisputed that, interpreted according to French law, the clause covered claims of the kind which the plaintiffs are seeking to put forward in the English action, no question of law, other than the purely elementary one of private international law to which I have already referred, appears to me to arise."*[1089]

Determining the scope of the jurisdiction clause was also one of the issues addressed in *The Pioneer Container*. In this case,

---

[1086] BIMCO, 'BIMCO Dispute Resolution Clause 2015', <https://www.bimco.org/en/Chartering/Clauses_and_Documents/Clauses/Dispute_Resolution_Clauses.aspx> (last visited 24 July 2015).
[1087] BELL, A. S., 2003, supra note 1015, p. 309.
[1088] ibid., p. 309.
[1089] Cited in KNIGHT, S. M., 'Avoidance of Foreign Jurisdiction Clauses in International Contracts', 1977, 26 *The International and Comparative Law Quarterly*, no. 3, pp. 670–671.

> *"a dispute arose between the plaintiff-owners of goods and the shipowner to whom they had been sub-bailed by the carrier to whom they had bailed for carriage by sea. The sub-bailment had been on terms which included an exclusive jurisdiction clause for the courts of Taiwan, and when the owners sued the shipowners it was held, against the owners, that they were bound by the jurisdiction agreement in a claim against the sub-bailee as they had consented to sub bailment 'on any terms'. The owners then argued that because the clause in question was worded to apply to disputes arising under the bill of lading contract, it was inapplicable to a claim founded not on the bill of lading contract, but on the relationship of bailor and sub-bailee."*[1090]

The Court was not impressed by the argument put forward by the owners. The Court stated that the logical construction of the contract, on the basis of the aims that the parties must have had at the time of its conclusion, would lead to understand that every type of claim should be covered under the forum selection clause. Delivering the ruling, Lord GOFF stated that it would make no commercial sense to exclude these other claims from the application of the jurisdiction clause, particularly because of how bills of lading work:

> *"This is a case where goods have been shipped under bills of lading. Bills of lading are documents which operate as receipts for the goods, and which contain or evidence the terms of the contract of carriage. Such terms include provisions relating to the shipowners' obligations in respect of the goods while in their care, and so regulate their responsibility for the goods as bailees. In these circumstances, their Lordships find it difficult to believe that a clause providing for the governing law and for exclusive jurisdiction over claims should be held not to be apt to cover claims by the cargo owners against the shipowners framed in bailment rather than in contract, simply because the clause refers to claims under the bill of lading contract as opposed to claims under the bill of lading. Furthermore, if this view is correct, it must follow that shipowners who are sub-bailees of the goods may similarly be able to invoke such a clause against owners of the goods who are seeking to hold them liable as bailees and who have consented to the inclusion of the clause in the bill of lading.*

[1090] BRIGGS, A., 2008, supra note 1053, p. 411 The jurisdiction clause in question (Clause 26) provided the following:

> *"This bill of lading contract shall be governed by Chinese law. Any claim or other dispute arising thereunder shall be determined at Taipei in Taiwan unless the carrier otherwise agrees in writing."*

The Pioneer Container [1994], p. 333.

> *Their Lordships cannot help feeling that any other conclusion* [...] *would lead to refinements and inconsistencies which are unacceptable in a commercial context."*[1091]

A similar conclusion had been reached in the 1976 Court of Appeal case of *The Makefjell,* where the plaintiffs framed at least one of their causes of action in tort, so as to escape the application of an exclusive Norwegian jurisdiction clause.[1092] The clause in question read:

> *"... any claim against the carrier shall be decided at the principal place of business of the carrier and in accordance with the law of that place..."*[1093]

As it is customary in matters regarding the scope of a clause, the argument dealt with semantic issues as to whether the clause's use of *"any claim"* truly included *every* type of claim, or only contractual ones. CAIRNS L.J. was not impressed by the restrictive interpretation of the clause, considering that it should be read as referring to *all* disputes. In his decision, he stated that:

> *"I do not think there can be any doubt that the parties intended that any claims in respect of damage to the goods carried under the bills of lading should be decided in Oslo and according to Norwegian law, however they were framed. To a business man it would be absurd to suppose that if one cause of action was pleaded it should be triable in Norway according to Norwegian law, whereas if another cause of action was pleaded it might be triable anywhere where one of the owners' ships might be arrested and possibly according to a different system of law; and that if cargo owners wished to pursue both causes of actions they could pursue them in two different courts and according to two different legal codes. Giving a common-sense meaning to the words of the clause I am satisfied that they apply to the claim in tort as well as the claim in contract."*[1094]

More recently, in the House of Lords case of *Donohue v. Armco Inc.*, Lord SCOTT also ruled on this issue, favoring an expansive interpretation of jurisdiction clauses. This would allow the clauses to cover even those cases that are not inherently contractual in nature.[1095]

> *"A claim for damages for, for example, fraudulent misrepresentation inducing an agreement containing an exclusive jurisdiction clause in the same form as that with which this case is concerned would, as a matter of ordinary language, be a claim in*

[1091] ibid., pp. 343–344. *See* also *The Cap Blanco* [1913] P, 130–136, p. 136 ("*In dealing with commercial documents of this kind, effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties"*) and BRIGGS, A., 2008, supra note 1053, pp. 411–412.
[1092] BELL, A. S., 2003, supra note 1015, p. 310.
[1093] KNIGHT, S. M., 1977, supra note 1089, p. 672.
[1094] Quoted in ibid., p. 673.
[1095] *Donohue v Armco Inc. & Others* [2002] CLC, 440, p. 459.

> *tort that arose 'out of or in connection with' the agreement.*[1096] *If the alleged fraudulent misrepresentation had been made by two individuals jointly, of whom one was and the other was not a party to the agreement, the claim would still be of the same character, although only the party to the agreement would be entitled to the benefit of the exclusive jurisdiction clause. The commencement of the claim against the two alleged tortfeasors elsewhere than in England would represent a breach of the clause. The defendant tortfeasor who was a party to the agreement would, absent strong reasons to the contrary, be entitled to an injunction restraining the continuance of the foreign proceedings. He would be entitled to an injunction restraining the continuance of the proceedings not only against himself but also against his co-defendant. The exclusive jurisdiction clause is expressed to cover 'any dispute which may arise out of or in connection with' the agreement. It is not limited to 'any claim against' the party to the agreement. To give the clause that limited construction would very substantially reduce the protection afforded by the clause to the party to the agreement. The non-party, if he remained alone as a defendant in the foreign proceedings, would be entitled to claim from his co-tortfeasor a contribution to any damages awarded. He could join the co-tortfeasor, the party entitled to the protection of the exclusive jurisdiction clause, in third party proceedings for that purpose. The position would be no different if the claim were to be commenced in the foreign court with only the tortfeasor who was not a party to the exclusive jurisdiction clause as a defendant. He would be able, and well advised, to commence third party proceedings against his co-tortfeasor, the party to the exclusive jurisdiction clause."*[1097]

Two conclusions can be drawn from the above cited decisions. First, English courts seem to reject argumentative lines that, in essence, seek to find loopholes in jurisdiction clauses by means of framing the action outside of the contractual sphere. And so, "*if it can be seen that a plaintiff is attempting a subtle method of forum shopping the court will find any way of curtailing that attempt rather than permit abuse of their policy.*"[1098] Second, the courts favour a one-stop adjudication approach to forum selection clauses.[1099] What this means is that courts will usually interpret the clauses, particularly in commercial cases, as granting jurisdiction on *all types* of claims to a single forum. As BELL notes, by taking this approach:

[1096] The clause read as follows:

> "[T]*he parties hereby irrevocably submit themselves to the exclusive jurisdiction of the English courts to settle any dispute which may arise out of or in connection with this agreement.*"

ibid., p. 444.

[1097] ibid., p. 459.

[1098] KNIGHT, S. M., 1977, supra note 1089, p. 674.

[1099] *See*, for example, *Black Diamond Offshore Limited & Others v Fomento de Construcciones y Contratas S.A.* [2015], 997509 WL, Unreported, p. 42

> *"*[The courts] *exhibit the strong modern prejudice* [...] *to minimize the scope for inconsistent decisions as a result of related concurrent proceedings or, to express it positively, to foster the goal of 'one-stop-adjudication'. This presumption may be particularly important in cases where the clause in question simply records that the parties submit to the exclusive jurisdiction of the courts of one particular forum without specifying the nature of the disputes submitted."*[1100]

Through this understanding of the clauses, the courts presume that, at the time of drafting the contract, the parties wanted to avoid the risk of inconsistent decisions that is inherent to "fragmenting" the claims through different jurisdictions.[1101] On the basis of this general presumption, *"the parties, especially parties to a commercial contract, should not be taken to have intended that certain types of claims should be heard exclusively in one court or, as the case may be, by arbitration (those strictly falling within the scope of the clause) but that others need not be."*[1102]

8.4.6 Denial of Enforcement by Discretion of the Court

Most commonly, when the resisting party is unable to frame her defense within any of the previously mentioned scenarios, she will appeal to the discretion of the court to refuse the enforcement of the forum selection clause.[1103] As we have mentioned before, this is a difficult gamble for the party, as there is a *prima facie* validity of the clauses themselves, and so a very strong cause is required for a court to refuse enforcement.

A number of distinctions must be made in regards to this option, depending on the special characteristics of the clause in question. First, between clauses submitting the disputes to a foreign *court*, and clauses submitting disputes to a foreign *arbitration*. While in the former case the court will be able to use its discretion to deny the enforcement of the clause, in the latter *"a stay must be granted automatically and there is no scope for retention of jurisdiction based on the court's discretion."*[1104] Clauses granting jurisdiction to foreign courts require yet another distinction, depending on whether the selected court is located in, on the one hand, a EU Member State, a signatory of the Lugano Convention, or which otherwise fall within the scope of the Brussels I (Recast) Regulation and, on the other, agreements submitting disputes to courts located in the rest of the world, and which are to be decided according to Common Law principles.

[1100] BELL, A. S., 2003, supra note 1015, p. 311.
[1101] TAN, Y. L., *Choice of Court Agreement: From a Viewpoint of Anglo-Commonwealth Law,* 2004, p. 13.
[1102] BELL, A. S., 2003, supra note 1015, p. 311.
[1103] ibid., p. 315.
[1104] ibid., p. 315.

In the first group of cases, those involving clauses submitting disputes to courts within the EU/Lugano Convention/ Brussels I (Recast) scope, the situation is, to an extent, more or less clear. In accordance with the Brussels I (Recast) Regulation, courts cannot exercise their discretion and refuse to enforce an exclusive forum selection clause.[1105] As Article 25 (1) of the Regulation establishes in the relevant part:

> *"If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."*[1106]

The situation is different when the selected court is located in a non-Member State, or a state which falls outside the scope of the Regulation, in which case English courts are empowered to exercise their discretion and assert their jurisdiction over a dispute, even in the presence of a choice of forum clause. Of course, the use of this discretion is quite restrictive since, as we have seen, English courts demonstrate a strong preference for enforcing jurisdiction clauses. This position is, clearly, commercially desirable, particularly in light of the important role that forum selection clauses play in international trade; furthermore, as BELL has notes, it "*is consonant with the maxim pacta sunt servanda, and is in line with the general policy evinced by the Conventions to jurisdiction agreements.*"[1107]

As Lord WILLMER of the Court of Appeal stated in *The Chaparral*:

> *"It is always open to parties to stipulate (as they did in this case) that a particular Court shall have jurisdiction over any dispute arising out of their contract. . . . Prima*

[1105] HARTLEY, T. C., *Choice-of-Court Agreements Under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, 2013, Oxford University Press, Oxford, United Kingdom, p. 182.

[1106] The text of this provision differs slightly from its equivalent in the Brussels I Regulation, and which established:

> *"Article 23*
>
> *1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.*
>
> […]
>
> *3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction."*

While nº 3 cited above was eliminated from the final text of the Brussels (Recast) Regulation, it seems to now be part of Article 25 (1), where *"one or more of whom is domiciled in a Member State"* was replaced by "*regardless of their domicile."*

[1107] BELL, A. S., 2003, supra note 1015, p. 318.

> *facie it is the policy of the Court to hold parties to the bargain into which they have entered* [...] [T]*he Court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain."*[1108]

Similarly, in a more recent case, Lord BINGHAM expressed this same view regarding how restrictively English courts will exercise their discretion against a jurisdiction clause. As he stated in *Donohue v. Armco*:

> *"If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case."*[1109]

In accordance with the principles expressed in, among others, the above cited decisions, English courts have taken the position that they will only entertain proceedings brought in contravention of a forum selection clause when "strong cause" is shown to justify it. It has been suggested that this strict approach adopted by the English courts aims at guaranteeing the normal working of commerce; indeed, as LEOW argues, bargains made by the parties (particularly those related to forum selection) must be upheld by the courts since "[t]*o hold otherwise would be to open up a Pandora's Box in respect of the sanctity of*

[1108] Cited in COLLINS, L., 'Forum Selection and an Anglo-American Conflict: The Sad Case of the Chaparral', 1971, 20 *The International and Comparative Law Quarterly*, no. 3, p. 554. ZAPHIRIOU distinguishes this approach from that taken in in American law in regards to discretion; he argues that in *The Chaparral* the Court, instead of applying the *forum non conveniens* doctrine *"in the American sense, i.e. to decline jurisdiction conferred by a forum selection clause,"* opted instead to reserve the exercise of jurisdiction *"when convenience so demands"* (ZAPHIRIOU, G. A., 1977, supra note 747, p. 316)

[1109] *Donohue v Armco Inc. & Others* [2002], p. 449.

contract, which is undeniably the life blood of commerce."[1110] This approach has resulted, as we have already seen, in a presumption of validity for the forum selection clauses, so that, *prima facie*, a court should give full validity to the clause, unless the plaintiff resisting the clause can justify otherwise.[1111]

As RIX J. expressed in *Sinochem v. Mobil Sales*:

> *"*[O]*f fundamental importance, it is in my judgment a principle of the court's residual discretion to stay even proceedings commenced in the consensual forum of an exclusive jurisdiction clause that the strong cause which needs to be shown if that discretion is to be exercised must go beyond matters of mere convenience and must enter into the interests of justice itself. After all, when parties agree to an exclusive forum for their disputes, they are or must be treated as being mindful both that they have chosen for themselves where such considerations of convenience take them and also that their choice may override pure matters of convenience — as where, typically, a neutral forum is chosen which has nothing whatsoever to do with their transaction or any likely dispute that may arise out of it.* [...] [I]*t is necessary to point to some factor which could not have been foreseen in order to displace the bargain which has been agreed.* [...]*It is or may be different, however, where the quality of the consideration is different and goes to a matter of justice, although even in such a case it might be said that the factor in question should be regarded as* having *been foreseen and encompassed in the bargain struck."*[1112]

The emphasis placed by the courts on the resisting party proving "strong reasons" to justify the breach is quite telling, as it demonstrates that not just any reason, nor any simple "inconvenience" will be enough. What is more, the resisting party will not be able to escape the clause if the reasons that she puts forward were known, or should have been known, by her at the time of the contract. Indeed, as GROSS J. stressed in a recent case, the weight of the factors analyzed by the court will be dependent on whether or not they were foreseeable at the time of the contract:

> *"In the nature of things, for the court to exercise its jurisdiction so as not to give effect to an EJC* [exclusive jurisdiction clause]*, the 'strong reasons' relied on must ordinarily go beyond a mere matter of foreseeable convenience and extend either to some unforeseeable matter of convenience or enter into the interests of justice itself. Even then, it cannot simply be assumed that the court will automatically exercise its*

[1110] LEOW, V., 'Exclusively Here to Stay: The Applicable Principles to Granting a Stay on the Basis of an Exclusive Jurisdiction Clause - Golden Shore Transportation Ptd. Ltd. v. UCO Bank', 2004 *Singapore Journal of Legal Studies*, no. 2, p. 576.

[1111] TAN, D., 'No Dispute Amounting to Strong Cause; Strong Cause for Dispute', 2001, 13 *Singapore Academy of Law Journal*, p. 429.

[1112] *Sinochem International Oil (London) Co Ltd. v Mobil Sales and Supply Corp (No.2)* [April 4, 2000] CLC, 1132–1145, p. 1144.

> *discretion so as to release one party from its contractual bargain. Once the interests of justice are engaged, then factors of convenience will be relevant to the exercise by the court of its discretion. These conclusions, in my judgment, recognise the importance to be attached to the parties' choice of contractual forum (whether exclusive or non-exclusive), accommodate the possible tension between the choice of a neutral forum and factors of convenience and, furthermore, enjoy the support of a weight of observations in the authorities* [...]."[1113]

Similarly, in *Ace Insurance v. Zurich Insurance,* Lord RIX of the Court of Appeal also affirmed that the exercise of discretion requires that the arguments put forward by the resisting party are not foreseeable. In a rather categorical fashion, he stated:

> *"If a party agrees to submit to the jurisdiction of the courts of a state, it does not easily lie in its mouth to complain that it is inconvenient to conduct its litigation there (i.e. to assert that the agreed forum is a forum non conveniens).* [...] [I]*t is necessary to point to some factor which could not have been foreseen in order to displace the bargain which has been agreed. In such a case that party must show some good reason or special cause why it should not be held to its agreement to submit to the agreed jurisdiction; and if it cannot do so, there seems no reason why the English court should entertain parallel proceedings here, with their attendant evils — duplication of expense and the danger of inconsistent decisions."*[1114]

Despite this apparent absolute nature of the courts' preference for enforcing forum selection clauses, however, there is a certain glimmer of hope for the parties who seek to resist them. Indeed, as BRIGGS had already noted in 1993, despite the courts' routine statements favoring enforcement, *"the practice is rather different"*.[1115] For better or worse, some authorities have suggested that even though theoretically this pro-enforcement policy exists, as HIRST J. noted in *The Nile Rhapsody,* "*the only difference rendered by the presence of a choice of court clause was one of burden of proof."*[1116] In other words, the only certainty created by these clauses refers to the party who will have the burden to prove that the court should or should not exercise its discretion. Nothing more, nothing less.

A case can certainly be made that decisions such as those in *The Nile Rhapsody* and *The Fehmarn* seem to undermine the certainty that the courts are, supposedly, trying to create in the commercial world.[1117] However, it is also true that a zealous enforcement that

---

[1113] *Import Export Metro Ltd. & Anor v Compania Sud Americana de Vapores SA* [2004], 2 CLC, 757–777, p. 767.
[1114] *Ace Insurance SA-NV v Zurich Insurance Co & Anor* [2001] CLC, 526–549, p. 547.
[1115] BRIGGS, A., 'Jurisdiction Clauses and Judicial Attitudes', 1993, 109 *Law Quarterly Review,* p. 383.
[1116] BELL, A. S., 2003, supra note 1015, p. 319, citing Hirst J. in *Hamed el Chiaty & Co (t/a Travco Nile Cruise Lines) v Thomas Cook Group Ltd (The Nile Rhapsody)* [1992], 2 Lloyd's Rep, 399.
[1117] *See Hamed el Chiaty & Co (t/a Travco Nile Cruise Lines) v Thomas Cook Group Ltd (The Nile Rhapsody)* [1992], 2 Lloyd's Rep, 399 and *Owners of Cargo Lately on Board the Fehmarn v Owners of the Fehmarn (The Fehmarn)* [1958], 1 W.L.R., 159–164.

leaves no room for escaping the effect of jurisdiction clauses might give way to an utterly unfair system. Notwithstanding this considerations, however, it should be noted that the issue of discretion has become less relevant in recent years, as courts have become less likely to refuse the enforcement of these clauses. Even though discretion continues to play a role, the standard seems to be set particularly high for those seeking to escape the clauses.

BELL has suggested that this shift towards more enforcement is the result of is that since English courts have adopted an *"almost automatic"* enforcement of exclusive jurisdiction agreements nominating English courts, they have been forced to use a similarly strict and pro-enforcement approach towards clauses nominating foreign forums.[1118] The motivation of the courts makes sense, since it avoids a kind of double-standard in which the courts would only be deeming themselves as capable of exercising jurisdiction. Indeed, since it is unlikely that an English court will not exercise her jurisdiction when there is an English forum selection clause in place, not using the same approach when the clause selects a foreign forum would create a rather jingoistic result in which only English courts appear worthy of being selected.

8.5 Judicial Discretion and Forum Selection Clauses

In *The Eleftheria,* BRANDON J. put forward a series of principles that, in his view, inform the exercise of discretion by the English courts. These are, in essence, the following:[1119]

1. If a plaintiff brings forth a suit before an English court in breach of a forum selection clause granting jurisdiction to a foreign court, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
2. The court should grant a stay of proceedings unless strong cause for not doing so is shown.
3. The burden of proving such strong cause is on the plaintiffs.[1120]
4. In exercising its discretion, the court should take into consideration all the relevant facts and circumstances of the case, particularly (but not exclusively):

[1118] BELL, A. S., 2003, supra note 1015, p. 320 *See* also COLLIER, J. G., 2004, supra note 1031, p. 98 ("*It is unlikely that a stay of English proceedings will be granted when the parties have agreed to English jurisdiction or arbitration*").
[1119] *The Eleftheria* [1970], pp. 99–100.
[1120] ibid., p. 97.

a. In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.

b. Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.

c. With what country either party is connected, and how closely.

d. Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

e. If the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

    i. Be deprived of security for their claim;

    ii. Be unable to enforce any judgment obtained;

    iii. Be faced with a time-bar not applicable in England;

    iv. For political, racial, religious or other reasons be unlikely to get a fair trial.

8.5.1 (In)Convenience of the Contractual Forum

The factors enumerated by BRANDON J. emphasize the convenience of the parties. Indeed, two of the considerations that he put forward (points (a) and (c) above) deal, precisely, with this issue.[1121] Although appeals to (in)convenience certainly continue to be a fairly common tactic used by the party seeking to prevent the enforcement of a forum selection clause, BRANDON J. did try to downplay their importance in later cases. As a matter of fact, in *The Makefjell* he specifically referred to the risk of "convenience" being used as a way to undermine the certainty that should surround forum selection clauses:

> *"If all or most such cases are to be treated as exceptions to the general rule, there is, it seems to me, a danger that such exceptions should be so frequent as to undermine the generality of the rule; or, to put it another way, that the rule will be nearly as much honoured in the breach as in the observance. Such an outcome would, in my view, involve a departure from the basic principle that foreign jurisdiction clauses of this kind should be enforced save only in cases which can truly be described as exceptional."*[1122]

[1121] BELL, A. S., 2003, supra note 1015, p. 322.
[1122] Cited in ibid., pp. 322–323.

Resisting parties will often argue that the selected forum is inconvenient for them for reasons of costs. In other words, that conducting proceedings in the contractual forum will be so expensive that it will prevent them from being able to obtain redress. Just as we saw in the case of the United States, English courts are not very sympathetic to those brandishing this line of argument. Cases abound in which the courts have not been moved by parties who seek to escape the enforcement in this manner. Indeed, the case law shows that *"increased cost to the plaintiff or decreased likelihood of success have rarely influenced the decisions"* of whether or not to stay proceedings.[1123] In *The Media*, for example, Lord MERRIVALE, despite acknowledging that proceedings in the contractual forum in India would be *"needlessly expensive"* and *"highly inconvenient"*, ruled that these were issues that the parties should have taken into consideration at the time of the contract, and not to seek to backtrack once problems arose.[1124]As GROSS J. ruled in *Metro Exports v. Sud Americana de Vapores*:

> *"While all the circumstances are to be taken into account and it cannot be said that the court will never release a party from a bargain contained in an EJC [(exclusive jurisdiction clause)] unless circumstances have arisen which could not have been foreseen at the time the contract was entered into, releases on the ground only of foreseeable matters of convenience are likely to be rare* [...] *In the nature of things, for the court to exercise its jurisdiction so as not to give effect to an EJC, the 'strong reasons' relied on must ordinarily go beyond a mere matter of foreseeable convenience and extend either to some unforeseeable matter of convenience or enter into the interests of justice itself. Even then, it cannot simply be assumed that the court will automatically exercise its discretion so as to release one party from its contractual bargain. Once the interests of justice are engaged, then factors of convenience will be relevant to the exercise by the court of its discretion."*[1125]

A similarly restrictive view had already been expressed in *The Kislovodsk*, a case in which a bill of lading contained a clause selecting Soviet courts as the competent forum. Here SHEEN J. also demonstrated that the courts were not willing to lend themselves to allow a party to go back on his word using "costs" as an argument. In his decision he stated that:

> *"I am prepared to assume that the unrecovered costs of proceedings in Russia exceed the amount of the costs which probably would not be recovered in England: But that is a part of the system of justice to which the plaintiffs agreed to submit when the bills of lading were signed. If it is thought that the system of administering justice in*

[1123] CUTLER, M. R., 1985, supra note 749, p. 124. BELL does note that although the excessive costs incurred by one of the parties are not often analyzed sympathetically by the courts, they do take into consideration *"the overall cost of the proceedings."*

[1124] BELL, A. S., 2003, supra note 1015, p. 323.

[1125] *Import Export Metro Ltd., Metro Exports v Compania Sud Americana De Vapores S.A.* [2003], 1610416 WL, Unreported, p. 15

> *USSR has built into it some aspect which appears unfair to litigants that will be a good reason for not signing bills of lading which contain a clause giving exclusive jurisdiction to the courts of the USSR. But it seems to me that it does not lie in the mouth of a party who agreed to such a clause to say, when the clause is invoked, that the cost of proceeding in Russia is expensive."*[1126]

In *British Aerospace plc v. Dee Howard Co.*, WALLER J. also expressed this view, when the defendants sought a stay of proceedings arguing that it would be more convenient to conduct them in Texas, where the defendants had already started their own proceedings.[1127] The Commercial Court rejected this argument, stating:

> *"It seems to me on the language of the clause that I am considering here,* [that] *it simply should not be open to DHC* [the defendants] *to start arguing about the relative merits of fighting an action in London, where the factors relied on would have been eminently foreseeable at the time that they entered into the contract. Furthermore, to rely before the English Court on the factor that they have commenced proceedings in Texas and therefore that there will be two sets of proceedings unless the English Court stops the English action should as I see it simply be impermissible, at least where jurisdiction in those proceedings has been immediately challenged. If the clause means what I suggest it means they are not entitled to resist the English jurisdiction if an action is commenced in England, it is DHC who have brought upon themselves the risk of two sets of proceedings if as is likely to happen BAe commence proceedings in England. Surely they must point to some factor which they could not have foreseen on which they can rely for displaying the bargain which they made i.e. that they would not object to the jurisdiction of the English Court.*
>
> *Adopting that approach it seems to me that the inconvenience for witnesses, the location of documents, the timing of a trial and all such like matters are aspects which they are simply precluded from raising. Furthermore, commencing an action*

[1126] *The Kislovodsk* [1980], 1 Lloyd's Rep, 183. In *The Fehmarn,* an earlier case with a Soviet-forum clause, the Court of Appeals reached the opposite decision, and actually refused to stay proceedings, with Lord DENNING arguing that since "*the dispute is more closely connected with England than Russia*" then there was no reason to prevent the proceedings brought in England (against the forum selection clause) from continuing (cited in WEBB, P. R. H., 'The Fehmarn', 1958, 7 *The International and Comparative Law Quarterly*, no. 3, p. 605). MENDELSOHN sees the decision in *The Fehmarn* not so much as an exercise of the discretion of the courts, but rather as a covert move on the part of the court to, by appealing to some *"convenient reasons"*, disregard a freely agreed-upon forum selection clause and allow the litigant to remain in an English court (MENDELSOHN, A. I., 'Liberalism, Choice of Forum Clauses and the Hague Rules', 1970, 2 *Journal of Maritime Law and Commerce,* pp. 662–663). ZAPHIRIOU, on the other hand, sees the decision in *The Fehmarn* as completely legitimate, since "*there was no conceivable reason for the case to be tried in Russia. It merely appeared to be an attempt by the shipowners to make matters difficult for the plaintiffs"* (ZAPHIRIOU, G. A., 1977, supra note 747, p. 316).

[1127] BELL, A. S., 2003, supra note 1015, p. 327.

> *in Texas, albeit that may not be a breach of the clause, cannot give them a factor on which they can rely, unless of course the action has continued without protest from BAe."*[1128]

In these decisions the courts seem to be giving the resisting parties a fairly straightforward message: "If you do not want to end up litigating a case in a faraway court, paying higher costs than at home, or being inconvenienced by distant evidence, then do not agree to it when you sign the contract." The fact that these contracts involved commercial parties must have certainly had some weight in this regard, as it would have made it much harder for the resisting parties to argue that they had been the victims of an oppressive bargain.

8.5.2 Unfairness or Injustice of the Contractual Forum

Plaintiffs seeking to resist the application of the forum selection clause by reasons of an alleged injustice of the selected forum have also found English courts to be less than welcoming.[1129] The reason for this reluctance is rather plain to see: Courts cannot remove themselves from the political realities of the moment, and so they must keep in mind that referring to a certain legal system as inherently unfair would certainly strain the relations between the two countries.

In *The Abidin Daver,* Lord DIPLOCK attempted to create a standard to determine when a certain system can be considered "unjust." In his view, when it speaks of an "unjust" or an "unfair" forum, a court is referring to:

> *"*[C]*ountries in whose courts there is a risk that justice will not be obtained by a foreign litigant in particular kinds of suits whether for ideological or political reasons, or because of inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts, or the unavailability of appropriate remedies."*[1130]

In the modern world, particularly among developed nations, countries whose judicial systems fit the description put forward by Lord DIPLOCK are in the minority, if not in practice at least in theory. What we mean by this is that even though some countries might have corrupt internal systems, it is difficult, if not impossible, for an English court to disregard them as unfair. What is more, within the European Union, an English court would be unable to refuse the enforcement of a clause granting jurisdiction to any country located within the European Community, in compliance with the terms of the Brussels I

[1128] *British Aerospace Plc v Dee Howard Co.* [1993], 1 Lloyd's Rep, 368, p. 376.
[1129] CUTLER, M. R., 1985, supra note 749, p. 124.
[1130] Cited in FAWCETT, J. J., 1989, supra note 1034, pp. 213–214. *See* also *The Abidin Daver* [1984] AC, 398.

(Recast) Regulation, even in cases when the selected court is located in a corrupt European nation.

The issue of corruption in the European Union, particularly in newer Member States, has created some frictions within the EU. Some argue that the principles of mutual trust that underlie rules such as the Brussels I (Recast) Regulation, for example, cannot exist between very dissimilar nations. As KRAMER notes:

> *"This has raised criticism from the member states and in doctrine, particularly where it concerns the public policy exception. In the Netherlands, this has even raised a debate in the Dutch Parliament, where earlier developments in this area went by unnoticed. The concerns specifically addressed the unreviewable import of judgments emanating from corrupt proceedings from particular member states.*
>
> *The issue of corruption is a sensitive one in the EU, and is usually avoided in the legislative discussions on private international law. But the existence of corruption in general is acknowledged, and was put on the political agenda. Recent reports from Transparency International and the EU have revealed that corruption is a major problem in many member states, and that it has increased over the past few years. Corruption exists in every member state, but the reports make clear that the expansion of the EU to countries with weaker institutions requires serious attention."*[1131]

The above caveats notwithstanding, however, there are some cases in which this defense has been accepted. Indeed, some cases, to different degrees, have considered that a foreign forum, despite having jurisdiction, is inconvenient for reasons of injustice or unfairness, both in situations of forum selection as well as in cases of *forum non conveniens*.

One of the most dramatic examples of this is that of *Oppenheimer v. Louis Rosenthal and Co AG*, a case in which a Jewish German citizen, domiciled in London, England, was dismissed from his job as the manager of the London branch of a German company. After he commenced proceedings against the company for wrongful dismissal, and was granted leave by the court to serve the defendant company in Germany, the company moved to have the service of writ set aside based on the fact that, for a number of reasons, the German forum was the *forum conveniens*. After the defendant prevailed, the Court of Appeal reversed this decision, and sided with the plaintiff, considering that the German forum would not ensure the fair treatment of a Jewish plaintiff. As GREER L. J. stated:

[1131] KRAMER, X. E., *Private International Law Responses to Corruption: Approaches to Jurisdiction and Foreign Judgments and the International Fight Against Corruption*, in Van de Bunt, H. G. (ed.), *International Law and the Fight Against Corruption*, 2012, p. 139.

> *"It is said that Germany is the forum conveniens in this case, or that it would be in normal circumstances, as the contract is governed by German law* [...] *This need occasion no difficulty as there is in London at present a large number of distinguished German lawyers, so there will be no injustice to the defendant company by depriving them of the opportunity of proving German law. On the other side there is said to be grave reason to suppose that, if the plaintiff goes to Germany, he would not be allowed to be represented by an advocate. He would have to appear in person before the Labour Court and conduct his own case; he would also be under a real risk of being arrested and put in a concentration camp. I find that the German courts are not the forum conveniens notwithstanding the fact that the plaintiff and the defendant company are both German."*[1132]

There are also a minority of cases in which even though there is a valid forum selection clause in a contract, English courts refuse to stay proceedings, due to the selected forum being considered inherently unfair for the specific case. In the 1939 case of *Ellinger v. Guinness, Mahon* & Co, for example, and which is similar to the *Oppenheimer* case above, an exclusive choice of forum granting jurisdiction to a German court was not enforced because it was considered that the fact that the plaintiff was Jewish would deny him the opportunity of a fair trial before the courts of the Third Reich.[1133] Similarly, in *Carvalho v. Hull, Blyth (Angola) Ltd.*, the Court of Appeal recognized that although the forum selection clause was undisputed, the plaintiff had satisfied the test established in *The Eleftheria* by presenting strong enough reasons as to the inconvenience of the selected forum, including the possible risks to his own life if he was to appear before it. Although noting that he did not wish to base his decision on this fact alone, Lane L.J. stated that

> *"*[o]*n all the evidence it seems to me that, plainly, the plaintiff was the sort of person who would be anathema to the present government in Angola. That can scarcely be disputed, and it seems to me there was a ground for the plaintiff's fear."*[1134]

The issue of the lack of justice and impartiality of the selected forum will place on the resisting party a heavy burden of proof in order to demonstrate that it is, indeed, impossible for him to obtain justice there. In *Muduroglu Limited v T.C. Ziraat Bankasi,* for example, the Court of Appeal was not moved by the defendant's claims regarding the injustices that occurred in Turkey, such as massive human right abuses and the existence of only an appearance of democracy and freedom, since this was not enough to demonstrate that the competent *commercial* courts would not be fair and balanced in their work. The claims put forward by the plaintiff, that the judges would feel pressured to act

---

[1132] *Oppenheimer v Louis Rosenthal & Co. AG* [1937], 1 All ER, 23.
[1133] *Ellinger v Guinness, Mahon & Co.* [1939], 4 All ER, 16. *See* also BELL, A. S., 2003, supra note 1015, p. 328.
[1134] *Carvalho v Hull, Blyth (Angola) Ltd.* [1979], 1 W.L.R., 1228. *See* also *Mohammed v Bank of Kuwait and The Middle East K.S.C.*, 1 W.L.R., 1483.

unfairly towards him were not enough to satisfy the Court, who granted the stay of proceedings requested by the defendants.[1135]

8.5.3 The Conduct of the Parties

One of the most controversial factors enumerated by BRANDON J. in *The Eleftheria* deals with the private motivations of the party seeking to enforce the clause. The issue of *"whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages,"* is, as a matter of fact, rather unique, and actually finds no similar criteria in, for example, the case law of the United States.[1136] This is understandable, as it is a rather strange criterion to take into consideration when deciding whether or not to enforce the clause.

There are actually no good reasons to justify using this criterion to determine the enforceability of a forum selection clause, as its mere presence implies that the otherwise presumptive validity of these clauses is not so. It creates the idea that there are lawful motivations, in a private, contractual setting, and that the court suddenly becomes able to analyze and value these motivations in order to decide whether an agreement is worth enforcing. This is a problem, because it seems to change the rules of the game for the parties; after all, forum selection clauses are always included for reasons of convenience, otherwise they would not be employed as much, and what BRANDON J. seems to have said is that sometimes that strive for "convenience" is not legitimate.

This criterion also adds an unnecessary layer of uncertainty and complexity to an already complex field. It is hard to imagine a workable and universal criterion that could be used to differentiate between moral and immoral motivations to seek a judgment abroad. After all, a party including a forum selection clause will always do so in the hopes of obtaining some type of advantage, and not because of some ethereal "genuine desire," emotional or otherwise, to litigate in a foreign tribunal. Whether a party chooses a forum that is located near her, or which possesses special knowledge of a certain field, it is beyond any doubt that these are concerns that, in the event of litigation, will certainly render a procedural advantage. Perhaps what BRANDON J. was seeking to avoid were situations in which the *only* reason for a selected forum was to damage the other party, such as deliberately choosing the farthest or slowest possible court available; however, in this case the resisting party would probably be able to argue that it is an unfair or inconvenient forum, without the need to argue over the mental motivations of the other. Even parties that ended up subjected to a forum selection clause for reasons of bargaining power disparities might be better suited seeking the discretion of the court by arguing that the

---

[1135] *Muduroglu Ltd. v T.C. Ziraat Bankasi* [1986] QB, 1225.
[1136] BELL, A. S., 2003, supra note 1015, 324-235.

contractual forum is severely inconvenient, than by arguing over the "genuine desire" of the other party.

In truth, this criterion seems to penalize the party that is seeking to enforce the clause, and who might have given adequate consideration in exchange for a procedural advantage during the bargaining process. As ROBERTSON explained:

> *"Surely the reason why the defendant very often asks for the foreign choice of venue clause is that he knows the periods of limitation and rules of evidence of the chosen law. It is arguable, however, that the defendants' desire to abide by any procedural advantages derived from the application of the law of the chosen foreign forum seems both reasonable and genuine and certainly no worse than the attitude of a plaintiff who is seeking to gain procedural advantages by utilising the provisions of an English forum rather than the stipulated law."*[1137]

Despite the above reservations, however, as COLLINS notes:

> "[A]*lthough the cases require the plaintiff to show good reason why the clause should be overridden, in practice the court will want to know what advantage the defendant obtains from the foreign forum and whether that is a proper advantage. If he seeks merely to inconvenience the plaintiff or to delay the proceedings, he is unlikely to receive much sympathy from the court."*[1138]

Although it might appear like a good thing that the plaintiff needs to show "good reason," such a requirement exists in regards to all other exercises of discretion. What this means is that this exception to the *prima facie* validity in reality carries the same weight as any other. Some have argued that this challenge should only succeed in extreme cases in which "*it could be shown that the chosen forum was calculated to make litigation as expensive or difficult as possible,"* but it hard to imagine how proving such a *desire* might work.[1139]

In *Town Shoes v. Panalpina*, a Canadian Federal Court analyzed this issue, in a case dealing with the carriage of a cargo of shoes from Italy to Canada. As the cargo was stolen prior to the delivery, the merchants sued the carrier in Federal Court. The defendants made a motion to stay proceedings or to dismiss them altogether, based on the existence of a forum selection clause in the governing bill of lading. The clause in question provided:

> *"18. Law and Jurisdiction: Any dispute arising under or in connection with this bill of lading shall be exclusively decided by the court of Hamburg according to the law of*

[1137] BISSETT-JOHNSON, A., 1970, supra note 1047, p. 543.
[1138] COLLINS, L., 'Choice of Forum and the Exercise of Judicial Discretion: The Resolution of an Anglo-American Conflict', 1973, 22 *International and Comparative Law Quarterly*, no. 2, p. 343.
[1139] MICHELL, M. P., 'Forum Selection Clauses and Fundamental Breach: Z. I. Pompey Industrie v. Ecu-Line N. V., The Canmar Fortune', 2002, 36 *Canadian Business Law Journal*, no. 3, p. 467.

> *Germany. The carrier reserves the right to bring suit against the merchant at the merchant's domicile."*[1140]

The Court reasoned that there was a *"**strong** reason"* to have the case be heard in Canada and not in Germany.[1141] TEITELBAUM J. explained that "*the factual evidence or almost all of it is to be found in the Province of Quebec,"* and so having the procedure in Germany would involve a significant *"waste of money and time*."[1142] On the basis of these facts, and referencing the factors mentioned by BRANDON J. in *The Eleftheria*, the judge concluded:

> "[T]*he defendants do not have a genuine desire to have the trial take place in Germany, but are using this as a means to cause the plaintiffs additional and unnecessary expenses to possibly force a settlement*.
>
> *I make the above statement solely from the evidence that is in front of me, that is, I see absolutely no reason for the defendants to insist that this matter is heard in Germany other than to cause additional problems for the plaintiffs to make their case."*[1143]

The Court's decision is very hard to explain. By referencing the very high costs of litigating in the contractual forum, TEITELBAUM J. seemed to be preparing the field for refusing to stay the proceedings based on the issue of inconvenience. In a *non sequitur* decision, however, TEITELBAUM J. instead opted to refer to the issue of the genuine desire of the defendants to litigate in the contractual forum. Indeed, the clause in question is a fairly straightforward exclusive jurisdiction clause, and so seeking its enforcement should not be seen as a wicked act on the part of the defendants, but simply as them trying to hold the plaintiffs' to their word.[1144] Had the decision been based exclusively on the inconvenience of the contractual forum, then it would truly be beyond reproach; however, by choosing to reference this "contractual mens rea", the decision ends up standing on shaky ground.

The difficulties involved in proving something as ethereal as the "genuine desire" of the party relying on the jurisdiction clause might explain why comparatively few decisions

---

[1140] *Town Shoes Ltd and Emfaro Calzature Srl v Panalpina Inc. and M.G. Transport Ltd* [2000] ILPR, 172–180, pp. 173–174.
[1141] ibid., p. 178 (emphasis in the original).
[1142] ibid., p. 178.
[1143] ibid., p. 178.
[1144] In *Euromark Limited v. Smash Enterprises,* Justice Coulson seems to have considered that the existence of an exclusive jurisdiction clause meant that seeking its enforcement is inherently a genuine desire. In his decision he noted how

> *"it is not a relevant consideration when there is, as here, an exclusive jurisdiction clause* [...] *the defendant can answer this contention simply by asserting the right to rely on the exclusive jurisdiction clause which was agreed as part of the contract."*

Euromark Limited v Smash Enterprises PTY Ltd. [2013], 2300013 WL, Unreported, pp. 16–17.

actually resort to it. Clearly, even though the sentiments expressed by the courts are certainly noble, seeking to prevent abusive behaviour, resorting to this criteria, at least as the sole deciding factor, does not seem adequate.

8.5.4 Risk of Inconsistent Decisions Involving Third Parties

In addition to the factors enumerated by Brandon J in *The Eleftheria* (and which, as we have seen, can be the subject of some criticism), the Court of Appeal decision in *The El Amria* added one more factor to be taken into consideration. According to this decision, and which was recently confirmed in *Donohue v. Armco*:

> *"The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions."*[1145]

Courts are sensitive to the enormous problems that would result from parallel proceedings being conducted in different jurisdictions, and so they have, *"with increasing frequency, referred to the desirability of grouping related litigation in one comprehensive set of proceedings."*[1146] As BRANDON LJ explained in *El Amria:*

> *"I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials* [...] *that the same issues might be determined differently in the two countries."*[1147]

The damage that could result from parallel proceedings is such that courts have even been willing to overlook whether this was a foreseeable risk at the time the clause was drafted.[1148] This makes sense, since parallel proceedings might make it very difficult, if not downright impossible, to be able to adequately enforce the rulings.

The *Donohue v. Armco* decision first recognizes this risk in regards to third parties who are not bound by the jurisdiction clause. Of course, parties who are not part of a forum selection clause cannot be compelled to comply with its terms, and so in the interest of

---

[1145] *Donohue v Armco Inc. & Others* [2002], p. 450.
[1146] BELL, A. S., 2003, supra note 1015, p. 329.
[1147] *Aratra Potato Co Ltd. v. Egyptian Navigation Co. (The El Amria)* [1981], p. 126.
[1148] TAN, Y. L., 2004, supra note 1101, p. 32.

protecting them and preventing inconsistent decisions, a court might go against a jurisdiction clause.[1149]

An interesting case in this regard happened in *The Frinton*, dealing with a bill of lading claim brought by the cargo interests for the damage of the goods transported aboard the vessel. As it is common in maritime trade, the vessel carried cargo owned by different merchants, under different bills of lading, several of them containing different clauses.

> *"The 87 plaintiffs were holders of 69 bills of lading issued by the Liberian owners of the 'Frinton' in respect of goods shipped in Argentina and Brazil for delivery in Far East ports. A fire on board the 'Frinton' was alleged to have caused damage to the cargo, and the plaintiffs' action was for 'breach of contract and/or duty and/or negligence.' The cargo had been discharged partly in Singapore, where the fire was eventually extinguished, in Keelung in Taiwan, and in Hong Kong; surveys of the 'Frinton' and her cargo had been carried out in each of these ports. The various plaintiffs gave addresses in eleven countries between them. The defendants applied to have the Hong Kong action stayed.*
>
> *The neat point of the case was that 65 of the 69 bills of lading, to which 85 of the 87 plaintiffs (the 'majority' plaintiffs) were party, contained an exclusive jurisdiction clause, whereas the remaining four bills contained no such clause."*[1150]

The mentioned jurisdiction clause included by the carrier in those 65 bills of lading stated in the relevant part that:

> *"Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business."*[1151]

Since proceedings were started by some of the cargo owners in Hong Kong, and the carrier had its place of business in Greece, he applied for a stay of the proceedings. FUAD VP of the Hong Kong Court of Appeal, writing the majority opinion, sided with the carrier, and granted the stay.

What is relevant about this decision in regards to the exercise of discretion by the Court is that even though the stay was granted, the grounds upon which it was based actually opened the door to reaching the opposite decision. Indeed, as BELL has noted, the decision was based on the fact that "*Greece was in fact the natural forum,"* meaning that if that had

---

[1149] FISHER, G., 'Anti-suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement', 2010, 22 *Bond Law Review*, 1, Article 1, p. 20.
[1150] MARGOLIS, R., 'Exclusive Jurisdiction Clauses and Multiple Plaintiffs', 1991, 21 *Hong Kong Law Journal*, no. 2, pp. 241–242.
[1151] ibid., p. 242.

not been the case, then the Court would (or at least should) have rejected the motion to stay.[1152]

The second situation contemplated in the *Donohue v. Armco* decision refer to cases in which grounds that are not the subject of the jurisdiction clause are part of the relevant dispute. Here, the forum selection clause cannot be invoked in regards to these other grounds of action, as they are beyond the scope of the clause.[1153]

8.6 The Risks of Discretion

The use of the court's discretion in order to escape the applicability of a forum selection clause constitutes a wide gap in the otherwise steadfast resolve of the English courts to enforce these clauses. As a matter of fact, some see the exercise of judicial discretion as reducing the status of exclusive jurisdiction clauses, by failing to give them the importance that they deserve.[1154] This discretion is also blamed as the reason why attempts at evading the application of a jurisdiction clause are often more successful than attempts at evading arbitration agreements.[1155]

BELL has gone as far as suggesting that the discretionary criterion included in *The Eleftheria* should be abandoned altogether. Indeed, he argues that, with the sole exception of inherent unfairness and injustice of the selected forum, all the other situations in which discretion can be used should be *"reconsidered and overruled."*[1156] In his view:

> *"What is required is a clear statement that it is simply not legitimate for a court to exercise its discretion on the basis of many of the factors set out in The Eleftheria (and others under its aegis) in circumstances where those factors were foreseeable at the time of entry into the jurisdiction agreement."*[1157]

It is hard to argue with BELL's position regarding foreseeability. Indeed, it makes little sense to not hold a party to a term that she agreed with, aware of its implications, even if this represents a complication in the future. If the plaintiff knew, for example, that litigating in the selected forum would be more expensive than litigating in her home turf, then she should not have agreed to those terms. In principle, therefore, BELL's desire to overrule the majority of *The Eleftheria* decision makes sense.

[1152] BELL, A. S., 2003, supra note 1015, p. 330. *See* also *Verity Shipping SA v NV Norexa* [2008], 370973 WL, Unreported.
[1153] FISHER, G., 2010, supra note 1149, p. 21.
[1154] KEYES, M., 2009, supra note 1055, pp. 200–201.
[1155] ibid., pp. 200–201.
[1156] BELL, A. S., 2003, supra note 1015, p. 327.
[1157] ibid., p. 328.

Despite BELL's reasonableness, however, it might not be such a good idea to change the current system based on *The Eleftheria*. Particularly when it comes to the inconvenience of the contractual forum, leaving a door open to allow parties to escape the bargain can be the only way to ensure fairness.

As we have seen many times before, even among commercial parties it is not uncommon that one of them is placed in a position that allows them to dictate the terms in a take-it-or-leave-it basis. Leaving weak parties at the mercy of the contract drafter, forced to litigate in distant forums that, for all intents and purposes, will prevent them from obtaining any redress, would certainly go against the type of justice and fairness that our legal systems seek to ensure.

The issue of judicial discretion regarding forum selection clauses should not be seen in absolutes. Discretion is certainly necessary, as it prevents a mechanical enforcement of the contracts, and ensures that fairness can be protected. Of course, this discretionary power should be employed in a restrictive manner, not allowing the parties to go against their own bargains, while at the same time being able to adapt to the facts of the case.

Chapter 9
Contracts in Maritime Law

> *"*[T]*he maritime law is not the law of a particular country, but the general law of nations."*
>
> Lord Mansfield.[1158]

> *"The sea with its winds, its storms and its dangers never changes and this demands a necessary uniformity of juridical regime."*
>
> Pasquale Stanislao Mancini.[1159]

9.1 Introduction

There is no doubt that, as one commentator noted, the dependence of the West "*on the use of the sea for its survival and prosperity is a geopolitical fact of life."*[1160] Despite being virtually invisible to most of the people who benefit from it, maritime trade is the backbone of our society. Approximately 90% of all trade is performed by sea, and that trade itself contributes to around 5% of the world economy.[1161]

> *"Over 10,000* [...] *maritime companies are in charge of the efficient operation of around 50,000 ships coming from 150 countries, dedicated to international trade, thanks to the skill and enthusiasm of one million seamen. This intricate heap of efforts, from the private sector, international organizations, and national*

[1158] Cited in GORMLEY, W. P., 'The Development of the Rhodian-Roman Maritime Law to 1681, with Special Emphasis on the Problem of Collision', 1961, 3 *Inter-American Law Review*, no. 2, p. 322.
[1159] Quoted in GRIGGS, P. J. S., 'Obstacles to Uniformity of Maritime Law the Nicholas J. Healy Lecture', 2003, 34 *Journal of Maritime Law and Commerce*, no. 2, p. 192.
[1160] BLACKHAM, J. & PRINS, G., 'Why Things Don't Happen', 2010, 155 *The RUSI Journal*, no. 4, p. 17.
[1161] *See* NORDENMAN, M., 'Europe and Its Seas in the Twenty-First Century', 2016, 27 *Mediterranean Quarterly*, no. 1, p. 22 ("[w]*hile specific figures vary, most estimates place the percentage (by weight) of international trade conducted by sea at over 90 percent*")" and ENRÍQUEZ, D., 'Uncitral y las Oscilaciones del Régimen Jurídico del Transporte Marítimo Internacional de Mercancías: Advertencias en Torno a la Búsqueda de una Tercera Vía', 2008, 8 *Anuario Mexicano de Derecho Internacional,* p. 80 ("*the maritime industry undertakes over 90% of the world trade and contributes to 5% of the world economy*").

> *jurisdictions, makes it possible for maritime transport to continue being the most competitive means of transport in terms of costs."*[1162]

Even though sea trade is an industry to which we owe a large part of our modern-day comfort, for most of the population it seems to remain a mystery.[1163] People tend to be completely unaware of how much we owe to the trade, actually seeing the navigation of the seas as merely a relic from times long gone. One First Sea Lord of the British navy is quoted as describing this phenomenon as one of "*sea blindness*" since, despite its importance staring us in the face, we remain ignorant of how vital this trade really is.[1164]

> *"We travel by cheap flights, not ocean liners. The sea is a distance to be flown over, a downward backdrop between takeoff and landing, a blue expanse that soothes on the moving flight map as the plane jerks over it. It is for leisure and beaches and fish and chips, not for use or work. Perhaps we believe that everything travels by air, or magically and instantaneously like information (which is actually anchored by cables on the seabed), not by hefty ships that travel more slowly than senior citizens drive."*[1165]

We have grown accustomed to the most visible aspects of trade and transportation, with most people imagining that air transport is not only an alternative, but rather the natural successor to maritime carriage. And yet, despite the passage of time, air transport, with all of its technological wonders, can only act as a complement to the trade conducted by sea.

> *"Habitual air travel has blinded* [the public] *to the fact that aircraft lift only people and light freight: commercially, they can lift no fuel other than that required to complete their own journey. Everything else must go by sea. A single medium-sized container ship can carry around one hundred times more weight and volume than the largest freight aircraft; a large passenger ship can readily carry ten to fifteen times as many people as the largest passenger airliner."*[1166]

[1162] ibid., p. 80. ENRÍQUEZ illustrates the issues of costs by explaining how shipping a *"20-foot container, from Asia to Europe, with 20 tons of cargo inside,"* costs roughly the same as a plane ticket for the same voyage; he also notes how, for an American consumer, the costs of transporting crude oil by sea from the Middle East to his local gas station, represents *"less than one cent per liter"* of his purchase. GEORGE places the number of ships at a much higher number, stating that there are actually *"more than one hundred thousand ships at sea, carrying all the solids, liquids, and gases that we need to live"* (GEORGE, R., *Ninety Percent of Everything: Inside Shipping, the Invisible Industry That Puts Clothes on Your Back, Gas in Your Car, and Food on Your Plate*, 2013, Henry Holt and Company, p. 3).

[1163] MOORE, S. K., 'Is the Maritime Domain a Security Vulnerability To Be Exploited During London 2012 and Beyond?', 2011, 11 *Defence Studies*, no. 4, p. 700 (referring to the maritime domain as *"the least understood"*).

[1164] GEORGE, R., 2013, supra note 1162, p. 4.

[1165] ibid., p. 4.

[1166] BLACKHAM, J. & PRINS, G., 2010, supra note 1160, p. 17. *See* also STURLEY, M. F. & FUJITA, T. et al., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly Or Partly by Sea*,

Our dependence on maritime trade is such that even national security, the very existence of our nations, would be at stake if the trade was affected.[1167] This dependency manifests itself in the fact that countries like the United Kingdom, for example, live in what is known as a *"just enough, just in time"* economy, where "*consumer goods, energy, food and raw materials are supplied on demand from around the world.*"[1168] Nations do not, as a rule, hold large reserves to be used in cases of emergency and are, as such, fully reliant on the existence of a vibrant trade. Interruptions to the maritime trade resulting from war, blockades, economic problems, or similar situations, would quickly lead to *"catastrophic shortages of food, fuel, and other vital resources within a few days."*[1169]

9.2 Defining Maritime Law

The carriage of goods by sea is regulated by what is known as "maritime law" (in German "Seerecht," Spanish "derecho marítimo," French "droit maritime," Dutch "zeerecht," and Norwegian "sjørett"). This is the body of laws and regulations that, as GARNER explains, governs

> *"marine commerce and navigation, the carriage at sea of persons and property, and marine affairs in general; the rules governing contract, tort, and workers' compensation claims or relating to commerce on or over water."*[1170]

Although their names might lead to confusion, maritime law must be distinguished from what is known as "the law of the sea," and which is defined as "*the body of international law governing how nations use and control the sea and its resources.*"[1171] This is a fundamental distinction, since while maritime law refers to private relations (even if it can sometimes touch upon some public law issues), and is generally considered as part of commercial law,

---

2010, Sweet & Maxwell, p. 1 ("[n]*o other mode of transport can move such large quantities of cargo over such great distances so efficiently and at such low cost* [as maritime carriage]").

[1167] MOORE, S. K., 2011, supra note 1163, p. 700. On some of the dangers that "sea blindness" represents for the European Union, *See* ROGERS, J., 'To Rule The Waves: Why a Maritime Geostrategy is Needed to Sustain European Union', 2010, 6 *Egmont Security Policy Brief*, p. 5.

[1168] MOORE, S. K., 2011, supra note 1163, p. 700. In the case of fuel, it is worth noting that a full eighty percent of *the world's liquid-fuel energy resources travel by sea at some point in their journey,"* and that, in addition to that, an increasing proportion of these resources are now being extracted directly from the sea-bed, thus increasing our reliance on sea carriage (BLACKHAM, J. & PRINS, G., 2010, supra note 1160, p. 17).

[1169] MOORE, S. K., 2011, supra note 1163, p. 700.

[1170] GARNER, B. A., 2009, supra note 373, p. 1055.

[1171] ibid., p. 967.

the law of the sea is part of (international) public law, often dealing with the relationship between State actors.[1172]

Due to its complexity and extension, some have referred to maritime law as *"a complete legal system,"* just like the Common Law and the Civil Law are "complete" legal systems in their own right.[1173] This, according to TETLEY,

> *"can be readily seen from its component parts. For centuries maritime law has had its own law of contract--of sale (of ships), of service (towage), of lease (chartering), of carriage (of goods by sea), of insurance (marine insurance being the precursor of insurance ashore), of agency (ship chandlers), of pledge (bottomry and respondentia), of hire (of masters and seamen), of compensation for sickness and personal injury (maintenance and cure) and risk distribution (general average). It is and has been a national and an international law (probably the first private international law). It also has had its own public law and public international law."*[1174]

Maritime law is divided in two parts. First, the *lex maritima,* the general maritime law, a *ius commune* that has evolved from different maritime codes throughout the ages and from time immemorial.[1175] It is part of the *lex mercatoria* and has, traditionally, been made up of uniform principles and rules that have, through their application, avoided conflicts of laws arising in disputes that involved different countries.[1176]

[1172] CONTRERAS STRAUCH, O., *Derecho Marítimo*, 2000, Editorial Jurídica ConoSur Ltda., Santiago de Chile, p. 9. See also FORCE, R., *Admiralty and Maritime Law*, 2004, Federal Judicial Center, ix (stating that, traditionally, *"maritime law was a species of commercial law, and in many countries it is still treated as such"*). Regarding the occasional contact of maritime law and public law, *See* FALKANGER, T. & BULL, H. J. et al., *Scandinavian Maritime Law: The Norwegian Perspective*, 2011, 3º Edition, Universitetsforlaget, p. 23 (including among examples of these contacts, the rules on the registration of the flag of a vessel, and the control of ship safety").

[1173] TETLEY, W., 'Maritime Law as a Mixed Legal System (with Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both Its Civil and Common Law Heritages)', 1998, 23 *Tulane Maritime Law Journal*, no. 2, p. 320.

[1174] ibid., p. 320. Similarly, CONTRERAS STRAUCH notes how maritime law is a *"discipline with a noticeable scientific and normative autonomy,"* with great emphasis in its international character (CONTRERAS STRAUCH, O., 2000, supra note 1172, p. 27).

[1175] TETLEY, W., 'The General Maritime Law - The Lex Maritima', 1994, 20 *Syracuse Journal of International Law and Commerce,* p. 108. *See* also CHRISTENSEN, K. J., 'Of Comity: Aerospatiale as Lex Maritima', 2003, 2 *Loyola Maritime Law Journal,* p. 1 (referring to the *lex maritima* as *"perhaps the oldest form of Jus Gentium or the law of nations still substantially extant and practiced today"*); and ALLSOP, J., 'Maritime Law - The Nature and Importance of Its International Character', 2009, 34 *Tulane Maritime Law Journal*, no. 2, p. 573 (stating that it is "*the living source of principle*[s] *derived from ancient practice, custom, codes, and organised doctrine that affects, constrains, and inspires the development of contemporary legal doctrine*").

[1176] TETLEY, W., 1998, supra note 1173, p. 321 (stating that this system has *"the immense advantage of averting conflict of laws problems because uniform principles and rules were applied to resolve disputes in all countries"*).

> *"Today's general maritime law consists of the common forms, terms, rules, standards and practices of the maritime shipping industry-standard form bills of lading, charterparties, marine insurance policies and sales contracts are good examples of common forms and the accepted meaning of the terms, as well as the York/Antwerp Rules on general average and the Uniform Customs and Practice for Documentary Credits. Much of this contemporary lex maritima is to be found in the maritime arbitral awards rendered by arbitral tribunals around the world by a host of institutional and ad hoc arbitral bodies."*[1177]

The second component of maritime law is the "maritime statutory law." It is composed of both national statutes as well as international conventions dealing with the maritime trade.[1178]

9.3 The Characteristics of Maritime Law

As William O'NEIL, former secretary general of the International Maritime Organization, stated, shipping is *"the most international of all industries."*[1179] This is easy to see when we consider that a seagoing vessel may visit several ports in different countries, carrying cargo from owners located in even more countries, and having contractual ties to even more nations, with all of these links having significant legal consequences.[1180]

> *"Foreign commodities remain in demand. Because of their nature, juridical relations pertaining to navigation are not restricted to a single country, but transcend boundaries and extend their sphere of operation to several countries. This explains why one of the most distinctive features of maritime law is the extension of the application of the law governing navigational relations beyond the frontiers of the state which enact such a particular national law. This extended application also touches upon the rights of persons and real property. In practical terms this means that the dealings of one country is so closely interwoven with another in matters*

[1177] ibid., p. 321. *See* also TETLEY, W., 1994, supra note 1175, p. 107 (stating this general maritime law is made up of, on the one hand, the *lex mercatoria* and, on the other, the common forms and terms used in the trade). In regards to the way in which boilerplate maritime agreements become part of maritime law, HETHERINGTON explains how "*a huge amount of world cargo is moved pursuant to standard form charter parties, whether in the nature of voyage or time charters* [...] *Terms are almost identical in large numbers of bills of lading that are traded around the world. Many clauses that appear in bills of lading have become standardized*" (HETHERINGTON, S., 'CMI and the Panacea of Uniformity - An Elusive Dream, The', 2014, 39 *Tulane Maritime Law Journal*, no. 1, p. 163).

[1178] TETLEY, W., 1998, supra note 1173, pp. 321–322.

[1179] Cited in MUKHERJEE, P. K. & BROWNRIGG, M. et al., *Farthing on International Shipping*, 2013, 4th ed., Springer, Berlin, ix.

[1180] FALKANGER, T. et al., 2011, supra note 1172, pp. 23–24. *See* also ALLSOP, J., 2009, supra note 1175, p. 555 ("[f]*ew maritime ventures are undertaken without a complex interconnection of international participants.*").

> *such as carriage and transport in general, that the boundaries of a single nation are transcended and that legal matters arising from the above involve the application of foreign laws by the courts."*[1181]

All of these elements have resulted in some seeing maritime law as the only "true" international law, as it often comes not from national power, but from international cooperation.[1182] As Justice FRANKFURTER stated, the binding character of maritime law comes

> *"not from* [the] *extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations."*[1183]

This historical and international character has allowed maritime law to achieve a certain degree of uniformity that is unheard of in virtually all other areas of the law. This has, in part, been achieved by countries *"borrowing solutions from other countries' legislation, and partly by countries co-operating to develop common solutions,"* as well as through the adoption of international conventions that have homogenized the solutions to given legal problems.[1184]

Although we are still far from reaching a unified international system, the spirit of commercial cooperation and trade that informs maritime law has allowed for *some* uniformity to exist. This is particularly true in the case of nations in similar stages of development which, as a result of facing similar challenges, have achieved an even higher degree of harmonization.[1185] Of course, complete uniformity and harmonization are still far from being a reality, and remain a difficult (and perhaps impossible) goal to reach.

Some have argued that the lack of a universal system of maritime law is actually a recent development.[1186] As a matter of fact, for a long time general maritime law, the *lex*

[1181] LOURENS, M., 'Overview of the Regimes Governing the Carriage of Goods by Sea, An', 1999, 10 *Stellenbosch Law Review*, no. 2, p. 244.

[1182] STURLEY, M. F. et al., 2010, supra note 1166, p. 1 (referring to maritime law as *"the most prominent example"* of international cooperation towards harmonization).

[1183] Quoted in ALLSOP, J., 2009, supra note 1175, p. 572.

[1184] FALKANGER, T. et al., 2011, supra note 1172, p. 24. *See* also VALDERRAMA, F. J., 'Las Obligaciones del Porteador en el Contrato de Transporte Marítimo de Mercancías', 2015, 42 *Revista Chilena de Derecho*, no. 2, p. 516 (referring to maritime trade as an *"eminently international activity"*).

[1185] A good example of this situation is what happens in Scandinavian countries, who possess a *"practically identical"* Maritime Code (FALKANGER, T. et al., 2011, supra note 1172, p. 24).

[1186] TETLEY, W., 1994, supra note 1175, p. 113 ("[e]*arly maritime law was not characterized by conflicts, because until at least the end of the sixteenth century in Europe, there was considerable homogeneity in maritime law*"). But *See* also HETHERINGTON, S., 2014, supra note 1177, p. 161 (arguing that this historical unity was not such a panacea, as attempts at unification have actually existed throughout "*the last couple of thousand years*," as a consequence of "*a*

maritima, stood as the only field of law that could truly be held as uniform, as in every other type of law "*conflicts between national laws*" were simply inevitable.[1187] They argue that the 20th century's attempts to achieve uniformity in the maritime field only became necessary as a result of the increased nationalism and governmental intervention that, over the centuries, destroyed the uniformity that had existed among traders from time immemorial.[1188]

> *"The pioneers of travel and commerce by sea found it necessary to develop various types of codes, laws, and regulations to facilitate trading. A ship master needed to know what procedures and standards were expected of him in whatever port he might be obliged to enter. Thus the purpose of these codes was to give all who engaged in maritime trade a uniform understanding of their rights and obligations, thereby minimizing surprises and supporting rather than restricting trade. Because of the disputes which invariably arise in trade, systems were developed very early in the history of maritime commerce to resolve them and to further interport shipping. A port which had an understandable, urbane, and civilized method of resolving such disputes in a way comprehensible to 'outlanders' would be attractive to international trade and to merchants from other ports.* [...] *While the traders, vessel owners, and navigators brought with them different languages, laws, and customs, they nevertheless lived and worked together within the wide world of trade and commerce. The wideness of sea trade fostered certain rules and a degree of uniformity in maritime law which only later, as a result of the passage of time and the advent of nationalism, was to be abandoned.*[...]
>
> *This uniform regulation of commerce and trade was recognized as a benefit and service to the nations involved; a fresh source of wealth was generated by interport trade. Not surprisingly, this wealth invariably led to government involvement as certain nations saw opportunities for increasing their gains. Also, because traders were by the nature of their work explorers, the resources of the foreign lands with which they traded were looked upon by their nation's rulers with covetous eyes. International commerce thus became a tool of international politics."*[1189]

---

desire amongst traders (and some rulers) to adopt uniform laws to govern their activities arising from transportation by sea").

[1187] TETLEY, W., 1994, supra note 1175, p. 113. *See* also CHRISTENSEN, K. J., 2003, supra note 1175, p. 1 ("*the Lex Maritima was remarkable both for its homogeneity and for its relatively uniform application throughout most of Western Europe*").

[1188] PAULSEN, G. W., 'Historical Overview of the Development of Uniformity in International Maritime Law', 1982, 57 *Tulane Law Review*, no. 5, p. 1065.

[1189] ibid., p. 1067. Somewhat similarly, FOX stated in 1919 that

> *"The mutual relations of carrier to shipper, and shipper to shipper, give rise to many problems that cannot arise in rail shipments nor can they be answered by any analogy to common law. These must be solved by*

As tempting as it might be to adopt this rather nostalgic view of the law, it is unfair to compare the situation that existed when "*the pioneers of travel and commerce by sea*" first started to develop the trade, with that of the 20th century, let alone the 21st century. Achieving legal uniformity centuries ago was considerably easier, as the amount of countries that were involved in trade, or which had a possibility to negotiate terms, was considerably smaller. What is more, the existence of large empires, with colonies and dominions spread all over the world, made it much easier to achieve a higher degree of uniformity, as "inter-empire" trade would certainly be harmonized.

We should also be careful when we blame State interference as the culprit for our lack of harmonization. It is true, of course, that the sight of the wealth emanating from international trade was tempting for State actors, making them interested in participating in it, sometimes at the expense of their competitors in other nations. However, the actions of the State in this regard are not limited to merely trying to profit, but also to regulate the trade and protect some of its players. While regulation can often be unsatisfactory, if not downright incompetent, when traders have been left to their own devices, they have been known to give rise to systems that benefit the few at the expense of the many. As we will see, maritime trade and carriage are, without a doubt, prime examples of such a situation.

9.4 The Commercial Exploitation of Vessels

The commercial exploitation of a vessel can be basically done in three ways. The carriage of goods by sea ("contracts of affreightment" or "contracts of carriage"), the carriage of passengers ("passenger contracts"), and the contracts of towage.[1190] In this and the following chapters we will only focus on the carriage of goods, as passenger and towage contracts follow different rules, and possess their own unique characteristics.

In a nutshell, the carriage of goods is basically performed through two types of agreements.

> "[W]*hen a shipowner* [...] *agrees to carry goods by water, or to furnish a ship for the purpose of so carrying goods, in return for a sum of money to be paid to him, such a contract is called a contract of affreightment, and the sum to be paid is called freight.*

---

the application of a set of rules entirely distinct and different from common law. These rules and customs are of most ancient origin and were in use long before our modern law was conceived."
FOX, J. M., 'The Importance of Maritime Law in Wisconsin', 1919, 3 *Marquette Law Review*, no. 2, p. 96.

[1190] CONTRERAS STRAUCH, O., 2000, supra note 1172, p. 165.

> *Depending on the manner in which the ship is employed, the contract of affreightment may be contained in a charterparty or evidenced by a bill of lading."*[1191]

Even though there are significant differences between the two, and that the rights and obligations assumed by the parties are quite different, charterparties and bills of lading are sometimes confused. This misunderstanding can be explained by how both contracts are often interconnected, with bills of lading incorporating charterparty terms, charterparties incorporating rules that govern bills of lading, etc. What is more, even though the distinction between both instruments *"is usually obvious from a quick perusal of the document,"* the lines can become blurred in, for example, the case of hybrid contracts of carriage, typically relating to only part of a ship.[1192]

Generally speaking, the differences between bills of lading and charterparties deal with the obligations that each party assumes. In a bill of lading, *the carrier contracts with the shipper to carry the cargo* from the port of loading to the port of discharge. In a charterparty, on the other hand, the charterer *contracts the use of the vessel from its owner*, be it for a specific voyage or for a period of time. Strictly speaking, bills of lading are contracts for the carriage of goods, while charterparties are contracts for the use of a vessel.[1193]

While charterparties occur, for the most part, between parties of significant bargaining power (the owner of a vessel and a party economically capable of chartering the ship), bill of lading contracts often take place in more imbalanced situations.[1194] Indeed, as the US Court of Appeals for the Second Circuit stated in *Nissho-Iwai Co. v. M/T Stolt Lion:*

[1191] BOYD, S. C. & BURROWS, A. S. et al., *Scrutton on Charterparties and Bills of Lading*, 1996, 20º Edition, London: Sweet & Maxwell, p. 1. *See* also BAUGHEN, S., *Shipping Law*, 2015, 6th ed., Taylor and Francis, Hoboken, p. 8 (stating that the "*two main types of contract in use for the carriage of goods by sea are the bill of lading and the charterparty"*).

[1192] AIKENS, R. & LORD, R. et al., *Bills of Lading*, 2016, 2nd ed., Taylor & Francis, 2.33.

[1193] BAUGHEN, S., 2015, supra note 1191, p. 188. CONTRERAS STRAUCH seems to see the difference between charterparties and bills of lading as being one between obligations *de moyens* and obligations *de resultat,* respectively (CONTRERAS STRAUCH, O., 2000, supra note 1172, pp. 165–166). This is not really accurate, since the owner providing the vessel has an obligation *de resultat* of providing the ship, and maintaining it in working order. The owner is not simply binding himself to do his "best efforts" to provide the ship, but instead to *actually* provide a fully operational vessel. An alternative reading of this author's work might suggest that he argues that in a charterparty the owner provides "*the means*" (*"proporciona un medio"*), therefore implying that the vessel is the means by which the charterer will perform his own duties, while in a bill of lading the carrier binds himself to achieving a result ("*obtener un resultado*"). Even if this latter interpretation is correct (as his review of the owner's obligations in the charterparty might suggest) his choice of words is very unfortunate, as it lends itself to confusion.

[1194] *See* STURLEY, M. F., 'Jurisdiction and Arbitration under the Rotterdam Rules', 2009, 14 *Uniform Law Review*, no. 4, p. 972 (explaining that "[b]*ecause charterparties are generally used when commercial parties have more-or-less equal bargaining power, meaning that genuine negotiation and agreement can occur, the risk of carrier abuse is*

> *"*[T]*he bargaining power of charterers and vessel owners* [has generally been considered] *to be merely equal, unlike the edge in bargaining power held by vessel owners and charterers over cargo owners."*[1195]

Similarly, in the 1972 House of Lords case of *Federal Commerce and Navigation v. Tradax Export*, Lord DIPLOCK commented:

> *"The freight market for chartered vessel still remains a classic example of a free market. It is world-wide in coverage, highly competitive and sensitive to fluctuations in supply and demand. It is a market in which the individual charterers and shipowners are matched in bargaining power and are at liberty to enter into charterparties in whatever contractual terms they please."*[1196]

Clearly, the power dynamics that exist in the case contracts evidenced by a bill of lading are the opposite to the ones we find in charterparties. While, as we have seen, the powers are more or less balanced in the case of charterparties, shippers and consignees are *"usually in a far weaker position vis-à-vis shipowners when entering into carriage contracts."*[1197]

---

significantly reduced") and LANNAN, K., 'The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea–A General Overview', 2009, 14 *Uniform Law Review*, no. 4, p. 307 (explaining that "*the principle of freedom of contract has already been accepted in certain situations in the Hague, Hague-Visby and Hamburg Rules, particularly in terms of contracts of carriage concluded under charterparties*"). The fact that the tramp trade, performed via the use of charterparties, occurs in a more or less balanced environment has been expressly recognized by many. In 1922, for example, speaking before the Comité Maritime International, a Danish shipowner explained this issue as such:

> *"Tramp shipping* [...] *is done on a basis of free contract. The bill of lading is not the primary document; the primary document is the charter party, and the charter party is gone through by both parties and signed by both parties. It is generally signed by the merchants and signed over by a representative of the shipowner, at any rate he acts for the owner and the owner must abide by what he does. Therefore the cargo interests are as regards tramp shipping in a much better position to protect their interests, and as there are so many trades in the world it is natural that there will be different charter parties, and it is possible for both parties, and convenient for both parties to be able to do so, to put such special conditions into any given charter party that any given special trade may demand."*

Cited in BERLINGIERI, F., 'Freedom of Contract Under the Rotterdam Rules', 2009, 14 *Uniform Law Review*, no. 4, p. 831.

[1195] *Nissho-Iwai Co., Ltd. v. M/T Stolt Lion* [1980], 617 F. 2d, 907–916, p. 913.

[1196] *Federal Commerce and Navigation Co. Ltd. v. Tradax Export S.A.* [1978] AC, 1–16, p. 8.

[1197] NAIR, A., 'Note on Norden: Voyage Charterparties, the Hague/Visby Rules and Enforcing Foreign Arbitration Awards, A', 2013, 27 *Australian and New Zealand Maritime Law Journal*, no. 2, p. 97. *See* also COLDWELL, R., 'Jurisdiction and the UN Convention on Contracts for the International Carriage of Goods: Where the Freedom of Contract Prevails', 2014, 17 *International Trade and Business Law Review*, no. 1, p. 109 ("a*lthough not to the extent that was once present in the industry, a carrier is likely to retain a stronger negotiating position than the shipper, allowing it to impose on the shipper jurisdiction agreements beneficial to the carrier. This uncompetitive outcome is a product of the exercise of parties' freedom of contract*").

Indeed, it is generally undisputed that in the negotiation of the bill of lading, the carrier of the goods will often enjoy a superior bargaining position over that of its merchant.[1198]

On the basis of their characteristics, and considering that our work has centered around unconscionable terms, with bargaining power disparities being a component of such clauses, we will place our focus on bills of lading.

9.5 Defining Bills of Lading

Contracts of carriage evidenced by bills of lading are the result of a complex and dynamic process. When a person (the shipper) wishes to ship a consignment of goods by sea, she will get in contact with a shipping company (the carrier), be it directly or through a forwarding agent, so as to book space on the ship for her cargo. The carrier will then instruct the shipper regarding the time and place for the delivery of the goods. Once the shipper has delivered the cargo for loading, the carrier will hand the shipper a mate's receipt, or a similar document, containing the number and state of the loaded goods. Later, the shipper will receive a copy of the bill of lading, containing the quantity and quality of the loaded cargo, the port of destination, and the name of the consignee (the receiving party), which the shipper will have to compare with the previously issued receipt. In order to receive the cargo at the port of destination, the consignee will have to surrender his copy of the bill of lading.[1199]

Bills of lading, like those issues in the example above, and which represent the large majority of the shipping market, are one of the most important documents in the commercial transport of goods.[1200] Despite being fairly commonplace, however, and as

---

[1198] GAUFFREAU, S. C., 'Foreign Arbitration Clauses in Maritime Bills of Lading: The Supreme Court's Decision in Vimar Seguros Y Reaseguros v. M/V Sky Reefer', 1995, 21 *NCJ Int'l L. & Com. Reg.*, no. 2, p. 395. *See* also VILLAREAL, D. R., JR., 'Carrier's Responsibility to Cargo and Cargo's to Carrier', 1970, 45 *Tulane Law Review,* pp. 777–778 ("[f]*reedom of contract is allowed in private carriage under the rationale that charterers have as much bargaining power as owners and operators and that the language used and the rate of charter are bargained for on a case-by-case basis*") and DIAMOND, A., 'The Rotterdam Rules', 2009 *Lloyd's Maritime and Commercial Law Quarterly,* p. 459 ("[c]*harterparties, especially in the bulk trades, have long been regarded as the typical example of a type of contract where freedom of contract should prevail on the ground that they are individually negotiated and that no question arises of a need to protect a weaker party from another in a stronger bargaining position*").

[1199] A more thorough and elaborate description of the shipping process appears in OANA, A., 'Implications of the Bill of Lading Usage in the Process of Goods Transportation by Sea', 2013, 20 *Constanta Maritime University Annals*, no. 2, p. 183. *See* also WILSON, J. F., *Carriage of Goods by Sea*, 2010, 7th ed., Pearson/Longman, Harlow, p. 115 (referring to the issuing of the bill of lading in the case of liner trade shipments).

[1200] ibid., p. 115. Similarly, *See* also FORCE, R., 2004, supra note 1172, p. 52 ("[i]*n carriage by water, the contract of carriage is often embodied in a negotiable bill of lading*"), PECEROS, G. E. Y., 'Contratación Electrónica en el Comercio Internacional de Mercaderías', 2003, 5 *Docentia et Investigatio*, no. 8, p. 199 (referring to bills of lading a "*the most used*"), OANA, A., 2013, supra note 1199, p. 183 (calling bills of lading "*the most important document in the*

AIKENS has noted, "[l]*ike an Elephant, a bill of lading is generally easier to recognise than to define*."[1201] Indeed, a review of the available literature shows that, in general, authors prefer to *describe* bills of lading, instead of *defining* them. SCRUTTON, for example, after noting that a bill of lading is issued as a receipt once the goods are shipped, explains that, in addition, it also serves two other distinct functions:

> *"1. Evidence of the contract of affreightment between the shipper and the carrier.*
>
> *2. A document of title, by the indorsement of which the property in the goods for which it is a receipt may be transferred, or the goods pledged or mortgaged as a security for an advance."*[1202]

AIKENS takes a similar approach, enumerating the functions of the bill of lading, adding that a document that *"has all these characteristics will* ***almost*** *certainly be a bill of lading, and a document which lacks any of them will rarely be* [one]."[1203] Confirming this terminological difficulty, CARR and STONE explain how

> "[n]*either common law nor existing legislation affecting bills of lading or the terms of carriage where a bill of lading is used provide a definition of a bill of lading. Its essence is to be gathered from the various functions it assumes. It is a receipt, evidence of the contract of carriage, a contract of carriage and a document of title, depending on whether the holder of the bill of lading is the shipper, consignee or endorsee."*[1204]

In an attempt to simplify the situation, CARVER offers the following definition:

---

commercial transport of goods by sea") and WILLISTON, S. & LORD, R., *Williston on Contracts*, 2002, West Group, Minnesota, p. 3 (calling them the *"principal type"* of documents related to the carriage of goods by sea).

[1201] AIKENS, R. et al., 2016, supra note 1192, 2.1.

[1202] BOYD, S. C. et al., 1996, supra note 1191, p. 2.

[1203] AIKENS, R. et al., 2016, supra note 1192, 2.3 (emphasis added).

[1204] CARR, I. & STONE, P., 2014, supra note 318, p. 166. *See* also AIKENS, R. et al., 2016, supra note 1192, p. 3 ("*there is no universally applicable definition of a bill of lading*") and MITCHELHILL, A., *Bills of Lading: Law and Practice*, 1990, Second Edition, Springer-Science+Business Media, B.V., p. 5 (stating, in regards to the United Kingdom, that "*neither the Bills of Lading Act 1855 nor any other Act of Parliament has defined the meaning of 'Bill of Lading'*"). A review of comparative legislation does show a general reluctance to define the term. Indeed, besides the United Kingdom and the United States, countries like Spain, Germany and the Netherlands have opted not to define it at all. A minority of nations, however, have made the attempt. Article 977 of the Chilean Code of Commerce, for example, defines the bill of lading ("conocimiento de embarque") as: *"a document that proves the existence of a contract for the carriage by sea, y which proves that the carrier has received the cargo or has loaded the goods and has become bound to deliver them against the exhibition of this document to a determined person, the endorsee of the bill of lading, or to its holder"* ("*un documento que prueba la existencia de un contrato de transporte marítimo, y acredita que el transportador ha tomado a su cargo o ha cargado las mercancías y se ha obligado a entregarlas contra la presentación de ese documento a una persona determinada, a su orden o al portador*"). It should be noted that although this definition covers the essential elements of a bill of lading, it still fails to account for some of its functions.

> *"A bill of lading is a document issued by or on behalf of a carrier of goods by sea to the person (usually known as the shipper) with whom he has contracted for the carriage of goods. Its basic features are that it contains promises by the carrier to carry the goods to the agreed destination subject to the terms of the document, and to deliver them there, in accordance with those terms; and a promise by the shipper to pay the agreed remuneration, known as freight."*[1205]

Despite being quite thorough, CARVER's definition is not complete, as it does not include all of the functions served by the bill of lading. This shortcoming, however, can hardly be blamed on the author, as it instead demonstrates the rather futile attempt of offering complete and total definitions of these documents.

9.6 The Bill of Lading and the Contract of Carriage

Although, as we have seen, bills of lading fulfill a number of functions, not all of them appeared at the same time. As a matter of fact, when bills of lading originated around the 14th century, they merely acted as non-negotiable receipts for the cargo transported aboard the ship, issued by the carrier.[1206] As disputes arose between shippers and carriers regarding the terms of the contract, however, it became customary to include the terms in the bill of lading itself, something that eventually evolved into the modern practice of adding the details of the cargo on the front of the bill, and the terms on the back.[1207] Later on, by the 18th century, *"with the increasing availability of methods of international transport,"* merchants were encouraged to sell their goods while they were still in transit; due to the obvious logistical problems that a physical transfer would entail, a workaround was found in the transfer of the bill of lading by the holder of the bill of lading, which was also understood to transfer the title over the goods mentioned therein.[1208]

In regards to the evidentiary function of the bill of lading, *evidencing* or *containing* the terms of the contract, it is important to make some clarifications. WILLISTON and LORD, for example, incorrectly state that this function developed at a time when the bill of

---

[1205] TREITEL, G. H. & REYNOLDS, F. et al., *Carver on Bills of Lading*, 2011, Third Edition, Sweet & Maxwell, p. 10.
[1206] WILSON, J. F., 2010, supra note 1199, p. 115. *See* also WILLISTON, S. & LORD, R., 2002, supra note 1200, p. 79 ("[o]*riginally, a bill of lading was merely a bailment receipt for goods received for carriage to a particular destination*").
[1207] WILSON, J. F., 2010, supra note 1199, p. 115. *See* also MORALES ARAGÓN, J. A., 'La Carga Dinámica de la Prueba dentro del Proceso Contractual de Transporte Marítimo bajo Conocimiento de Embarque', 2013, 10 *Revista Ciencias Humanas*, no. 1, p. 57 (noting that *"although their original function was to provide a receipt"* for the cargo aboard the vessel, other functions, like serving as a document of title, were added later).
[1208] WILSON, J. F., 2010, supra note 1199, p. 115. *See* also GIRVIN, S., *Carriage of Goods by Sea*, 2011, 2º Edition, Oxford University Press, Oxford, United Kingdom, p. 34.

lading *"also **became** the contract of carriage."*[1209] Indeed, even though overlapping certainly exists, and that some courts have even treated them as equal, it is not correct to say that the bill of lading is the same as the contract of carriage.[1210] Indeed, as TETLEY has noted, the bill of lading "*is really not the contract of carriage but the best evidence of the contract.*"[1211]

The difference that exists between the contract itself and the bill of lading is, in essence, an issue of time. The contract of carriage precedes the bill of lading, and therefore must have been made before the bill is issued. By its very nature, the bill must come *after* the contract has been concluded, since only *then* can it be signed and delivered.[1212] The bill of lading will, therefore, serve as the best evidence of the terms of the contract or, if it is in the hands of a third-party endorsee, as the only evidence, without, however, being *the* contract. According to TETLEY, the "real" contract of carriage is made up of *"the advertisements, the booking note, the freight tariff, and custom and usage of the carrier and the place of shipment all taken together."*[1213]

Making this distinction is not merely an academic issue, as determining the exact terms of the contract of carriage has important consequences. This was the situation that arose in, for example, the 1950 English case of *The Ardennes*.[1214] In this case, the claimant, a shipper of a cargo of oranges from Cartagena to London, had agreed orally with the shipping agents that the cargo would be shipped directly to its destination, in order to avoid an upcoming increase in import tariffs. Despite the verbal assurances, however, the bill of lading that was issued when the cargo was loaded contained a liberty clause that allowed the carrier to call at other intermediate ports in the voyage to London. As the vessel did in fact call at other ports before reaching its final destination, prolonging the voyage, by the time the cargo arrived to London the import duties had increased, and the price of oranges had fallen. This caused a significant monetary damage to the shipper.

[1209] WILLISTON, S. & LORD, R., 2002, supra note 1200, p. 79 (emphasis added). Similarly, after explaining the different functions of the bill of lading, GIRVING notes how *"bills of lading of various types constitute the main contract of carriage for many commercial parties engaged in the shipment of their goods from one country to another"* (GIRVIN, S., 2011, supra note 1208, p. 35).

[1210] SCHNARR, C. N., 'Foreign Forum Selection Clauses Under COGSA: The Supreme Court Charts New Waters in the Sky Reefer Case', 1996, 74 *Wash. ULQ*, no. 3, p. 868 (noting that "*courts use the bill as the contract itself*" despite not being the same thing).

[1211] Cited in ZEKOS, G. I., 'The Contractual Role of Documents Issues under the CMI Draft Instrument on Transport Law 2001', 2004, 35 *Journal of Maritime Law and Commerce*, no. 1, p. 103. *See* also TETLEY, W., 'Selected Problems of Maritime Law under the Hague Rules', 1963, 9 *McGill Law Journal*, no. 1, p. 56 ("[t]*he real contract of carriage is not the bill of lading, it being only the best evidence of the contract*") and PECEROS, G. E. Y., 2003, supra note 1200, pp. 198–199 ("[the contract of carriage] *is a consensual contract, evidenced by the bill of lading* ").

[1212] BOYD, S. C. et al., 1996, supra note 1191, p. 67.

[1213] Cited in SCHNARR, C. N., 1996, supra note 1210, p. 868. *See* also WILSON, J. F., 2010, supra note 1199, p. 129 ("[t]*he contract is normally concluded orally long before the bill is issued, and the terms are inferred from the carrier's sailing announcements and from any negotiations with loading brokers before the goods are shipped*").

[1214] *The Ardennes* [1951], 1 KB, 55–61.

When the claimant sought to recover the losses that resulted from the breach of the contract, the carrier pleaded in his defense the existence of the liberty clause.[1215]

Lord GODDARD CJ, after ruling that oral testimony was admissible in regards to the terms of the contract, stated:

> *"*[A] *bill of lading is not in itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms* […] *The contract has come into existence before the bill of lading is signed; the latter is signed by one party only, and handed by him to the shipper usually after the goods have been put on board. No doubt if the shipper finds that the bill contains terms with which he is not content, or does not contain some term for which he has stipulated, he might, if there were time, demand his goods back; but he is not, in my opinion, for that reason, prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term. He is no party to the preparation of the bill of lading; nor does he sign it."*[1216]

This separation between the bills of lading and the contract which is evidenced by them, can also be seen in some of the rules that govern them. The Chilean Code of Commerce, for example, defines the bill of lading, in the relevant part of Article 977, as:

> *"a document that* ***proves*** *the existence of a contract of maritime carriage* […]*"*[1217]

[1215] WILSON, J. F., 2010, supra note 1199, pp. 129–130.

[1216] *The Ardennes* [1951], pp. 59–60. Similarly, in the more recent case of *Cho Yang Shipping Co. v. Coral*, Hobhouse LJ stated:

> *"In English law the bill of lading is not the contract between the original parties but is simply evidence of it* […] *Indeed, though contractual in form, it may in the hands of a person already in contractual relations with the carrier (e.g. a charterer) be no more than a receipt* […] *Therefore, as between shipper and carrier, it may be necessary to inquire what the actual contract between them was; merely to look at the bill of lading may not in all cases suffice. It remains necessary to look at and take into account the other evidence bearing upon the relationship between the shipper and the carrier and the terms of the contract between them* […] *The terms upon which the goods have been shipped may not be in all respects the same as those actually set out in the bill of lading."*

Cho Yang Shipping Co. Ltd. v. Coral (UK) Ltd. [1997] CLC, 1100–1108, p. 1102. *See* also *Dry Bulk Handy Holding Inc, Compania Sud Americana de Vapores S.A. v Fayette International Holdings Limited, Metinvest International S.A.* [2012] EWHC, 2107. It should be noted that, under English law, if the shipper considers it appropriate and necessary, he is still able to *"adduce oral evidence to show that the true terms of the contract are those contained in the bill of lading, but are to be gathered from the mate's receipt, shipping-cards, placards, handbills announcing the sailing of the ship, advice-notes, freight-notes, or undertakings or warranties by the broker, or other agent of the carrier"* (BOYD, S. C. et al., 1996, supra note 1191, p. 67). In the of the United States, on the other hand, ZEKOS argues that a case like *The Ardennes* would have been ruled differently, since *"the bill of lading would be found to be the contract of carriage, superseding any oral promises or agreements"* (ZEKOS, G. I., 2004, supra note 1211, p. 106).

[1217] "*Artículo 977*:

Similarly, Article 1(7) of the Hamburg Rules establish in the relevant part that a bill of lading is:

> *"a document which* ***evidences*** *a contract of carriage by sea* […]"[1218]

While the Hague-Visby Rules do not define bills of lading, they do seem to recognize the distinction. Indeed, when Article 1 (b) defines the term "contract of carriage," it establishes that such term

> *"applies only to contracts of carriage* ***covered*** *by a bill of lading or any similar document of title* […]*"*

Under German law the situation is the same, with the HGB, the Commercial Code, making a clear distinction between the contract of carriage itself and the bill of lading.[1219] For example:

> *"§513. Entitlement to issuance of a bill of lading*
>
> *(1) Unless* ***otherwise agreed in the contract for the carriage*** *of general cargo, the carrier must issue to the Ablader* [shipper]*, at the latter's request, an order bill of lading* […]"[1220]

In Scandinavia, the Norwegian Maritime Code of 1994 (versions of which also apply in Sweden, Denmark and Finland) is also careful not to confuse bills of lading with contracts of carriage.[1221]

> *"§ 292. Bills of Lading*
>
> *By a bill of lading is meant a document*
>
> 1) *which* ***evidences*** *a contract of carriage by sea and that the carrier has received or loaded the goods* […]"[1222]

> *El conocimiento de embarque es un documento que* ***prueba*** *la existencia de un contrato de transporte marítimo* […]"

(emphasis added).

[1218] Emphasis added.

[1219] SPARKA, F., 2010, supra note 927, p. 44. It is worth noting that some of SPARKA's comments in regards to the applicable HGB rules are no longer applicable, based on the HGB's 2013 amendment.

[1220] "*§ 513 Anspruch auf Ausstellung eines Konnossements*
> *(1)* ***Der Verfrachter hat, sofern im Stückgutfrachtvertrag nicht etwas Abweichendes vereinbart ist****, dem Ablader auf dessen Verlangen ein Orderkonnossement auszustellen* […..]*"*

(emphasis added).

[1221] On the applicability of the Maritime Code in Scandinavia, *See* FALKANGER, T. et al., 2011, supra note 1172, pp. 26–27.

[1222] "*§ 292.Konnossement*
> *Med konnossement forstås et dokument*

These important considerations notwithstanding, some caveats need to be made. First, even if it is not, strictly speaking, the same as the contract of carriage, the bill of lading will, in fact, serve as *prima facie* evidence of the terms contained therein. In fact, the burden of proof that must be carried by the party seeking to prove that the terms are different from those contained in the bill of lading, might be virtually impossible to defeat. Second, despite the ruling in *The Ardennes,* it might not be altogether accurate to say that the shipper does not participate in the preparation of the bill of lading, since he will often fill in the details of the cargo being shipped, at which point he will also be able to review the terms that it contains.[1223]

Finally, irrespective of the situation of the shipper himself, it should be kept in mind that in regards to a *bona fine* third party, the terms contained in the bill of lading will be seen as conclusive evidence of the contract of carriage.[1224] As CARR and STONE put it:

> *"The view that the bill of lading is evidence of the contract of carriage is correct only in so far as the holder of the bill is the shipper. On endorsement to a third party (i.e., the consignee or endorsee) in the hands of that third party, the bill of lading is the contract of carriage. Any oral or written agreement between the shipper and the shipowner not expressed on the bill of lading will not affect the third party on grounds of lack of notice."*[1225]

This difference in regards to third parties makes sense. The endorsee has no way of knowing what were the terms that, privately, the shipper and the carrier might have agreed upon, and must therefore rely exclusively on what he can see in the bill of lading. When a negotiable bill of lading is issued, the carrier knows that it might be transferred to third parties, and so it is in his best interest to make sure that it reflects the correct terms. If the carrier does not wish to be bound to terms he did not agree upon, it is *his* duty to ensure that the bill of lading accurately reflects the contract.[1226]

> 1) *som er* ***bevis for*** *en avtale om sjøtransport og for at transportøren har mottatt eller lastet godset, og*
> 2) *som betegner seg som konnossement eller inneholder en bestemmelse om at transportøren påtar seg bare å utlevere godset mot tilbakelevering av dokumentet."*

(emphasis added).

[1223] WILSON, J. F., 2010, supra note 1199, p. 130.

[1224] ibid., p. 130. *See* also OANA, A., 2013, supra note 1199, p. 184 ("[b]*etween the carrier and the third* [party] *endorsees, the bill of lading may constitute a contract of carriage and not mere evidence of its existence. Indeed, once endorsed for value to a third party acting in good faith, the bill of lading becomes conclusive evidence of the terms of the contract of carriage*").

[1225] CARR, I. & STONE, P., 2014, supra note 318, p. 173.

[1226] ibid., p. 173.

Chapter 10
The International Regulatory Framework of Contracts of Affreightment

"Variety is what constitutes organization; uniformity is mere mechanism. Variety is life; uniformity is death."

Benjamin Constant[1227]

"There is a paramount need not only for a national system, but also for international uniformity in dealings between the United States and our colleagues abroad."

Howard M. McCormack[1228]

10.1 Introduction

In order to be useful and be able to fulfill its purpose, the regulation of international trade in general, and maritime trade in particular, needs to ensure stability and certainty for legal relations. It must also take a pragmatic approach towards regulation, so as to create workable solutions, firmly grounded on the reality of trade, seeking to solve the problems that are most likely to arise in the normal course of business.

Aware of the international elements that are inherent to maritime trade, the community of nations has sought to establish a uniform regulatory system. Be it through unification or harmonization, there has been a clear desire to facilitate the normal workings of maritime trade, creating a predictable system that applies regardless of the specific geographical details of a given voyage. With this goal in mind, starting in the late 19th century, there have been several efforts to draft international rules that govern the relationship between carriers and shippers, arising in response to a fairly unregulated environment that, according to some, was ripe for abuse.

[1227] CONSTANT, B., *On Uniformity*, in Fontana, B. (ed.), *Constant: Political Writings*, 1988, p. 77.
[1228] MCCORMACK, H. M., 'Uniformity of Maritime Law, History, and Perspective from the U.S. Point of View', 1998, 73 *Tulane Law Review*, no. 5, pp. 1546–1547.

10.2 A Laissez-Faire Trade

In the beginning, bills of lading, as well as maritime trade in general, were left unregulated.[1229] It was understood that the market could take care of itself, and so freedom of contract was the governing principle of the industry. The parties were able to determine the exact content of their contracts with virtually little or no external limitations.

> *"Up until the early part of the last century, there was no internationally accepted system of minimum liability as between a carrier (not necessarily a shipowner) and the owner of goods carried. This meant that often onerous terms were imposed on shippers while a third party buyer of goods could not be certain about the extent of any obligations or liabilities which might be contained in a bill of lading. This could give rise to later unexpected and unwelcome surprises."*[1230]

During this time, both in the Common Law as well as in Civilian systems, shipwoners (as common carriers, in the case of English and American law) were considered to be strictly liable for the safe transport of the cargo to its destination, as well as for the delivery to the designated person.[1231] As STURLEY has documented, during the early 19th Century,

> *"the carrier was held strictly liable for cargo damage or loss that occurred in the course of the conveyance unless it could prove (1) that its negligence had not contributed to the loss and (2) that one of the four excepted causes (act of God, act of public enemies, shipper's fault, or inherent vice of the goods) was responsible for the loss."*[1232]

[1229] MARGETSON, S. W., *The History of the Hague (Visby) Rules*, in M. L. Hendrikse et al. (eds.), *Aspects of Maritime Law: Claims Under Bills of Lading*, 2008, p. 6 (arguing before the issue of bills of lading became a point for debate, *"carriage by sea was dominated by freedom of contract"*).

[1230] MUKHERJEE, P. K. et al., 2013, supra note 1179, p. 331.

[1231] CRUTCHER, M. B., 'Ocean Bill of Lading--A Study in Fossilization', 1970, 45 *Tulane Law Review*, no. 4, p. 701 ("[t]*he shipowner could be considered a common carrier, under English law, and as such virtually an insurer of those goods, the only exceptions to his liability being loss from acts of the public enemy or acts of God. The master himself was liable in the same measure"*). A similar view is expressed by MAGASHI, A. I. & HARUNA, A. L., 'Revisiting Freedom of Contract in the Contract of Carriage of Goods by Sea under the Rotterdam Rules: Service Contracts in Disguise?', 2016, 24 *IIUM Law Journal*, no. 1, p. 237. PING-FAT defines a common carrier as *"one who holds himself out as being prepared to carry for reward for all and sundry without reserving the right to refuse the goods tendered,"* adding that shipowners are *"practically 'brought under the same kind of liability as common carriers unless that liability is cut down by special contract'"* (PING-FAT, S., *Carrier's Liability Under the Hague, Hague-Visby and Hamburg Rules*, 2002, Kluwer Law International, The Hague, The Netherlands, p. 2).

[1232] Cited in MANDELBAUM, S. R., 'Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods under the Hague, COGSA, Visby and Hamburg Conventions', 1995, 23 *Transportation Law Journal*, no. 3, p. 474. *See* also PEACOCK, J. H., III, 'Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts', 1989, 68 *Texas Law Review*, no. 5, p. 979 ("[o]*nly acts of God, acts of enemies of the state, inherent vice of the goods, and loss caused by the*

In effect, this wide liability virtually made the carriers insurers of the cargo that they were transporting.[1233] As the United States Supreme Court stated in the 1858 case of *The Propeller Niagara*:

> *"Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general, insurers, and liable in all events, and for every loss or damage, however occasioned, unless it happened by the act of God, or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading.* [...] *In the absence of any special agreement, his duty extends to all that relates to the lading, as well as the transportation and delivery of the goods; and for the faithful performance of those duties the ship is liable, as well as the master and owners."*[1234]

The extent of the duties of the common carrier can be better understood by the ruling in the 1703 King's Bench case of *Coggs v. Bernard*.[1235] Here, Sir HOLT explained the responsibility of the carrier as follows:

> *"The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by*

---

fault of the shipper exempted the carrier from liability"). As ZHAO makes sure to note, however, this "strict liability" regime did not mean that this was a system in which there was no fault, neither in the Common nor in the Civil Law systems. As she notes:

> *"Under common law, 'strict' meant high standards of duty for carriers and there were exemptions, but only four (i.e. "act of God,* [an] *act of public enemies, shipper's fault, or inherent vice [i.e. defects] of the goods.") Under civil law, carriers' liabilities were based on presumed fault or neglect. Accordingly, carriers were held to be liable for cargo claims unless they could prove damages resulting from one of four exemptions, or the absence of fault on the part of the carrier."*

ZHAO, L., 'Uniform Seaborne Cargo Regimes--A Historical Review', 2015, 46 *Journal of Maritime Law and Commerce*, no. 2, pp. 138–139.

[1233] MANDELBAUM, S. R., 1995, supra note 1232, p. 474. *See* also MCCORMACK, H. M., 1998, supra note 1228, p. 1521 ("*in the absence of any legislative provisions prescribing a different rule,* [common carriers] *were, essentially, insurers liable in all events, except for very restrictive defenses.*").

[1234] *The Propeller Niagara v. Cordes* [1858], 62 US, 7–35, p. 23. *See* also STURLEY, M. F., 'The History of COGSA and the Hague Rules', 1991, 22 *Journal of Maritime Law and Commerce*, no. 1, p. 5 ("[t]*his extensive no-fault liability, in an era when such liability was rare, led many to describe the carrier as an 'insurer' of the goods. This label, albeit technically incorrect, well conveys the concept that a carrier assumed broad liability for cargo under general maritime law*").

[1235] *Coggs v. Bernard* [1703], 92 E.R., 107–114.

> *combining with thieves, etc. and yet doing it in such a clandestine manner, as would not be possible to be discovered."*[1236]

In order to avoid being exposed to massive liability, carriers increasingly relied on all-embracing exclusion clauses.[1237] These exculpatory provisions were so wide, in fact, that even negligence on the part of the carrier during the voyage would be completely exempted.[1238] This was a demonstration of the position the carriers had in the market in comparison to that of their individual merchants, and which, in effect, allowed them to dictate the totality of the terms in a take-it-or-leave-it basis.[1239] Despite their apparent unfairness, due to the prevailing understanding about freedom of contract, these disclaimers of liability were often enforced in both Civil as well as Common Law jurisdictions.[1240]

A clear proof of how widespread was the use of these clauses comes from an 1889 report from the West of England P&I Club, and which stated:

> *"*[T]*he Committee congratulates the members on the absence in recent years of cargo claims which has been brought about by the now general adoption of the negligence clause; the premium reduction for use of this clause is therefore discontinued."*[1241]

Clubs were justified in their glee. Despite holding the carriers as strictly liable, both English and European courts had no problem in accepting and enforcing these exclusion clauses.[1242] In France, for example, the courts *"generally admitted disclaimers of liability or limitation of liability clauses in bills of lading, despite protests by shippers and scholars;"* other

---

[1236] ibid., p. 112.
[1237] CRUTCHER, M. B., 1970, supra note 1231, p. 702.
[1238] MAGASHI, A. I. & HARUNA, A. L., 2016, supra note 1231, p. 238.
[1239] NIKAKI, T. & SOYER, B., 'New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive and Efficient, or Just Another One for the Shelves', 2012, 30 *Berkeley Journal of International Law*, no. 2, p. 303 ("[f]*or decades, sea carriers-taking advantage of their superior bargaining power-insisted on the inclusion of clauses into contract of carriages that exempted them even from their basic common law liability*"). *See* also LIANG, C., 'Bills of Lading's Freedom of Contract: With Special Reference to the Development of the International Legislation and to a Special Issue under the Chinese Law', 2013 *China Oceans Law Review*, no. 18, p. 226 (explaining that carriers took advantage of their strong position that granted him the freedom *"to contract out as much of his liability towards the cargo interests as possible,"* resulting in *"a typical unfair contract term at modem times"*). With a certain dramatism, MAGASHI and HARUNA illustrate the power of the carrier by noting how "*the almighty shipowners dictated the terms in the bills of lading down the throat of the shippers who had no option but to swallow those incongruous terms"* (MAGASHI, A. I. & HARUNA, A. L., 2016, supra note 1231, p. 238).
[1240] ZHAO, L., 2015, supra note 1232, p. 139. *See* also CARR, I. & STONE, P., 2014, supra note 318, p. 217, MCCORMACK, H. M., 1998, supra note 1228, p. 1521 and MITCHELHILL, A., 1990, supra note 1204, p. 5 ("*the terms incorporated into the bill of lading became more difficult and harsh for the shipper, almost to the point where the shipowner was 'not responsible for anything apart from the collection of his freight'*").
[1241] Quoted in REYNOLDS, F., 'The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules', 1990, 7 *Australian and New Zealand Maritime Law Journal*, p. 16.
[1242] ALLISON, S., 'Choice of Law and Forum Clauses in Shipping Documents — Revising Section 11 of the Carriage of Goods by Sea Act 1991 (CTH)', 2014, 40 *Monash University Law Review*, no. 3, p. 639.

Civil Law countries followed suit.[1243] Similarly, the courts of England, at the time the largest and most powerful maritime power, were generally inclined to uphold these wide exculpatory clauses, even if they went as far as releasing the carrier from the consequences of his own negligence.[1244] The basic understanding of the British courts on this matter was that "*the common carrier's liability under the common law was a default rule that could be displaced by an agreement to the contrary.*"[1245]

While carriers themselves, as well as the governments of nations with a large maritime industry, were satisfied with the state of affairs, the situation was different in nations with a majority of cargo interests. Evidently, nations devoted to exporting goods were not as happy about this practice since, in effect, the adherence that some courts demonstrated to a fairly absolutist idea of freedom of contract allowed the shipowners to carry the cargoes *"when he liked, as he liked, and wherever he liked."*[1246] Indeed, through the use of these exclusion clauses, shippers were left at the mercy of their carriers, often unable to obtain any kind of redress, as the clauses *"operated totally in the carrier's favour and the goods were carried entirely at the merchant's risk."*[1247] The bargaining power of the carriers allowed them to, in effect, conduct their trade free of almost any reasonable limitations.[1248]

> *"The bills of lading became so lengthy that it became difficult to ascertain rights and liabilities. Even bankers were 'in doubt as to their security when discounting drafts drawn against bills of lading, cargo underwriters [had] not known the risks which they covered when insuring goods… and carriers and shippers [were] in constant litigation.' The exculpatory clauses typically included losses and damage from*

[1243] ESTRELLA FARIA, J. A., 'Uniform Law for International Transport at UNCITRAL: New Times, News Players, and New Rules', 2009, 44 *Texas International Law Journal*, no. 3, p. 281. *See* also POOR, W., 'New Code for the Carriage of Goods by Sea', 1923, 33 *Yale Law Journal*, no. 2, p. 133.

[1244] VALDERRAMA, F. A. J., 'Contratos de Transporte Marítimo de Mercancías: Del Harter Act Norteamericano de 1893 a las Reglas de Rotterdam de 2008 y los Tratados de Libre Comercio de Colombia con los Estados Unidos de América y la Unión Europea', 2012, 38 *Revista de Derecho,* pp. 112–113. In regards to the relevance of the United Kingdom in the development of shipping and its regulation, it is worth noting that by the 1800's, *"almost all"* the ships that were devoted to trans-oceanic carriage were English (CRUTCHER, M. B., 1970, supra note 1231, p. 699).

[1245] ESTRELLA FARIA, J. A., 2009, supra note 1243, p. 281.

[1246] FREDERICK, D. C., 'Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules', 1991, 22 *Journal of Maritime Law and Commerce*, no. 1, pp. 82–83.

[1247] CARR, I. & STONE, P., 2014, supra note 318, p. 217.

[1248] ZHAO, L., 2015, supra note 1232, pp. 139–140. *See* also DONOVAN, J. J., 'The Hamburg Rules: Why a New Convention on Carriage of Goods by Sea', 1979, 4 *Maritime Lawyer*, no. 1, p. 2 (stating that "*British carriers exploited their commercial position by inserting clauses in their bills of lading which exonerated them from liability for cargo damage caused by their negligence*"). LIANG argues that the fact that the carrier was in a stronger bargaining power than the shipper came as a result of maritime ventures being, at the time, inherently dangerous, which limited the availability of ships conducting trade (LIANG, C., 2013, supra note 1239, p. 226). Although LIANG seems to limit this bargaining disparity to the past, it is hard to see why such logic cannot apply, *mutatis mutandis,* to the current landscape of the trade.

> *thieves, heat leakage, and breakage; contracts with other goods; perils of the seas; jettison; damage by sea water; frost; decay; collision; strikes; benefit of insurance; liberty to deviate; sweat and rain; rust; prolongation of the voyage; nonresponsiblity for marks or numbers; removal of the goods from the carrier's custody immediately upon discharge; limitation of value; time for notice of claims; and time for suit."*[1249]

SCRUTTON referred to this as a situation in which, apparently, *"the only obligation resting upon the fortunate shipowner is to receive the freight."*[1250] As it was to be expected, such a liberal environment lead to enormous abuses and to "*interpretative anarchy*."[1251] By placing the risk wholly on the shippers, the carrier had little or no motivation to actually care for the goods, as his compensation would not be affected in case of damage.[1252]

Even in countries where the disclaimers of liability were interpreted in a very narrow manner, the issue of the burden of proof complicated things even more for the cargo interests. In the United States, for example, the courts had ruled that clauses exempting the carrier from his own negligence were against public policy and therefore unenforceable; however, if the alleged damages were the result of one of the perils excepted in the bill of lading, then it was the merchant's responsibility to prove that the damage was caused by the carrier's negligence.[1253]

> *"In the pre-discovery days, that burden of proof was a very real defensive weapon, and a source of serious difficulty for the cargo claimant. A predictable result of this situation was a great proliferation of oppressive exemptive clauses under which, if*

[1249] MANDELBAUM, S. R., 'International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules', 1995, 5 *Journal of Transnational Law & Policy*, no. 1, p. 9.

[1250] POOR, W., 1923, supra note 1243, p. 133 *See* also STURLEY, M. F., 1991, supra note 1234, p. 10 (quoting the Glasgow Corn Trade Association's complaint to the British Prime Minister, stating that the exclusion clauses were *"so unreasonable and unjust in their terms as to exempt [the carriers] from almost every conceivable risk and responsibility"*).

[1251] CORNEJO FULLER, E., 'El Contrato de Transporte Bajo Conocimiento de Embarque: Norma sobre Contenedores y Transporte Multimodal', 1988, 12 *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso,* p. 278. *See* also MAGASHI, A. I. & HARUNA, A. L., 2016, supra note 1231, pp. 236–237 ("[s]*hipowners had almost unfettered freedom and discretion to dictate, unilaterally and unfairly, the terms of the contract of carriage. They insert every exemption clauses imaginable; choose exclusively the law and the forum and standard form of clauses that exempt liability from their obligations in the contract of carriage"*). MARGETSON does not agree with the characterization of this situation as abusive, arguing instead that shippers simply saw the exclusion clauses as part of doing business, and simply placed the increased risk with their underwriters. In what could be criticized as an appeal to anecdotal evidence, and without providing a source for his claim, MARGETSON goes on to add that *"*[t]*he allegation that liner companies abused their dominant position is further negated by the fact that carriers – particularly after the rapid increase in pilferage after the war began – often paid for the damages for which they were not liable under the rules of the bill of lading"* (MARGETSON, S. W., 2008, supra note 1229, pp. 6–7).

[1252] POOR, W., 1923, supra note 1243, p. 136.

[1253] MARGETSON, S. W., 2008, supra note 1229, p. 7 (referring to the US' refusal to enforce wide exclusion clauses).

> *the burden of proof were literally applied and the carrier could bring the cause of loss within one of those exemptive clauses, the damaged cargo bore the burden of proving that the loss resulted from the carrier's negligence. In a very significant number of cases, this burden was impossible for* [the] *cargo* [interest] *to bear."*[1254]

By the late 19th century, as well as in the dawn of the 20th century, the diverse interests that operated in different nations also resulted in a variety of approaches towards the clauses disclaiming the liability of the carrier. While the courts of "*carriers' countries*" would enforce them, those in *"shippers' countries"* (those where cargo interests dominated) would declare them invalid.[1255] Of course, shippers were not the only who, at the time, were opposing these clauses, as other parties with interests in the cargo, like bankers and underwriters, saw their interests threatened by them.[1256]

This was clearly a problem, since the international character of maritime law requires a certain amount of stability and predictability for the normal conduction of the trade.[1257] Carriers and merchants needed to know that compliance with their contractual obligations would not be dependent on the country where the action was started, and that the decisions reached by a given court would be enforceable by others.[1258]

> *"In the United States* [...] *federal courts permitted carriers to limit their liability in many circumstances, but carriers could not exonerate themselves from the consequences of their own negligence or their failure to provide a seaworthy ship. Similarly, the Japanese Commercial Code invalidated agreements exonerating a shipowner 'from liability for damages caused by the shipowner himself, or by the willful act or gross negligence of the crew or any other employee, or by the fact that the ship is unseaworthy.' This conflict among major maritime nations, which became*

[1254] YANCEY, B. W., 'Carriage of Goods: Hague, Cogsa, Visby, and Hamburg', 1982, 57 *Tulane Law Review*, no. 5, pp. 1239–1240.

[1255] YIANNOPOULOS, A. N., 'Conflicts Problems in International Bills of Lading: Validity of Negligence Clauses', 1957, 18 *Louisiana Law Review*, no. 4, p. 609 *See* also MANDELBAUM, S. R., 1995, supra note 1232, p. 475; ZHAO, L., 2015, supra note 1232, p. 140 and BASNAYAKE, S., 'Introduction: Origins of the 1978 Hamburg Rules', 1979, 27 *American Journal of Comparative Law*, no. 2, p. 353 ("[b]*y the end of the nineteenth century, the case-law of countries concerned with ocean carriage had become sharply divided; British courts gave wide effect to "freedom of contract," while American courts, anticipating modern 'consumerism,' were more skeptical of the freedom given to shippers by bill of lading clauses prepared by carriers*").

[1256] ZHAO, L., 2015, supra note 1232, p. 140.

[1257] STURLEY, M. F. et al., 2010, supra note 1166, p. 1 ("[t]*o be effective, commercial law should provide clear and predictable solutions to the problems that are most likely to arise in practice*").

[1258] For an illustration of this problem, *See Re Missouri Steamship Company* [1889], 42 Ch. D., 321–342. In this case, the English Court of Appeal ruled that a bill of lading containing a disclaimer of liability that would not be valid under American law for violating public policy should be governed by English law, since the parties would have intended the clause to be valid.

> *more serious in the early twentieth century, meant that the general maritime law no longer provided a uniform risk allocation."*[1259]

The increasing lack of uniformity also manifested itself in the field of private international law, as more and more countries started to adopt conflicts rules that would allow for the application of their own domestic standards to bills of lading. As YIANNOPOULOS notes, this represented a great problem since, as a result, the security of international commerce was put in jeopardy, "*the negotiability of bills of lading was imperiled, and world trade was seriously hampered*."[1260]

10.3 From the Harter Act to the Hague Rules

As international bodies attempted to create some modicum of harmonization of the existing maritime law, different nations sought to regulate the way in which they dealt with exclusion clauses. Paradoxically, the massive differences that existed among these countries, and which increased the uncertainty that plagued the trade, would actually contribute towards its harmonization in the long run. STURLEY suggests that subjecting the carriers to such dissimilar regulations, increasing their risks of being held liable in unknown terms, increased their incentive to support an international resolution of this problem.[1261] Although it is unlikely that this was in the minds of the wide array of legislators who enacted the regulations, the outcome, the push towards harmonization, remains the same.

The United States was at the forefront of this effort towards domestic regulation, enacting its first thorough regulation in the form of the Harter Act of 1893, "*the world's first legislative attempt to allocate the risk of loss in ocean transportation between carrier and cargo interests*."[1262] This statute reflected the problems that cargo nations were facing at the time, as it sought to prohibit *"unreasonable clauses in bills of lading,"* as well as

---

[1259] STURLEY, M. F., 1991, supra note 1234, pp. 5–6.
[1260] YIANNOPOULOS, A. N., 1957, supra note 1255, pp. 609–610.
[1261] STURLEY, M. F., 1991, supra note 1234, p. 10.
[1262] STURLEY, M. F., 'Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence', 1993, 24 *Journal of Maritime Law and Commerce*, no. 1, p. 119. *See* also DONOVAN, J. J., 1979, supra note 1248, p. 2 (referring to the Harter Act as "*one of the most remarkable statutes ever enacted in the field of shipping*"), COLDWELL, R., 2014, supra note 1197, p. 110 (calling it "[the] *first to stir debate with respect to the contractual imbalance between shipper and carrier*"), MITCHELHILL, A., 1990, supra note 1204, p. 5 (stating that the Act represented *"the first steps taken to control the situation"*) and MARGETSON, S. W., 2008, supra note 1229, p. 7 (stating that in the Act *"the opposition to the carrier's freedom of contract was successful for the first time*").

"covenants against due diligence."[1263] Generally, it outlawed any clause contained in the bill of lading that had the effect of relieving the shipowner from liability for negligence in properly loading, carrying, and/or delivering the cargo.[1264] It was conceived to be a compromise between the interests of both the shippers and the carriers, as well as a solution (even if only partial) to the lack of uniformity and certainty that plagued the American admiralty courts.[1265] As a compromise, the Act made important concessions for both of the interested parties:

> *"Carriers lost their exoneration clauses, but they gained a new list of statutorily approved exemptions from liability-including one relieving the shipowner from liability for negligence in the navigation or management of the ship, as long as the owner exercised due diligence to provide a seaworthy vessel. By adding more exceptions for the innocent carrier to escape liability, the Harter Act shifted the risk of loss for all of these cases to the innocent cargo owner.* [...] *As the list of exceptions to liability for the innocent carrier grows, the scheme approaches a fault-liability scheme, under which only a culpable carrier will bear any risk of loss."*[1266]

The Harter Act was, in the words of TETLEY, a *"great achievement of American maritime law"*. It brought positive changes to the shipping business, as it sought to balance an often extremely imbalanced situation.[1267] In fact, its influence was felt in all corners of the world, as other nations with significant cargo interests passed similar (if not identical) regulations.[1268] This was the case in, for example, New Zealand, Australia and Canada, countries that exported large quantities of raw material and which, despite being British dominions, felt their shippers were not being treated fairly by the carrier interests

---

[1263] EVANS, I. L., 'The Harter Act and Its Limitations', 1910, 8 *Michigan Law Review*, no. 8, pp. 638–639. *See* also MARGETSON, S. W., 2008, supra note 1229, p. 8 ("[t]*he major consequence of the Harter Act was the banning* [...] *of clauses which implied a negligence clause for commercial errors*").

[1264] CRUTCHER, M. B., 1970, supra note 1231, p. 710.

[1265] MCCORMACK, H. M., 1998, supra note 1228, p. 1521 (arguing that the Harter Act was "*conceded by all to be a compromise between the shipping and cargo interests,*" as well as "*at best, a partial resolution and, at times, a rather unsatisfactory one,*" since it did not go as far as any of the interested parties wanted) *See* also SWEENEY, J. C., 'Happy Birthday, Harter: A Reappraisal of the Harter Act on Its 100th Anniversary', 1993, 24 *Journal of Maritime Law and Commerce*, no. 1, p. 41.

[1266] HICKS, J. K., 'What Should We Do with the Fire Defense, Late in the Evening', 2004, 83 *Texas Law Review*, no. 4, p. 1234.

[1267] TETLEY, W., 'Reform of Carriage of Goods-The UNCITRAL Draft and Senate COGSA'99', 2003, 28 *Tulane Maritime Law Journal*, no. 1, p. 23.

[1268] *See* ENRÍQUEZ, D., 2008, supra note 1161, p. 85 (*"the international repercussions of the Harter Act did not take long, and within three decades of its entry into force international maritime rules had taken it as a basis for their development*") and ZHAO, L., 2015, supra note 1232, p. 142 (noting that several countries *"followed the U.S. and unilaterally enacted domestic legislation governing exoneration clauses in bills of lading,"* including Australia, Canada, New Zealand and French Morocco).

present in England.[1269] Similar legislation was, at the time, expected to be enacted in other nations as well, including France, the Netherlands, Spain, Denmark, Sweden, Finland, Iceland and South Africa.[1270] In order to avoid even more disunity and disorganizations, something had to be done.

The success that the United States reached in reaching a compromise in its internal legislation between the interests of carriers and shippers, allowed the country to take the lead in the move towards international uniformity.[1271] Additionally, the United Kingdom, traditionally a carriers' nation, aware of the problems that were appearing as a result of the lack of uniformity, also took a leading role in pushing for a new uniform system, also due to increasing pressure from its dominions.[1272]

As the move towards uniformity increased its momentum, the international community recognized that any regulation that allowed international trade to flourish would need to accommodate two purposes: "*(i) flexibility to allocate risks in line with their commercial needs, and, (ii) prevention of abuse and protection for the parties in a weaker bargaining position*."[1273] This would allow for a regulatory system in which

> *"the entire risk should not be assumed by either carrier or shipper* [...] *The first alternative destroys freedom of contract and places insurable risks on the shipowner which can more conveniently be borne, or placed with underwriters, by the shipper; the second too greatly diminishes the carrier's incentive to exercise care."*[1274]

[1269] SWEENEY, J. C., 1993, supra note 1265, p. 30. *See* also POOR, W., 1923, supra note 1243, p. 134 and MCCORMACK, H. M., 1998, supra note 1228, p. 1523.

[1270] STURLEY, M. F., 1991, supra note 1234, pp. 17–18.

[1271] YIANNOPOULOS, A. N., 1957, supra note 1255, p. 610 *See* also YANCEY, B. W., 1982, supra note 1254, p. 1242 ("[t]*he United States was one of, if not the, prime motivating force in the drafting of this Convention"*) and POOR, W., 1923, supra note 1243, p. 134 (arguing that the Hague Rules are *"a set of conditions regulating the carriage of goods by sea, based in principle on the Harter Act"*).

[1272] STURLEY, M. F., 1991, supra note 1234, p. 18. *See* also MITCHELHILL, A., 1990, supra note 1204, p. 6 and MARGETSON, S. W., 2008, supra note 1229, p. 8.

[1273] NIKAKI, T. & SOYER, B., 2012, supra note 1239, p. 303.

[1274] POOR, W., 1923, supra note 1243, p. 136. Insurance was a very important topic on the road to securing an international regulation, and some have even argued that the issue of disclaimers of liability was relevant to the insurers more than to the shippers themselves. As MARGETSON explained:

> *"Shippers showed themselves to be 'indifferent' to exoneration clauses. During the discussion* [of the Hague Rules] *on the negligence clause, De Faynal, the Advocate General at the French Supreme Court, argued that there was no question of a battle between carriers and shippers. The question was merely who should pay the insurance premium.*
>
> *When shippers intervened in the discussion about the* [Hague] *Rules, they did so mainly at the insistence of their underwriters. Hill summarized it as follows. '[T]he whole object of the cargo interest in pressing for these rules is to make a bill of lading a really sound creditable document for the purpose of getting credit from the bankers, insurance from the underwriters, and generally making it as negotiable as possible.'"*

MARGETSON, S. W., 2008, supra note 1229, pp. 2–3.

It was within this framework, after discussions had been conducted between "*the principal shipowners, underwriters and insurance interests, shippers' representatives and leading bankers of maritime nations,*" that in 1921 the International Law Association adopted a set of rules drafted by the *Comité Maritime International* (CMI).[1275] These Rules, which were greatly inspired by the Harter Act, and after some amendments, were later submitted to the International Diplomatic Conference on Maritime Law, and signed on August 25, 1924 as the "International Convention for the Unification of Certain Rules Relating to Bills of Lading," also known as the Hague Rules.[1276]

The main goal of the Hague Rules was the establishment of a uniform system of liability for the carriage of goods by sea.[1277] The goal was to increase certainty by clearly and carefully defining the responsibilities of all the parties to the contract, namely the carriers, shippers, bankers, and underwriters. As POOR argued in 1923:

> *"It is to be hoped that they will be adopted, and thereby uniformity secured, so that any person interested in a shipment may know his rights and liabilities without the necessity of reading a long and complicated document, and possibly taking legal advice thereon."*[1278]

The result of this uniformity would then allow costs to go down, particularly those of insurance, since insurers would be able to calculate their risks more accurately by identifying potential liabilities.[1279] This would be the result of the significant change brought by the Hague Rules, as they would prevent the carrier from being able to contract out of certain responsibilities regarding the cargo.

Just like the Harter Act, the Hague Rules were a compromise between the interests of the shippers and the carriers.[1280] On the one hand, they attempted to do away with the

---

[1275] MITCHELHILL, A., 1990, supra note 1204, p. 6.

[1276] On the influence of the Harter Act, *See* VALDERRAMA, F. A. J., 2012, supra note 1244, pp. 113–114 and MITCHELHILL, A., 1990, supra note 1204, p. 6. On the enactment of the Hague Rules, *See* YANCEY, B. W., 1982, supra note 1254, p. 1242 and MOORE, J. C., 'The Hamburg Rules', 1978, 10 *Journal of Maritime Law and Commerce*, no. 1, p. 2.

[1277] PEACOCK, J. H., III, 1989, supra note 1232, p. 982. *See* also MCCORMACK, H. M., 1998, supra note 1228, p. 1522.

[1278] POOR, W., 1923, supra note 1243, p. 140.

[1279] PEACOCK, J. H., III, 1989, supra note 1232, p. 984.

[1280] TETLEY, W., 'Per Package Limitation and Containers under the Hague Rules, Visby & Uncitral', 1977, 4 *Dalhousie Law Journal*, no. 3, p. 685 *See* also CORNEJO FULLER, E., 1988, supra note 1251, p. 280 ("[c]*ommentators have said that the Hague Rules were a compromise between the interests of the carriers and those of the users or shippers*") and POOR, W., 1923, supra note 1243, p. 140 ("[t]*he* [Hague] *Rules are to a certain extent the result of compromise between the various interests*"). ZHAO attributes the success of the Hague Rules to the fact that they were not truly governmental efforts, and that they were instead the product of "*private sectional interests*" who were thus in a better position to understand the needs of the trade (ZHAO, L., 2015, supra note 1232, pp. 149–150). This compromise meant, among other things, that even though freedom of contract was restricted (to prevent draconian clauses) there were still some instances under which such freedom was allowed; this was the

practice of carriers to exclude all liability, establishing a mandatory minimum "per package".[1281] On the other, however, carriers were protected by this limitation of liability, several exemptions, and a very favorable 1-year time bar period.[1282] As TETLEY explained:

> *"The purpose of the per package limitation is the same as that of the Rules generally, i.e. to retain a proper balance between the rights and responsibilities of the carrier on the one hand, and the rights and responsibilities of the claimant on the other. The per package limitation is part of the bargain between carriers and shippers. Non-responsibility clauses are no longer valid and a certain standard of care is imposed on carriers. In return carriers benefit from a maximum per package limitation."*[1283]

The existence of this compromise, and which, to an extent, allowed for the interests of both carriers and shippers to be taken into consideration, allowed for the rules to be quickly ratified by some of the leading maritime nations in the world, including the United Kingdom, Finland, Germany, Italy, Sweden, Denmark, Australia, Canada, India and several others.[1284] Although the United States had been a proponent of the rules during their preparation, they were only incorporated into American law, with some modifications, in 1936 in the Carriage of Goods by Sea Act (US COGSA).[1285] With the enactment of the Hague Rules, as well as their incorporation into the domestic legal systems of several nations, *"the modern era of the law of bills of lading"* had begun.[1286]

10.4 The Hague-Visby Rules[1287]

Even though by 1938 "*substantially all the world's maritime trading nations*" had adopted the Hague Rules, they were far from perfect.[1288] The passage of time and the development of new industry practices made it clear that an update was necessary.[1289] Issues like the amount and interpretation of the package limitation established in the rules, their applicability being limited only to bills of lading that had been issued in a contracting

---

situation, for example, in the case of charterparties and of shipments where a bill of lading was not issued (BERLINGIERI, F., 2009, supra note 1194, p. 831).

[1281] MITCHELHILL, A., 1990, supra note 1204, p. 6.

[1282] REYNOLDS, F., 1990, supra note 1241, p. 18.

[1283] TETLEY, W., 1977, supra note 1280, p. 686.

[1284] YANCEY, B. W., 1982, supra note 1254, p. 1242.

[1285] ibid., p. 1243.

[1286] AIKENS, R. et al., 2016, supra note 1192, §2.

[1287] Since several aspects of the Hague Rules remained unchanged after the Visby amendments, we will use the term "Hague (Visby) Rules" when we are making a comment that can apply to both the original as well as the amended rules. If we are only referring to the Visby version, however, we will speak of "Hague-Visby Rules."

[1288] ibid., §2. *See* also MCCORMACK, H. M., 1998, supra note 1228, p. 1525 ("[t]*he Hague Rules gained the commitment of the majority of the world's shipping by* [...] *1938*").

[1289] STURLEY, M. F. et al., 2010, supra note 1166, p. 2.

state, as well as the problems associated with the increasing shift towards containerized cargo, lead to demands for change.[1290]

Fundamental in the need for a change was the so-called "container revolution," and which dramatically changed maritime trade, shedding light on some of the most outdated parts of the existing regulations.[1291] Under the Hague Rules, for example, the limitations of liability were built around "packages," limiting the liability of the carrier to "100 pounds sterling" per package (or USD 500 in the US COGSA).[1292] As YATES noted, *"this mode of transport rendered ridiculous the per package limitation in the original Hague Rules, with the package being the sealed container."*[1293] This was a massive problem, dealing with the reading that such an important provision should receive, and which could not have been predicted by the original drafters.

> *"Little did the legislators dream that* [...] *a container revolution in which mechanized containerships equipped with removable cargo holds called 'containers' for pre-stowage of cargo would take the place of the traditional cargo freighter and manual piece-by-piece stowage of cargo. And little did they dream that certain judges in the containerization era would virtually exonerate steamship companies for cargo loss in applying their legislation designed to protect the consignees from the carriers' contracts of adhesion."*[1294]

Together with other issues, the growing dissatisfaction with the Hague Rules lead to the adoption of a protocol being added to them in 1968, forming what is now known as the

---

[1290] AIKENS, R. et al., 2016, supra note 1192, §2. *See* also MCCORMACK, H. M., 1998, supra note 1228, p. 1525 (blaming some the growing dissatisfaction with the Hague Rules on the lack of uniformity in their interpretation).

[1291] Attempting to illustrate the extent of the changes brought forward by the use of containers in the carriage of cargo, CRUTCHER explains how "[o]*ne of our containerships and its workings would astound a citizen of 1897, perhaps as much so as a diesel locomotive or one of our freeways or even an airplane"* (CRUTCHER, M. B., 1970, supra note 1231, p. 698). For further comments on the container revolution, *See* TETLEY, W., 1977, supra note 1280, pp. 698–699; and STURLEY, M. F. et al., 2010, supra note 1166, p. 10.

[1292] HETHERINGTON, S., 2014, supra note 1177, p. 169. *See* also TETLEY, W., 1977, supra note 1280, p. 685. Other limitations included 500 Canadian Dollars under the Canadian COGSA, and 2,000 francs under French law. On the value of "100 pound sterling" as gold, an issue that later affected the usefulness of the original text of the Hague Rules, *See,* generally, TETLEY, W., 'Package & Kilo Limitations and the Hague, Hague/Visby and Hamburg Rules & Gold', 1995, 26 *Journal of Maritime Law and Commerce*, no. 1.

[1293] Quoted in MARGETSON, S. W., 2008, supra note 1229, p. 13. *See* also MENDELSOHN, A. I., 1992, supra note 5, p. 31 and ZHAO, L., 2015, supra note 1232, p. 155.

[1294] SIMON, S., 'Container Law: A Recent Reappraisal', 1976, 8 *Journal of Maritime Law and Commerce*, no. 4, p. 489. It is worth noting that problems arising from the interpretation of "package" continue to this day, often leading to clearly unfair results. In 1999, for example, the Federal Court of Australia ruled that a yacht transported under a bill of lading incorporating US COGSA amounted to a single package or *"customary freight unit."* Since the yacht had suffered damages amounting to a total loss during the voyage, the Court ruled that the claimants were only entitled to receive $500 USD (out a $65000 USD yacht), the package limitation established in the US COGSA (HETHERINGTON, S., 2014, supra note 1177, p. 171).

Hague-Visby Rules.[1295] Significantly, this new version allowed for the determination of the transport units to adapt to the new forms of carriage, based on *"whatever is enumerated in the bill of lading"* to be considered as the article of transport.[1296] Additionally, the rules now also contained a provision allowing for the limitation to be calculated as either 10,000 francs per package or 30 francs per kilo, whichever was higher, and which represented an increase from the Hague Rules.[1297] The Protocol also included the possibility of extending the protection of the Rules to the servants and agents of the carrier, extended the time that the cargo interests had to file suit against the person liable under the rules, and ensured that the regime of the Rules could not be avoided by means of claiming in tort instead of contract.[1298]

A further change occurred in 1979, in what has come to be known as the *"SDR Protocol of 1979,"* and in which the unit of calculation for the package limitation was changed to Special Drawing Rights (SDR), as defined by the IMF.[1299] The SDR being used as a "unit of account" came as a result of the IMF having abandoned the gold standard, and is determined based on a weighed average value of several major currencies. It provided a more stable way of determining value than gold, which was then relegated to being merely a commodity (albeit an expensive one) of fluctuating market value.[1300] Although seemingly a small change, this represented a significant improvement in the maritime rules, as it made them no longer susceptible to become effectively useless as a result of issues like monetary devaluation, and avoided problems resulting from currency exchange.[1301]

To this day, the Hague-Visby rules remain the most often-encountered regime in cargo claims. They have been ratified, acceded to, or adopted by some of the most powerful

---

[1295] COLDWELL, R., 2014, supra note 1197, p. 110 ("*Following the period of decolonisation and the subsequent creation of new sovereign states, this issue* [of contractual imbalances] *became prominent in the industry and further work was required to accommodate for these new, underdeveloped States' interests*"). For some of the other concerns that lead to the Visby protocol, *See* YANCEY, B. W., 1982, supra note 1254, p. 1247.

[1296] MARGETSON, S. W., 2008, supra note 1229, p. 13.

[1297] YANCEY, B. W., 1982, supra note 1254, p. 1248.

[1298] *See* LAMONT-BLACK, S., 'Transporting goods in the EU: an interplay of international, European and national law', 2010, 11 *ERA Forum*, no. 1, p. 94 and ZHAO, L., 2015, supra note 1232, pp. 156–157.

[1299] LAMONT-BLACK, S., 2010, supra note 1298, pp. 94–95.

[1300] STURLEY, M. F. et al., 2010, supra note 1166, p. 12.

[1301] MANDELBAUM, S. R., 1995, supra note 1232, pp. 481–482 (noting that the adoption of the SDR Protocol was done *"to account for currency exchange imbalances"*). On some of the difficulties arising as a result of the SDR Protocol, and which lead to it being limited exclusively to the Hague-Visby Rules, in order to avoid arbitrary choices regarding the conversion of the Pre-Visby limitations, *See* MARGETSON, S. W., 2008, supra note 1229, pp. 14–15.

maritime nations in the world.[1302] They continue to provide, therefore, a relatively uniform legal regime for the large majority of international shipments.[1303]

10.5 The Hamburg Rules

Parallel to the momentum that lead to the Visby amendments, new nations were rising, each of them with their own economic powers. These new players were the result of the massive economic changes brought about by the devastation of World War II, the ending of the great colonial powers, and the shift in the power over maritime trade, previously held by only a handful of maritime nations.[1304] As much progress as the Hague-Visby Rules had represented for the legal framework of the maritime trade, it was far from enough to placate the calls for change made by these new developing nations.[1305] Indeed, they had emerged to encounter an economic system based on principles that had been formulated well before this massive global changes had occurred, and thus did not take them into account.[1306]

There was a perception that the existing framework did not only benefit developed nations and industries, but that it actually hindered the economic growth of developing nations.[1307] As SWEENEY explained:

> *"Dissatisfaction of the developing world stems essentially from the belief that the operation of traditional maritime law (along with other aspects of international*

[1302] YANCEY, B. W., 1982, supra note 1254, p. 1249. *See* also MARGETSON, N. J., *The System of Liability of Articles III and IV of the Hague (Visby) Rules*, 2008, Paris Legal Publishers, Zutphen, the Netherlands, p. 21 ("[the Hague-Visby Rules are] *the regime most often encountered*"), STURLEY, M. F., 'United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress, The', 2003, 39 *Texas International Law Journal*, no. 1, p. 66 (calling the Hague-Visby Rules "*the dominant convention for the international carriage of goods by sea"),* AIKENS, R. et al., 2016, supra note 1192, §2 calling the Hague-Visby Rules *"the predominant legal code for the international carriage of goods by sea"*); STURLEY, M. F. et al., 2010, supra note 1166, p. 12 (stating that these Rules *"remain in force – in one form or another and by one method or another – in countries representing approximately two-thirds of the world trade"*); ENRÍQUEZ, D., 2008, supra note 1161, p. 87 (referring to the Hague (Visby) Rules, *"for better or worse,"* and *"despite the criticisms that we might make against them"* as *"the true authentic international regulation of the international carriage of goods by sea"*); and NIKAKI, T. & SOYER, B., 2012, supra note 1239, p. 304 ("[p]*resently, the most prominent regime that governs a large majority of international shipments is an amended version of the original Hague Rules, the Hague-Visby Rules"*).

[1303] STURLEY, M. F. et al., 2010, supra note 1166, p. 1.

[1304] FREDERICK, D. C., 1991, supra note 1246, p. 98.

[1305] FORCE, R., 'Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)', 1995, 70 *Tulane Law Review*, 6 Part A, p. 2052. *See* also ENRÍQUEZ, D., 2008, supra note 1161, p. 89

[1306] FREDERICK, D. C., 1991, supra note 1246, p. 98.

[1307] MUKHERJEE, P. K. et al., 2013, supra note 1179, p. 333 ("[t]*he Hamburg Rules came about as a result of pressure* […] *by developing countries whose representatives questioned the basis of earlier international provisions and their suitability in terms of the needs of developing economies*").

> *trade law) impairs the balance of payments position of developing states so as to insure continued poverty and perpetual under-development in an industrial age."*[1308]

Although these views had plenty of critics coming from supporters of the Hague (Visby) Rules, the point made by these developing nations is fairly clear to see. [1309] Until they themselves became maritime powers, they would be dependent upon the services provided by the already powerful maritime countries. These services would, in turn, be provided on the basis of rules that had been drafted without their participation. The existing rules were therefore seen not only as instruments created without their participation, but also as *"a product of a carrier-dominated process."*[1310]

It was argued, for example, that the existing rules *"did not strike a fair balance between the interests of shippers and shipowners."*[1311] Also, the compromises that had been struck in the Hague-Visby Rules were seen by these actors as "*already slanted too much in favor of carriers*," with the caps on liability dramatically tipping the balance in favor of the carriers.[1312] What is more, it placed a series of duties on the owners of the goods to insure against contingencies not contemplated in the bills of lading, for which the existing Rules did not make carrier responsible, and which could easily represent a prohibitive cost for the developing world.[1313] In particular, the Hague (Visby) Rules were seen as leaning in favor of the carriers for allowing them to negate their liabilities for the negligence of their servants or their agents in the navigation of the ship, an unparalleled provision in trade law.[1314] In fact, as ESTRELLA FARIA noted, at the time the prevailing view was that

---

[1308] SWEENEY, J. C., 'The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)', 1975, 7 *Journal of Maritime Law and Commerce,* p. 73.

[1309] YU & LI refer to the argument put forward by UNCTAD that the existing system *"benefitted developed countries at the expense of developing countries"* as *"farfetched"* (YU, X. & LI, T., 'A Legal Analysis of the Provisions of Volume Contract under Rotterdam Rules', 2012, 7 *Frontiers of Law in China*, no. 4, p. 587).

[1310] ESTRELLA FARIA, J. A., 2009, supra note 1243, p. 297.

[1311] BASNAYAKE, S., 1979, supra note 1255, p. 354. Writing in 1971 SASOON noted how, in comparison with other modes of transportation, "*cargo is at a considerable disadvantage, when it is transported by sea rather than by land or air. In other words, the sea carrier (owner or charterer)' enjoys rights and immunities far more extensive than those afforded the rail, road or air carrier of international shipments*" (SASSOON, D. M., 'Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparisons', 1971, 3 *Journal of Maritime Law and Commerce*, no. 4, p. 759). Clearly, beyond any political motivations that might have lead to the drafting of the Hamburg Rules, there were significant problems that needed to be addressed in regards to the liability of the carrier.

[1312] DONOVAN, J. J., 1979, supra note 1248, pp. 3–4 *See* also HESKETH, D., 'Weaknesses in the Supply Chain: Who Packed the Box?', 2010, 4 *World Customs Journal*, no. 2, p. 7 ("*the Hague-Visby Rules promote far greater bargaining power by the carrier over the shipper"*).

[1313] FREDERICK, D. C., 1991, supra note 1246, p. 99. *See* also AIKENS, R. et al., 2016, supra note 1192, §2.

[1314] SOOKSRIPAISARNKIT, P., 2014, supra note 318, p. 310. REYNOLDS explains the opposition against this provision arguing that the view was that this was *"an old-fashioned exception dating back to sailing vessels and days when maritime ventures were hazardous"* and which had little to no justification in modern maritime ventures (REYNOLDS, F., 1990, supra note 1241, p. 28). In regards to this defense being "unparalleled" in other types of transport, it has been argued that when the Hamburg Rules removed the defense errors in navigation and the

> *"whatever historical reasons had existed for protecting the carrier from liability for the consequences of acts of the master or crew, they were no longer justified in light of modern means of communication available to help navigation. In fact, there had been growing opposition to the nautical fault defense since the Hague Rules were adopted. Courts in many countries became clearly hostile to the nautical fault defense, as it was inconsistent with the general principle of vicarious liability of masters for the acts of their servants. As a result, the courts started to impose conditions to the exercise of this defense to the extent that one might wonder whether there was still any practical room left for nautical fault. Even the Warsaw Convention, which originally contained a defense of negligent navigation for cargo damage, had been amended by the Hague Protocol of 1955 to eliminate the defense for air carriers."*[1315]

The demands made by the developing nations were heard by the United Nations, which recommended UNCITRAL considered it a priority to draft an international shipping legislation. A 1969 United Nations report explained the feeling that motivated this action:

> "[R]*epresentatives* [of developing countries] *stated that present-day legislation in the field reflected, in many respects, an earlier economic phase of society, as well as attitudes and practices which seemed unduly to favour ship-owners at the expense of shippers. They also observed that the developing countries were particularly interested in legislation on ... standard clauses in bills of lading, and the limitations on the ship-owner's liability resulting from exemption clauses. Some delegations expressed the opinion that international shipping legislation is a priority topic that provides UNCITRAL with the best opportunity of contributing to a change in the status quo and the creation of more just and equitable conditions for the developing nations in the field of international trade."*[1316]

This lead, in 1978, to the United Nations Convention on the Carriage of Goods by Sea, also known as the Hamburg Rules. This convention was drafted by UNCITRAL, *"in an effort to resolve problems which had arisen in fifty years of experience under the Hague Rules, and which would not hinder the growth and development of international trade."*[1317] These rules offer a more extensive regulation of the liability of the carrier, being more than

---

management of the ship, *"maritime transport became more akin to transport by other modes"* (*See* RAMBERG, J., 'Global Unification of Transport Law: A Hopeless Task', 2009, 27 *Penn State International Law Review*, 3 & 4, p. 852). On this issue, it seems fair to say that, in general, regarding the exemptions of liability allowed by the Hague-Visby Rules, there was a common perception (some might argue, a common misconception) that the convention had been *"'dictated' by the most powerful states"* (MARGETSON, S. W., 2008, supra note 1229, p. 1).

[1315] ESTRELLA FARIA, J. A., 2009, supra note 1243, pp. 298–299.

[1316] Cited in WERTH, D. A., 'The Hamburg Rules Revisited - A Look at U.S. Options', 1991, 22 *Journal of Maritime Law and Commerce*, no. 1, p. 64.

[1317] DONOVAN, J. J., 1979, supra note 1248, p. 1.

twice the size of the Hague-Visby Rules, combining some its rules with those established in the CMR and Warsaw Rules on road and air carriage, respectively.[1318]

Unlike the Visby Protocol, which had simply amended the Hague Rules, the Hamburg Rules sought to completely overhaul the existing regulation by establishing a completely new regime (although, of course, based in the existing system).[1319] They addressed the issues that had been raised by the developing countries, such as the time bar period for claims, jurisdiction, burden of proof, and responsibility for navigational mistakes, and which had not been satisfactorily covered in previous regulatory attempts.[1320] Additionally, they dramatically shortened the list of defenses available to the carrier.[1321]

Besides the political and social motivations behind the Hamburg Rules, they also sought to remedy the lack of uniformity in maritime trade, as the Hague-Visby regime had failed to be incorporated equally in all countries, and also left some issues unregulated. Indeed, "[w]*hereas Hague-Visby is considered to provide basic rules of liability to the industry, Hamburg was to provide a complete, uniform guide to carriage of goods relationships*."[1322] The desire of the drafters of the Hamburg Rules to create a new system, however, fell short of its goal, as the rules failed to create any significant impact in the practice of international shipping.[1323]

While the Hague (Visby) Rules had been, at their core, the product of non-governmental actors, the Hamburg Rules were inherently political.[1324] As such, their drafting often saw the negotiating parties coming to standstills, unable to reach acceptable compromises for their respective interests, as they frequently represented a clash between political ideas, more than commercial interests.[1325] These disputes were "solved" by what TETLEY referred to as a "*compromise by drafting,"* that is resorting to ambiguous language that could be read in a number of ways.[1326] In essence, the approach was to defer conflicts *"linguistically through ambiguous language that reflected the inability of the drafters to agree on a clear*

[1318] ENRÍQUEZ, D., 2008, supra note 1161, p. 91.
[1319] STURLEY, M. F. et al., 2010, supra note 1166, p. 12.
[1320] WERTH, D. A., 1991, supra note 1316, pp. 65–66. The changes were not exactly met with universal support; in fact, some saw the end of the excuse for navigational errors as a grave mistake that would "*provide fertile fields for litigation of factual questions*" (MOORE, J. C., 1978, supra note 1276, p. 5). *See* also VALDERRAMA, F. J., 2015, supra note 1184, pp. 533–534 ("*the Hamburg Rules respond to completely different conditions* [compared to the Hague-Visby Rules]. *Within the international organizations like UNCITRAL, the grievances and interests of developing countries strongly manifest themselves, seeking more balance in transport*").
[1321] ESTRELLA FARIA, J. A., 2009, supra note 1243, p. 298.
[1322] COLDWELL, R., 2014, supra note 1197, p. 111.
[1323] ibid., p. 111.
[1324] ZHAO, L., 2015, supra note 1232, p. 157.
[1325] ibid., p. 159.
[1326] CHANDLER [III], G. F., 'A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules', 1984, 15 *Journal of Maritime Law and Commerce*, no. 2, p. 236.

position."[1327] This resulted in a level of ambiguity that, in effect, threatened the uniform application of the rules, as "*disagreement on the wording of disputed clauses were all too frequently settled by making the wording capable of interpretation favoring each of the disagreeing parties*."[1328] These political problems were also exacerbated by the fact that, since every country received a vote in UNCITRAL, the Hamburg Rules represented the views of the majority of countries belonging to a political bloc that, at the same time, represented only a minority of the shipping world.[1329]

While the developing countries pushing for the Hamburg Rules saw them as a triumph, shipowners and their insurers did not.[1330] Indeed, while their supporters saw them as inherently fairer than the Hague (Visby) regime, their detractors saw them as a threat to maritime trade.[1331] Critics argued that adopting these rules would lead to an increase in freight rates, to the detriment of those same shippers that were supposedly being protected by the Hamburg Rules.[1332] They also argued that the liability regime established in the rules approached a "strict liability" system, as it presumed the fault of the carrier.[1333] To the credit of the drafters of the Hamburg Rules, however, and regardless of other criticisms that they might deserve, the carriers' claim that premiums and freight

---

[1327] FREDERICK, D. C., 1991, supra note 1246, p. 105.

[1328] CHANDLER [III], G. F., 'After Reaching a Century of the Harter Act: Where Should We Go from Here?', 1993, 24 *Journal of Maritime Law and Commerce*, no. 1, p. 45.

[1329] ZHAO, L., 2015, supra note 1232, p. 159 ("*the draft Hamburg Rules reflected the majority political wishes, even though the political bloc of developing countries represented a commercial minority*").

[1330] *See*, for example, MOORE, J. C., 1978, supra note 1276, p. 11, ENRÍQUEZ, D., 2008, supra note 1161, p. 92 and LEE, E. S., 'The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules', 2002, 15 *Transnational Lawyer*, no. 2, p. 241 ("[t]*he Hamburg Rules have the potential to change not only the price of insurance relevant to international trade, but also the insurance- purchasing behavior involved in international trade*").

[1331] VALDERRAMA, F. A. J., 2012, supra note 1244, p. 119. Proponents of the Hamburg Rules argued that the Hague Rules were unfair, with the Visby amendments working as a *"mere facelifting,"* one that had only become necessary because the Hague Rules *"were being exploited more to evade liability than to anchor responsibility"* (YANCEY, B. W., 1982, supra note 1254, pp. 1250–1251). *See* also MAGASHI, A. I. & HARUNA, A. L., 2016, supra note 1231, p. 244 (also calling the Visby amendments "*a mere face-lift to the Hague Rules*," arguing that "*the form and structure of the original rules remained unchanged*").

[1332] ESTRELLA FARIA, J. A., 2009, supra note 1243, p. 301. *See* also ZHAO, L., 2015, supra note 1232, p. 160 (noting that detractors of the Hamburg Rules "*argued they had imposed on them commercially unreasonable levels of liability by a political instrument, and this would inevitably cause increased freight rates, damaging shippers' interests*") and CHANDLER [III], G. F., 1984, supra note 1326, p. 237 ("[t]*he Hamburg Rules were created to cut overall shipping costs, particularly for the developing countries, but as pointed out above, they might well raise costs*"). In all fairness, it should be noted that arguing that regulations would increase freight rates was not unique to the process of enacting the Hamburg Rules, as the same threat was made when the Harter Act was passed, as well as, as we have seen before, *any* regulation whatsoever in virtually any type of market activity. In 1923, for example, POOR noted how shipowners *"retorted that if they were compelled to bear increased risks they must be compensated by increased freight rates. Such shipowners as are subject to the Harter Act, or similar statutes, have complained of their inability freely to contract with their shippers"* (POOR, W., 1923, supra note 1243, p. 134).

[1333] ESTRELLA FARIA, J. A., 2009, supra note 1243, p. 299 *See* also ENRÍQUEZ, D., 2008, supra note 1161, pp. 91–92 (arguing that the Hamburg Rules adopted a *"system of presumed fault*").

rates would go up has not actually materialized. What is more, even though the threat of higher costs of freights and premiums has been repeated as a mantra for years, there is a *"striking absence of empirical support for either proposition."*[1334]

Perhaps a more significant criticism, and a problem that might have actually doomed the Hamburg Rules to failure, comes from the environment in which they were drafted. As we have seen, the rules were inherently "political" (and were criticized as such), inferior to the "commercial" compromise that had been reached in the Hague (Visby) Rules. This complaint certainly has merits, since not only have the proponents of the rules themselves conceded that they were drafted in a fairly confrontational setting, but also their very history shows that they rose up as a result of political concessions (whether justified or not) towards the developing world.[1335] By prioritizing the needs of the developing world, and lacking official commercial delegates, the Hamburg Rules *"led to political compromises rather than economic bargaining."*[1336] As sympathetic as we might be towards the plight of the developing world, regulating maritime trade without listening to the participants of that trade is not the ideal route. For comparison, it has been argued that the reason why the Hague-Visby Rules achieved their success was, in large measure, due to the fact that they were "*based on commercial practicality*."[1337] As Lord Justice ROSKILL argued during the discussion of the Hamburg Rules:

> *"Those who propose them do not, with all respect, seem to me to be asking the only relevant question- Is this change necessary to a better working result in practice?* [...] *One begins to suspect, rightly or wrongly, that other influences were at work and that these proposals emanate from some who have no practical experience in how well the Hague Rules have worked over the last fifty years. Once again I venture to repeat, has anyone counted the cost of these changes if they are made?"*[1338]

The evidence seems to show that the Hamburg Rules, in their attempt to please the underprivileged, failed to properly take into account the need to obtain the collaboration of the carriers. Clearly, carriers and their interests are an essential part of maritime carriage, and tackling a uniform regulatory system without taking them into consideration can never render positive results. Since the Harter Act, maritime regulations and reforms have always been the result of commercial compromises; the

---

[1334] ESTRELLA FARIA, J. A., 2009, supra note 1243, p. 301.
[1335] ibid., p. 300 ("[e]*ven the more moderate commentators of the Hamburg Rules - who did not fail to recognize how much of the Hague Rules and the Visby Protocol had been retained by the Hamburg Rules-described the climate of the negotiations as a confrontation between those who saw in the Hague Rules 'a set of principles to be defended in whole and, when the whole was lost, in each part,' and those-the actual majority-for whom they were 'a dragon to be slain'*").
[1336] FREDERICK, D. C., 1991, supra note 1246, p. 105 *See* also CHANDLER [III], G. F., 1993, supra note 1328, p. 44 (*"the core problem is that the Hamburg Rules were produced without real commercial compromise"*).
[1337] MOORE, J. C., 1978, supra note 1276, p. 2.
[1338] ibid., p. 5.

acceptance of the Hamburg Rules was certainly affected by not taking this into account.[1339]

For all the good intentions that were behind the Hamburg Rules, they simply did not succeed in achieving the level of adhesion that their proponents hoped for. To date, only thirty-four nations have ratified the Hamburg Rules, none of them being a powerful player in the maritime trade.[1340] As one author explained:

> *"The list of countries that have adopted the Hamburg Rules shows that their importance for international sea-trade is minor. Not only are they few in number; but nine of them are landlocked and not even one of four is an industrialized country. Statistics show that the part of the world sea-trade covered by the 1978* [Hamburg Rules] *Convention is at present less than 5% and there seems to be no clear upwards trend… Chile seems to be… the only important trading and shipping country that has adopted the Hamburg Rules."*[1341]

It has been suggested that this lack of success is due to the fact that, as we have explained before, the Hamburg Rules are seen *"to favor cargo interests rather than the interests of carriers."*[1342] Although exactly how pro-cargo the Hamburg Rules are is up for debate, what is certain is that by the mid-1990's it had become evident that the ambitious goals that informed the Hamburg Rules would simply not be achieved.[1343]

It is worth noting that although it is true that the Hamburg Rules did not end up covering such a significant part of global maritime trade, they did have some degree of influence beyond those that ratified it. The Chinese Maritime Code, for example, took some articles

---

[1339] CHANDLER [III], G. F., 1993, supra note 1328, pp. 44–45 (stating that *"each of the rules were reached through commercial compromise*").

[1340] PALLARES, L. S., 'Brief Approach to the Rotterdam Rules: Between Hope and Disappointment, A', 2011, 42 *Journal of Maritime Law and Commerce*, no. 3, pp. 454–455 (noting that the Hamburg Rules were ratified *"by only a small number of states that, furthermore, have little weight in international shipping").* A complete list of ratifying states is available on the UNCITRAL website, available at: *http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html* (last accessed February 24, 2016). In 1995, MANDELBAUM perfectly illustrated the lack of success of the Hamburg Rules noting that "[t]*o date only 22 states have adopted the Hamburg Rules, 98 of which seven are land-locked states having no ports, and all 22 states, as a group, represent only a very small portion of U.S. trade. These 22 nations are not major shipping powers, and are concerned mostly with protection for their imports and exports*" (MANDELBAUM, S. R., 1995, supra note 1232, pp. 483–484 Although, at the time of this writing, the number of ratifying states has increased, they still represent *"only a small proportion of international trade,"* with over a third of them being land-locked (STURLEY, M. F., 2003, supra note 1302, p. 66).

[1341] MARGETSON, S. W., 2008, supra note 1229, p. 15.

[1342] GRIGGS, P. J. S., 2003, supra note 1159, p. 195. *See* also LIANG, C., 2013, supra note 1239, p. 228 (explaining that with the Hamburg Rules, "*the pendulum swung drastically further towards the cargo interests*").

[1343] ESTRELLA FARIA, J. A., 'Uniform Law and Functional Equivalence: Diverting Paths or Stops along the Same Road - Thoughts on a New International Regime for Transport Documents', 2011, 2 *Elon Law Review*, no. 1, p. 14.

from the Hamburg Rules, such as those relating to the Himalaya Clause.[1344] Similarly, Scandinavian nations, although they did not ratify the Hamburg Rules (though they were all signatories), were greatly influenced by them in the drafting of the Nordic Maritime Code of 1994 ("NMC94").

> *"'Whilst Scandinavian countries maintain that they remain signatories to and appliers of the Hague (Visby) Rules, their leaning towards Hamburg has long been known and this new Code makes it even more obvious.' Although it cannot be concluded that this statute is in conflict with the HVR, but 'it has seized upon every point where Hague-Visby allowed freedom of contract and removed that freedom with a Hamburg solution'"*[1345]

These examples of how the Hamburg Rules influenced some non-ratifying nations highlights an important consequence of the lack of harmonization. A patchwork of solutions ends up being in force, with every jurisdiction following its own rules or interpretations thereof, as well as adopting whatever part of the rules they think are the best. It is precisely this problem that, together with a clear need for reform, lead the international community to, once again, try to develop a uniform system.[1346]

10.6 The Rotterdam Rules

As we have seen, the Hague (Visby) and Hamburg regimes failed to achieve complete acceptance. As a result, different nations started to enact their own rules to govern trade, mixing and matching provisions from all the existing systems.[1347] Several countries inserted Hamburg Rules provisions into their own legislations, sometimes combining them with parts of the Hague (Visby) Rules.[1348] This situation produced what some authors have referred to as a *"Tower of Babel,"* where different systems are applicable at the same time, and where even countries that apply the same systems do so in different manners.[1349] Even among countries who were parties to the Hague (Visby) Rules, the landscape was (and continues to be) grim and confusing:

[1344] XU, L., *China's Approach Toward International Conventions: The Impact of the Hamburg Rules on the Maritime Code of the PRC,* LLM Thesis, August, 2008, p. 21.
[1345] MARGETSON, S. W., 2008, supra note 1229, p. 16.
[1346] DIAMOND, A., 2009, supra note 1198, p. 445 (stating that although in England the Hague-Visby Rules are *"the central code defining the rights and obligations"* in carriage contracts, on an international level they *"have long seemed ripe for reform and probably replacement"*).
[1347] FAGHFOURI, M., 'International Regulation of Liability for Multimodal Transport', 2006, 5 *WMU Journal of Maritime Affairs*, no. 1, p. 101 For a similar overview, *See* LANNAN, K., 2009, supra note 1194, pp. 292–294.
[1348] ESTRELLA FARIA, J. A., 2009, supra note 1243, p. 302. *See* also ZHAO, L., 2015, supra note 1232, p. 162.
[1349] PALLARES, L. S., 2011, supra note 1340, pp. 453–454.

> *"The reason is to be found in the fact that, despite their initial widespread acceptance, they were modified by two protocols: firstly, on February 23rd, 1968, by the so-called Visby Rules and, secondly, on December 21st, 1979. These protocols were opened to signature not only by the parties who had ratified the Brussels Convention, but also -in order to achieve a wider acceptance of the text- by other states, the signature and ratification of which would produce the accession to the Rules as a whole.*
>
> *As a consequence, states can be found where the Hague Rules are in force in their original version, while others apply the so-called Hague-Visby Rules (those that have ratified the Protocol of 1968) or, like Spain, the Hague- Visby Rules as amended by the 1979 Protocol."*[1350]

The lack of uniformity and the resulting uncertainty created a demand for a new system that would remedy the situation.[1351] For this purpose, the CMI "*initiated efforts to bridge the gap between the old system represented by the Hague and the Hague/Visby Rules and the new system evidenced by the Hamburg Rules."*[1352] While the old system was seen by some as too favorable for the carriers, the new system was seen by others as too favorable for the shippers. There was, therefore, a need to reach a new compromise that would allow these differences to be surmounted. What is more, critics argued that even though the almost 100 years of application of the Hague (Visby) Rules had allowed for a substantial body of case law to overcome their structural deficiencies, this "*cannot change the fact that the system and some of the principles of the Hague Rules are outdated and remain barely adequate in the modem environment of international trade and transportation."*[1353] Once again, the need for reform was clear. Though the reasons that led to this move for reform are many,

---

[1350] ibid., p. 454. For other coexisting rules and regulations adding to the confusion *See* FRESNEDO DE AGUIRRE, C., 'The Rotterdam Rules from the Perspective of a Country that is a Consumer of Shipping Services', 2009, 14 *Uniform Law Review*, no. 4, p. 869 (mentioning, in addition to the Hague (Visby) and Hamburg regimes, "*the 1889 Montevideo Treaty on International Commercial Law, the 1940 Montevideo Treaty on International Commercial Navigation Law and the 1928 Bustamante Code*").

[1351] NIKAKI, T. & SOYER, B., 2012, supra note 1239, p. 304 *See* also MUKHERJEE, P. K. et al., 2013, supra note 1179, p. 334 ("*concerns began to emerge about the perceived diversity of cargo liability regimes across the world. The position might not have been quite as bleak as it appeared on paper but, nevertheless, the different* [regulatory] *arrangements* [...]*suggest that the objective of a single international regime had been lost*") and CARLSON, M. H., 'U.S. Participation in Private International Law Negotiations: Why the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea Is Important to the United States', 2009, 44 *Texas International Law Journal*, no. 3, p. 270 ("[j]*ust about everybody agrees that the world needs a new carriage of goods regime*").

[1352] RAMBERG, J., 2009, supra note 1314, p. 852.

[1353] ZIEGLER, A. V., 'The Liability of the Contracting Carrier', 2008, 44 *Texas International Law Journal*, no. 3, p. 331. *See* also NIKAKI, T., 'The Carrier's Duties under the Rotterdam Rules: Better the Devil You Know', 2010, 35 *Tulane Maritime Law Journal*, no. 1, p. 3 (noting that already by 1996 the need for a new modern international convention on maritime trade had been *"evident for a long time"*) and STURLEY, M. F. et al., 2010, supra note 1166, p. 14 (stating that at the time the CMI commenced negotiations, it was clear that *"the Hague-Visby Rules had grown out-of-date*," and that the Hamburg Rules were "*only slightly more modern*").

the increase importance of multimodal transport of containerized cargo, the narrow applicability of the Hague (Visby) regime, and the perception that this regime was disproportionately favorable to the carrier, have been singled out as some of the most important.[1354]

This new attempt by the CMI and UNCITRAL resulted in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, commonly known as The Rotterdam Rules. The first and most important aim of the Rotterdam Rules was uniformity, hoping to supersede the Hague (Visby) and Hamburg Rules, and become the standard.[1355] As explained by José María ALCÁNTARA, one of the councilors at the CMI:

> *"At first the initiative of the CMI sought to overcome, through a new international Convention, the fragmentation, if not atomization, created by the convergence of the Hague Rules, Hague-Visby Rules, the Hamburg Rules, regional accords, and national variations. In other words, the objective was no other than international uniformity."* [1356]

Indeed, as the General Assembly of the United Nations made clear in its Resolution adopting the text of the Rotterdam Rules and calling for their adoption:

> *"**Convinced** that the adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States,*
>
> ***Believing** that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally."*[1357]

[1354] DIAMOND, A., 2009, supra note 1198, pp. 445–446.

[1355] *See* ANDERSON, V., 'A Critical Assessment of the Rotterdam Rules' Potential to be Ratified, in Light of the Proposed Multimodal Transportation System and the Proposed Changes to the Obligations and Liability of the Carrier', 2015, 5 *Southampton Student Law Review*, no. 1, pp. 19–20 and COLDWELL, R., 2014, supra note 1197, p. 110.

[1356] ALCÁNTARA, J. M., *La Convención de NN.UU. sobre Transporte de Mercancías Total o Parcialmente por Mar: Un Instrumento Neocon sobre Responsabilidad del Porteador*. XIII Congreso de Derecho Marítimo, Montevideo, 10-12 November, 2008, p. 2. *See* also LANNAN, K., 2009, supra note 1194, p. 294 (referring to the current regulatory system as *"a highly fragmented one*").

[1357] UN General Assembly, *Resolution 63/122*, December 11, 2008 (emphasis in the original).

In addition to uniformity, the Rotterdam Rules also had as their goal the modernization of the regulatory framework, in order to make it compatible with the needs of the maritime trade in the 21st Century.[1358] Fundamental among these needs were updating the existing rules to reflect the increasing reliance on electronic documents and, most of all, the growing importance of door-to-door transport, something that the Hamburg Rules had failed to do (having expanded the Hague-Visby tackle-to-tackle coverage only to port-to-port) despite having been drafted well into the "container revolution".[1359] Aware of these new necessities, particularly in the field of containerized cargo, the Rotterdam Rules went beyond the limits established in the previous regulatory bodies, extending its applicability not only to the maritime portion of the carriage, but to *"the different modes of transport to allow for door-to-door movement under a single contract of carriage."*[1360]

Unlike the Hague (Visby) and the Hamburg Rules, the Rotterdam Rules depart from the traditional *"liability-driven"* framework, aiming instead to be *"a harmonizing instrument regulating nearly the entire contractual relationship between parties to a contract of carriage."*[1361] In other words, the Rotterdam Rules are not concerned exclusively with the liability of the carrier, but instead with the whole process of the carriage.[1362] This change was the result of the drafters of the Rotterdam Rules not merely aiming to simply "update" the Hague (Visby) regime, seeking instead to create a new system that, although learned from the mistakes of its predecessors, went well beyond their previous

---

[1358] ORTIZ, R. I., 'What Changes in International Transport Law after the Rotterdam Rules', 2009, 14 *Uniform Law Review*, no. 4, p. 894 ("*the Convention is a product of its times and offers a number of innovative solutions to a wide range of contemporary problems encountered in the carriage of good wholly or partly by sea*"). *See* also PEJOVIĆ, č., *Article 47(2) of the Rotterdam Rules: The Solution of Old Problems or a New Confusion?*, in Basedow, J. et al. (eds.), *The Hamburg Lectures on Maritime Affairs 2011-2013*, 2015, p. 178 (arguing that the *"innovative approach"* of the Rotterdam Rules *"was probably motivated by the need to adjust the international regime governing the carriage of goods by sea in such a way as to cope with various modern developments, such as the increased importance of container transport, logistics and electronic commerce"*).

[1359] STURLEY, M. F. et al., 2010, supra note 1166, p. 13.

[1360] LANNAN, K., 2009, supra note 1194, p. 294. Comparatively, the Hague (Visby) rules are "tackle-to-tackle," while the Hamburg Rules are limited to "port-to-port" carriage, methods that have progressively become *"insufficient for current practical needs"* (ÜNAN, S., *The Scope of Application of the Rotterdam Rules and Freedom of Contract*, in Güner-Özbek, M. D. (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the "Rotterdam Rules"*, 2011, p. 88). *See* also RECALDE CASTELLS, A., *Reflections on Spain's Decision to Ratify the Rotterdam Rules*, in Basedow, J. et al. (eds.), *The Hamburg Lectures on Maritime Affairs 2011-2013*, 2015, p. 48 ("[the goal of the Rotterdam Rules] *was not merely adapting the* [Hague-Visby] *or* [Hamburg Rules], *but to include new topics and to regulate the entire contract for carriage of goods by sea*").

[1361] ZIEGLER, A. V., 2008, supra note 1353, p. 331.

[1362] *See* LANNAN, K., 2009, supra note 1194, p. 295 (noting that, according to their supporters, the Rotterdam Rules are intended "*to do much more than merely expand the existing liability regime*") and CARLSON, M. H., 'U.S. Participation in Private International Law Negotiations: Why the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea Is Important to the United States', 2008, 44 *Texas International Law Journal*, no. 3, p. 270 (arguing that the Rotterdam Rules "*will make the process of transporting goods by sea across international boundaries simpler, more efficient, and less costly*").

constraints.[1363] This ambitious character of the Rotterdam Rules is also responsible for their complexity and length, with some commentators referring to them as *"one of the most complex regulatory bodies ever known."*[1364]

Perhaps one of the most revolutionary elements contained in the Rotterdam Rules is the fact that they are not limited to the sea portion of the carriage. Unlike their predecessors, the Rotterdam Rules introduced a regime for multimodal transport, extending the period of liability of the carrier (under certain circumstances) even to the non-sea legs of the carriage.[1365] Although this is not a completely new development (some courts had already used the Hague-Visby Rules have to govern the liability of the carrier when the sea portion was "*the prevailing route*"), there were plenty of cases where the liability regimes applicable were split depending on the exact portion of the carriage in question.[1366] It was in order to prevent illogical or nonsensical results that one of the most important aims of the Rules was to establish this "*globalized, uniform and modern regime for regulating the rights and obligations of stakeholders in the maritime industry, with a single contract of carriage from door to door."*[1367]

Additionally, the Rotterdam Rules aimed at achieving a larger degree of balance that had previously existed in the regulatory framework of maritime carriage. Fundamental among these changes was the elimination of the exception of liability established for navigational faults;[1368] the extension of the obligation of the carrier to provide a seaworthy ship during the whole voyage, and not only at the beginning;[1369] a significant increase in the package limitation, establishing it at 3 SDR per kilo of cargo; and the extension of the time allowed

---

[1363] CARBONE, S. M. & LA MATTINA, A., *Uniform International Law on the Carriage of Goods by Sea: Recent Trends Toward a Multimodal Perspective*, in Boschiero, N. et al. (eds.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, 2013, p. 826.

[1364] ALCÁNTARA, J. M., supra note 1356, p. 2. *See* also MUKHERJEE, P. K. et al., 2013, supra note 1179, p. 335.

[1365] CARBONE, S. M. & LA MATTINA, A., 2013, supra note 1363, p. 828.

[1366] ibid., p. 828.

[1367] URIBE, M. A. et al., 'Transport Facilitation from the Perspective of the Rotterdam Rules', 2010, 283 *Bulletin FAL*, no. 2, p. 4.

[1368] As we saw in regards to the Hamburg Rules, the navigational fault exception included in the Hague (Visby) Rules had become quite controversial in the second part of the 20th Century. It appeared as an exceptional favour granted to the carriers, seemingly going against the interests of the shippers. Indeed, no similar exception exists since 1955 for any other form of carriage, *"in recognition of the developments in navigational technology."* As such, maintaining this exception represented an anachronistic practice of the maritime industry (ANDERSON, V., 2015, supra note 1355, p. 25).

[1369] Limiting the obligation of the carrier to make the ship seaworthy only *"before and at the beginning of the voyage"* had created a problem that, according to some, placed the shipper in a disadvantageous position. Under the Hague (Visby) regime, a shipper was often left to rely only on the obligation of the carrier to *"properly care for the cargo"* when damages occurred during the voyage, even if these were the result of unseaworthiness that arose *after* the ship started on her voyage. Since the carrier will often be excused under the exceptions to liability included under Article 4(2) of the Hague (Visby) Rules, limiting the seaworthiness obligation to the commencement of the voyage thus placed the shipper *"in a vulnerable position"* (ibid., p. 23).

for filing claims for cargo damage to 2 years, among others. At the same time that they increased the responsibilities of the carrier, however, the Rotterdam Rules also established some new obligations for the shippers, for example in regards to their responsibility for shipping hazardous cargo.[1370] This supposed balance in the duties of both parties has made some supporters argue that even though the Rules are not in effect yet, nothing should stop the parties from simply incorporating them into their agreements.

> *"Whilst local laws may give effect to regimes that predate the Rotterdam Rules, it is hard to see why parties would seek to rely on those older regimes when by private contract they have agreed to another regime, especially when there would be provisions that are beneficial. For shippers and consignees, there are clearly benefits in having higher package limitations, the ability to sue for delay, and an absence of nautical fault being a defence to a carrier. For carriers, the benefits include a clearer responsibility on shippers and certainty insofar as the applicable liability regime is concerned. Further, it may be unlikely that carriers would take advantage of more beneficial limitations in the country in which proceedings take place if they have taken the step of incorporating the less beneficial regime into their contract."*[1371]

Clearly, the Rotterdam Rules are an ambitious project. This is hardly a disputed fact, as even some their drafters have openly referred to them as *"much broader, more detailed and technically ambitious"* than its predecessors.[1372] Ironically, for all of their good intentions, and the enormous efforts involved in their making, the complexity and extension of the Rotterdam Rules might be responsible for their lack of success in obtaining the necessary ratifications.[1373] Indeed, a case has been made that "*the longer and more complex a document the less likely it is that national governments will embrace it."*[1374] Although the size alone of the Rotterdam Rules is impressive (they contain 96 articles, compared to the 16, 17 and 34 and in the Hague, Hague-Visby and Hamburg Rules, respectively), that is hardly their only structural problem.

[1370] KHALID, N. & SUPPIAH, R., 'The Rotterdam Rules: Catalyst for trade or cumbersome convention?', 2010, 37 *Maritime Policy & Management*, no. 4, p. 449.

[1371] HETHERINGTON, S., 2014, supra note 1177, p. 172.

[1372] RECALDE CASTELLS, A., 2015, supra note 1360, p. 50. *See* also PEJOVIĆ, č., 2015, supra note 1358, p. 177 (referring to the approach taken by the Rotterdam Rules as "*ambitious and innovative*") and COLDWELL, R., 2014, supra note 1197, p. 112 (calling the Rotterdam Rules "*more complex than past shipping treaties; a likely product of the law seeking to meet the commercial expectations of the industry*").

[1373] *See* ZHAO, L., 2015, supra note 1232, p. 167 (arguing that the Rotterdam Rules are *"too ambitious"* to regulate multimodal transport, something that would keep them from *"being widely ratified as global, uniform rules"*) and COLDWELL, R., 2014, supra note 1197, p. 112 (stating that, in general, *"greater complexity is likely to discourage States from ratification*").

[1374] GRIGGS, P. J. S., 2003, supra note 1159, p. 203.

> *"More concerning is their dense drafting and complex structure, brimming with references to other precepts in the same text (more than 200), as well as exceptions, and exceptions to exceptions* (the case of Article 13 is significant). *These characteristics complicate the understanding of the Convention, which may lead to an increase in litigation costs and damage legal certainty due to the unpredictability of court decisions."*[1375]

In addition to the above, even if they were to be ratified, the use that the Rotterdam Rules make of new terminology, as well as the fact that they regulate previously unregulated aspects of commerce, will require a significant amount of time to pass before even a modicum of certainty is achieved, as the ramifications of the new rules become clear through practice.[1376] A significant body of court decisions will be essential for this process, as only then will the market learn how the convention can be applied.[1377]

As of this writing, the entry into force of the Rotterdam Rules (whether in the near or distant future) seems, to say the least, unlikely. Although 25 countries signed the convention, only 3 (Togo, Spain and Congo) have ratified it.[1378]

[1375] RECALDE CASTELLS, A., 2015, supra note 1360, p. 50.

[1376] VALDERRAMA, F. A. J., 2012, supra note 1244, p. 131 (noting that although it is a positive thing that the Rotterdam Rules try to reflect the new realities and necessities of maritime transportation, their complexity and extension create problems for their interpretation and application). As BERLINGIERI noted in regards to harmonization and unification,

> *"interpretation is not a process which can be carried out hurriedly: it requires time; it requires that the provisions which need interpretation be tested many times against the reality of the commercial life. Therefore, an interpretation made once and for all by the legislature at the time of the ratification of a convention, when probably very little experience exists in other countries on the practical application of its provisions, and certainly no experience exists in the State in question, is very dangerous. It may lead to results which may adversely affect uniformity."*

BERLINGIERI, F., 'Uniformity in Maritime Law and Implementation of International Conventions', 1987, 18 *Journal of Maritime Law and Commerce*, no. 3, p. 318.

[1377] RECALDE CASTELLS, A., 2015, supra note 1360, p. 67. *See* also COLDWELL, R., 2014, supra note 1197, p. 112 ("*States are cautious of the unknown in circumstances where the exercise of sovereignty over national industry is threatened by international law*").

[1378] HETHERINGTON, S., 2014, supra note 1177, p. 171 (also noting that although some countries are interested in moving towards ratifying the Rotterdam Rules, they are "*awaiting developments in the United States*"). While some countries, like Australia and New Zealand, have expressed their reluctance to even sign the Rotterdam Rules, others, like Germany, the United Kingdom, China and India, have expressed *"their tentative intentions"* towards an eventual signature and ratification (COLDWELL, R., 2014, supra note 1197, p. 112).

10.7 The Current Regulatory Landscape

Albert LILAR, former president of the CMI once said:

> *"The history of maritime law bears the stamp of a constant search for stability and security in the relations between the men who commit themselves and their belongings to the capricious and indomitable sea. Since time immemorial, the postulate which has inspired all the approaches to the problem has implied the establishment of a uniform law."*[1379]

Despite the undisputed importance that uniformity has for those in the maritime trade, the current situation is anything but harmonious. Indeed, as Judge HAIGHT explained, "[a]*lthough there is widespread recognition of the value of international uniformity in* [the] *law governing the carriage of goods by sea, there is little uniformity to be found at the moment*."[1380]

HETHERINGTON offers a good demonstration of the current landscape of confusion and lack of uniformity by reproducing a clause paramount included in a bill of lading for the carriage of cargo from China to Australia:

> *"Clause Paramount*
>
> *(a) The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25h August 1924 as enacted in the country of shipment, shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect to which no such enactments are compulsorily applicable, the terms of the said convention shall apply.*
>
> *(b) Trades where Hague-Visby Rules apply*
>
> *In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968-the Hague-Visby Rules-apply compulsorily, the provisions of the respective legislation shall apply to this bill of lading."*[1381]

As the above clause shows, even without setting foot in a court of law, trade is affected by a lack of unity in regulations. Contracts themselves become even more complex, as they permit the existence of parallel legal regimes governing them, with the carriers always seeking the one that will be the most favorable.

[1379] Quoted in HETHERINGTON, S., 2014, supra note 1177, p. 165.
[1380] Quoted in MCCORMACK, H. M., 1998, supra note 1228, p. 1526.
[1381] HETHERINGTON, S., 2014, supra note 1177, pp. 172–173

There is little doubt that the harmonization of maritime law is not merely a desirable goal, but also a necessity for the trade.[1382] Indeed, those involved in maritime commerce need to know that the law applicable to their business, wherever it is that they trade, will be largely the same.[1383] Harmonization would not only benefit the participants of this market, but also the consumers that, in the end, are the true beneficiaries of the free and constant movement of goods around the world.

> *"Knowing in advance the rules that will apply to determine who is liable and for how much allows parties to make rational, efficient decisions about contract terms and insurance. If there is uniformity, each party involved in a transaction will know at the outset what its liability (or possible recovery) will be if there is a dispute, no matter where the dispute is resolved. Predictability and certainty will reduce transaction costs and minimize litigation. Ultimately, the consumer will benefit from lower prices."*[1384]

The international character that is inherent to this trade can create such enormous difficulties that a single, unified regime appears like a panacea. This might explain why, historically, conventions on maritime matters were among the earliest international agreements.[1385] As a matter of fact, the international carriage of goods by sea might the commercial activity that has received *"the most attention from governments, intergovernmental international organizations and trade organizations."*[1386]

In general, outside of maritime attorneys, nobody benefits, and no greater public interest is served, from a situation in which different regulatory systems are in constant "*battle,*" nor by the proliferation of a plethora of domestic systems internally regulating the trade.[1387] While it is undeniable that the international community, as well as the

---

[1382] CARLSON, M. H., 2008, supra note 1362, p. 270 (arguing that uniformity of the rules is so important, that it "*probably matters more than the substance of those rules*").

[1383] *See* MCCORMACK, H. M., 1998, supra note 1228, p. 1483 ("[s]*hipowners and merchants alike need to know what their rights and obligations are when their ships and goods are in foreign waters. This is made easier if their rights and obligations are the same the whole world over*") and GRIGGS, P. J. S., 2003, supra note 1159, p. 192 ("*those involved in the world of maritime trade need to know that wherever they trade the applicable law will, by and large, be the same*").

[1384] CARLSON, M. H., 2008, supra note 1362, p. 270. *See* also PAULSEN, G. W., 1982, supra note 1188, p. 1066 (arguing that "[i]*nternational* [u]*nification is a natural requirement of the maritime law*," since maritime law often creates complex transactions between participants in different countries, thus giving rise to conflicts between their respective domestic legislations, and which cannot "*be solved by adopting common principles of private international laws*").

[1385] MASON, A., 'Harmonization of Maritime Laws and the Impact of International Law on Australasian Maritime Law', 1999, 14 *Australian and New Zealand Maritime Law Journal*, no. 1, p. 2.

[1386] RODRÍGUEZ FERNÁNDEZ, M., 'La Interpretación e Integración de los Instrumentos de Derecho Comercial Internacional: El Caso de las Reglas de Rotterdam', 2013, 12 *Revista E-mercatoria*, no. 2, p. 151.

[1387] RAMBERG, J., 'Unification of the Law of International Freight Forwarding', 1998, 3 *Uniform Law Review*, no. 1, p. 12. *See* also LIANG, C., 2013, supra note 1239, p. 229 ("[t]*he co-existence of the three conventions, namely the*

participants in the maritime market, would see an enormous benefit in a unified system, the fact remains that, at the moment, such an idea is a utopia, the stuff of dreams.[1388]

> *"Parties affected by the current regime lament the lack of uniformity of the existing rules which they say fail to adequately take into account the modern transport practices including containerization, multimodal transport, and the use of electronic data interchange (EDI). Under the current regime of the carriage of goods by sea, the shippers and carriers do not have the benefit of a binding and balanced universal regime to support the operation of contracts of carriage involving various modes of transport."*[1389]

As we have seen, these are issues that were taken into consideration in the drafting of the Rotterdam Rules, as they aimed to cover the perceived gaps that existed in the regulations.[1390] They were drafted at a time when there was a clear awareness of the fact that the regulatory situation, *"with multiple international regimes and unique regional and national laws competing to govern the carriage of goods by sea,"* was completely unsatisfactory.[1391] Their awareness of the problem, however, has not been enough to help them obtain the necessary support to enter into force. What is more, even if they were to enter into force, unless they are ratified by a large majority of maritime nations, they will only serve as just one more system, one more "standard" that hoped to the be only one.[1392]

Hague, Hague-Visby and Hamburg Rules, obviously adversely affects the mission of international uniformity in this area").

[1388] MATTEUCCI, M., 'The History of Unidroit and the Methods of Unification', 1973, 66 *Law Library Journal*, no. 3, p. 289 (referring to ideas such as a supranational code as "*more utopian than realistic*").

[1389] KHALID, N. & SUPPIAH, R., 2010, supra note 1370, p. 448.

[1390] PEJOVIĆ, č., 2015, supra note 1358, p. 178 ("[the Rotterdam Rules have] *the ambitious goal of restoring the uniformity of the law governing the international carriage of goods by sea*").

[1391] STURLEY, M. F. et al., 2010, supra note 1166, p. 13.

[1392] Without a hint of irony, CARLSON urges the ratification of the Rotterdam Rules stating:

> *"Just about everybody agrees that the world needs a new carriage of goods regime. The two main problems with the current regimes-including the 1924 Hague Rules (in use in the United States and a few other countries), the 1968 Hague-Visby Rules (in use by most of our major trading partners), and the 1978 Hamburg Rules (in force, but rejected by most major maritime and commercial powers)- are that they are outmoded and there are too many of them."*

Although she is right in regards to the current landscape, looking at a situation in which there are too many coexisting legal systems and assume that the solution will be to create a new one is rather naive (CARLSON, M. H., 2008, supra note 1362, p. 270). Furthermore, as of 2016 the Rotterdam Rules have only been ratified by 3 countries (Congo, Spain and Togo). This landscape can hardly leave us hopeful about their entry into force, especially when we consider that, based on Article 94 of the Rotterdam Rules, they will only enter into force until one year after the 20th ratification. As some authors have explained:

> *"The US State Department completed its own consideration of the new Convention in June 2013, but there seems to have been little progress since in the process of Senate approval for ratification by the President. Although various world-wide and European industry bodies are enthusiastic about ratification of the Rotterdam Rules, there appears to be some resistance towards doing so in some European capitals*

Despite the ambitious and admirable goals of unifying the law, the history of the regulations that exist in the maritime field show that unification attempts do not necessarily lead to harmony. Since there are so many different interests at play, the only way in which approval has been obtained has been through compromises that often go against the legal certainty that they allegedly seek to achieve.[1393] The Hamburg Rules are a good example of this since, as we have already mentioned, their language was left deliberately ambiguous in order to give opposing sides the illusion that *their* position was the one being adopted.[1394] This will continue to be the case as long as harmonization efforts follow political agendas instead of commercial necessities.[1395] As one author explained:

> *"Those who strive to achieve a uniform maritime law, nationally and internationally, seek to have the people of the maritime community -shipowners, cargo owners, insurers, lenders, furnishers of supplies, salvors- 'be of one language and of one speech,' so that rights and obligations may be certain and predictable.* [...]
>
> *And progress in achieving uniformity has been made from time to time throughout history. But it seems that whenever the maritime world begins to achieve one legal language, so that the tower of a uniform maritime law starts to arise, some force confounds that language, and scatters the maritime community upon the face of all the earth, so that uniformity, having taken two steps forward, then takes one step back."*[1396]

The interplay of different interests is perhaps one the biggest challenges to unification and, in the case of maritime law, the largest source of conflict. The different participants of the trade want to ensure that whatever regulation enters into force benefits *them*, and places *their* interests at the forefront. As a result, it will often be the case that a given

---

> *and in the European Commission, so that ratification by EU states is uncertain. Without the imprimatur of both the United States and the EU states, it seems unlikely that the requisite 20 ratifications will be obtained."*

AIKENS, R. et al., 2016, supra note 1192, 1.59.

[1393] STEPHAN, P. B., 'The Futility of Unification and Harmonization in International Commercial Law', 1999, 39 *Virginia Journal of International Law*, no. 3, p. 788 ("*International unification instruments display a strong tendency either to compromise legal certainty or to advance the agendas of interest groups*").

[1394] CHANDLER [III], G. F., 1993, supra note 1328, p. 45.

[1395] In his rather damning analysis of the Hamburg Rules, GOLDIE explains that the ambiguities contained in them mean that even if they were *"universally adopted they would be applied in different ways in different countries,"* among other reasons, due to the *"drafting deficiencies"* present in them (GOLDIE, C. W. H., 'Effect of the Hamburg Rules on Shipowners' Liability Insurance', 1993, 24 *Journal of Maritime Law and Commerce*, no. 1, p. 111). Although he also recognizes that different forums will also apply the Hague (Visby) Rules differently, this does not seem to come as a result of drafting deficiencies, but rather of differences in their respective internal rules (ibid., pp. 111–112).

[1396] HAIGHT, C. S., JR., 'Babel Afloat: Some Reflections on Uniformity in Maritime Law', 1997, 28 *Journal of Maritime Law and Commerce*, no. 2, p. 190.

framework will be opposed "*for reasons of expedience and because of the economic interests defended by particular sectors* [and] *not because of any particular legal problems.*"[1397] This makes, of course, the process of harmonization and unification very difficult, if not downright impossible, as it quickly becomes clear that it will be more about placating and balancing political and economic interests than about seeking appropriate legal solutions to existing legal and commercial problems.[1398]

On the topic of the unification of private law, EVANS has stated:

> "[T]*he whole unification process might be likened to an attempt to dismantle the Tower of Babel. If this linguistic analogy may seem far-fetched, it is worth recalling that one of the most eminent commercial law judges in the English High Court, Mr. Justice Hobhouse, has gone on record as referring to the utopian ideals underlying uniformity as a concept and has compared them to those which gave rise to the movement for the adoption of Esperanto as a universal language.*"[1399]

EVANS' position is tough, but accurate. Just like Esperanto failed to gain any significant traction to become a universal language, it seems unlikely that any of the existing conventions, whether those in force or those waiting for ratification, will achieve the universal support that their drafters hoped for. On the contrary, every new set of rules creates a new standard that is then added to a trade already full of possible standards. While the intentions of the drafters of these rules are laudable, it is worth asking whether it is useful to simply add more possible regulatory systems, hoping that new attempts will receive the approval they so desperately need, even in the face of every past failure to achieve that.

To make matters worse, and as much as we might recognize the good intentions behind those seeking uniformity in maritime law, we cannot overlook the fact that such attempts can backfire. The United States represents a good case study of this situation, particularly their failure to ratify the Visby amendments to the Hague Rules. Indeed, as has been well documented, it was the American cargo interests who, for years, opposed the ratification of these amendments, worried that they might delay the ratification of the Hamburg Rules, and which they saw as more beneficial to their interests.[1400] Conversely, the shipowners that had originally opposed the Visby amendments, changed their position

---

[1397] FRESNEDO DE AGUIRRE, C., 2009, supra note 1350, p. 870.

[1398] ZHAO, L., 2015, supra note 1232, p. 170. The supporters of the Rotterdam Rules lauded as "*a compromise between the various interest groups, which actively participated in the drafting process,*" differentiating them from the *"political compromises"* that existed in the Hamburg regime (*See* GROBARČÍKOVÁ, A. & SOSEDOVÁ, J., 'Carrier's liability under the international conventions for the carriage of goods by sea', 2014, 9 *Transport Problems*, no. 3, p. 77). Needless to say that this alleged compromise has not been enough to allow them to enter into force.

[1399] EVANS, M., 'Uniform Law: A Bridge Too Far', 1995, 3 *Tulane Journal of International and Comparative Law*, pp. 146–147.

[1400] MENDELSOHN, A. I., 1992, supra note 5, p. 30.

and supported their ratification once they saw the changes that the Hamburg Rules would bring.[1401] As a result, with other groups opposing both the Visby amendments and the Hamburg Rules, and unable to see any political gain in making a final choice in such a technical field, both the US Government and the US Congress were unwilling to commit to either Visby or Hamburg.[1402] This left the United States in a very complex situation, as

> *"U.S. law now differs from the law in any Hague-Visby country, any Hamburg country, and even any other country that still follows the unamended Hague Rules. Unless something is done, the United States will neither enjoy the benefits of uniform law in this area nor play a role in developing a new internationally uniform regime."*[1403]

This is not merely an anecdote, but a cautionary tale. It highlights the real possibility of new regulatory frameworks threatening the ratification of the ones that already exist. Simply adding more possible rules to the maritime field (or, for that matter, to any other) means that no single regulation will ever become the only one, something that threatens the stated goal of harmonization. Nobody benefits from a system where regulatory uncertainty becomes the norm.[1404]

All of the above problems have lead to a situation in which, without taking into consideration the *lex mercatoria* that also governs part of the trade, what can currently be called the "international regulatory framework" of maritime law is, to say the least, extremely complex. It is, primarily, *"a patchwork of competing and outdated multilateral conventions,"* including the Hague Rules, the Hague-Visby Rules, and the Hamburg Rules, together with *"national and regional alternatives* [that] *now supplement or partially supersede those long-established regimes in some parts of the world."*[1405] Clearly, the landscape is fairly

---

[1401] ibid., pp. 52–53.

[1402] STURLEY, M. F., 'Uniformity in the Law Governing the Carriage of Goods by Sea', 1995, 26 *Journal of Maritime Law and Commerce*, no. 1, p. 569.

[1403] ibid., p. 570. While the regulatory framework in the United States continues to be the same, it should be noted that they did play a very important role, for better or worse, in the development of the Rotterdam Rules.

[1404] Writing in 1999, TETLEY argued that the failure of UNCITRAL (responsible for the Hamburg Rules) and the CMI (responsible for the Hague(Visby) Rules) to update their rules and make them "*compatible with one another*" was directly responsible for the lack of international uniformity affecting the trade (TETLEY, W., 'Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law, The', 1999, 30 *Journal of Maritime Law and Commerce*, no. 4, p. 614).

[1405] YU, X. & LI, T., 2012, supra note 1309, pp. 583–584. *See* also RODRÍGUEZ FERNÁNDEZ, M., 2013, supra note 1386, pp. 153–154 (enumerating some of the co-existing regulatory systems) and TETLEY, W., 1999, supra note 1404, p. 596 (arguing that the failure to reach uniformity or consensus makes *"many shipping nations"* to go off *"on their own"* and to adopt *"non-uniform changes to their national carriage of goods by sea laws"*).

grim, as the international carriage of goods by sea, which was *"at one time among the world's most uniform of all international laws,"* suffers from significant fragmentation.[1406]

This fragmented landscape is made more complex by the ever-present threat of conflict of laws, not only between different States, but also between them and, on the one hand, the international regulation of the trade, and, on the other, the *lex maritima* (often preferred by the merchants, though not by the courts).[1407] In the end, determining what law will apply to a given case might end up being as difficult as predicting the result of a coin toss.

[1406] ibid., p. 596. *See* also YU, X. & LI, T., 2012, supra note 1309, p. 585 (referring to the current situation as *"chaotic"*).
[1407] TETLEY, W., 1998, supra note 1173, p. 322.

Chapter 11
Party Autonomy in Contracts of Affreightment

"After the war I could neither work in a city nor lead the dull life of a businessman. I wanted freedom, open air, adventure. I found it on the sea."

Alain Gerbault.[1408]

11.1 Introduction

The history of the regulation of maritime law shows that, at least from the late part of the 19th century, there has been a certain consensus on the fact that allowing unfettered freedom of contract in this area would be counterproductive. Having learned from the history of the trade, starting with the Harter Act and the Hague Rules, and all the way down to the Rotterdam Rules, regulations have aimed at restricting the freedom of contract enjoyed by the parties to carriage contracts, by means of imposing mandatory minimum levels of liability for the carriers.[1409] The reason behind these restrictions has been to somehow temper the clear imbalance that has traditionally existed between carriers and cargo owners, and which, as we have seen, traditionally worked to the detriment of the latter.[1410]

As MENDELSOHN has explained, *"if there ever was an area wholly and totally lacking in that elusive objective of freedom of choice, not to mention equality of bargaining power, it is the area of ocean bills of lading."*[1411] This situation is the result of an explicit desire on the part of the regulators who, through different rules, have expressly recognized that that the parties to these contracts are often imbalanced in their bargaining power. Indeed, if anything, the

[1408] GERBAULT, A., *The Fight of the Firecrest*, 1926, H.F.G Witherby, p. 231
[1409] ZHAO, L., 'The Limited Scope of Seaborne Cargo Liability Regime: New Political–Economic Environments in the 21st Century', 2016 *Maritime Policy & Management,* pp. 1–2.
[1410] MASON, A., 1999, supra note 1385, p. 3. *See* also YU, X. & LI, T., 2012, supra note 1309, p. 585 ("*the storyline is mainly focused on the debate surrounding the contractual imbalance between carrier and shipper due to the contract of carriage*").
[1411] MENDELSOHN, A. I., 1970, supra note 1126, p. 663.

fact that shippers are often in a much weaker position than the carriers has virtually become a dogma.[1412]

11.2 Bargaining Power and Bills of lading

When a shipper wants to conclude a contract to carry cargo to another port, he will soon find out that the terms that are offered to him are rather one-sided, and that these terms are basically the same across all carriers. If he goes ahead with the agreement, the shipper will then receive a large contract, full of fine-print terms regulating every aspect of the voyage, often excusing the carrier from as many variables as possible, and leaving the shipper to assume most of the losses.

> *"Prominent admiralty lawyers, at the behest of shipowners, spend weeks drafting and revising these multi-paragraphed monsters. They are indeed the work of artists skilled in the arcane and archaic sciences. Shippers, on the other hand, are given absolutely no choice when they seek to ship their goods. If they reject the bill of lading of shipowner X, they will find that shipowner Y's standard form bill is equally microscopic and equally if not more adverse to shippers' interests."*[1413]

In the end, the only real decision that the shipper will be able to make will be whether or not to ship his cargo. Nothing more, nothing less. Several courts have been aware of this problem, as it also manifests itself in other means of carriage. Already in 1873, for example, in a case dealing with railroad transport, the United States Supreme Court had recognized that situations like these were not conducive for freedom of contract, and that, as a result, some degree of regulation was necessary. As the Court stated:

> *"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to haggle, or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business.*[...]
>
> *The business* [of carriage] *is almost concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common*

[1412] Regarding the Harter Act, CRUTCHER notes how it effectively sought to "*limit the freedom of contract which the shipowner and shipper had previously enjoyed*" (CRUTCHER, M. B., 1970, supra note 1231, p. 710).
[1413] MENDELSOHN, A. I., 1970, supra note 1126, p. 663.

> *carriers ought not to be adverse (to say the least) to the dictates of public policy and morality."*[1414]

Recognizing this risky situation, in which only a few providers of a service were able to dictate whatever draconian terms they wished, has been at the core of the regulation of maritime trade, both domestically and internationally. The Hague Rules themselves had been based on the premise that *"carriers have far greater bargaining power than shippers*," and so they were designed precisely *"to protect the interests of the shippers by imposing a minimum level of obligations* [on the carrier]."[1415] As we have seen, similar rationales would later motivate the drafting of the Hamburg Rules and the Rotterdam Rules, both of which attempted to "update" the regulation of the carriage of goods by sea, in the aims of ensuring balance and fairness in the relation between shipowners and carriers, on the one side, and cargo owners, on the other.

Domestic regulations on the carriage of goods by sea have also, largely, taken bargaining power into consideration. In the United States, for example, the Harter Act of 1893, dealing with the liability of carriers, was largely *"aimed at protecting the American industry (at that time mainly shippers) from the English shipping industry."*[1416] Later, a similar reasoning was also behind the adoption of the US COGSA, which implemented the Hague Rules in American Law. Indeed, the US COGSA *"had as its central purpose the avoidance of adhesion contracts, providing protection for the shipper against the inequality in bargaining power"*.[1417] Specifically, its rules regarding limitations of liability were enacted "*to restrain the superior bargaining power wielded by carriers over shippers;* [their] *purpose was to set*

[1414] *Railroad Co. v. Lockwood* [1873], 84 US, 357–384, p. 379.

[1415] VAN DEN BERGH, R., *Regulation and Economics*, 2012, Edward Elgar Publishing Limited, p. 509. *See* also MAGASHI, A. I. & HARUNA, A. L., 2016, supra note 1231, p. 242 (referring to the Hague Rules as aiming to "*abridge the unfettered freedom enjoyed by the shipowners*").

[1416] ZIEGLER, A. V., *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research*, in Centre for Studies and Research in International Law and International Relations (ed.), *Le Droit International des Transports Maritimes 1999,* p. 106. *See* also MAGASHI, A. I. & HARUNA, A. L., 2016, supra note 1231, p. 239 (stating the Harter Act aimed to *"address the unfettered freedom enjoyed by shipwoners*").

[1417] *Standard Electrica, SA v. Hamburg Sudamerikanische* [1967], 375 F. 2d, 943–948, p. 945. BEALE has a different view of this, arguing that the Hague Rules (and, therefore, US COGSA) were *"needed in part because shippers sending small quantities of goods under bill of lading contracts did not find it worthwhile to haggle over the terms of the bill"* (BEALE, H., 'Inequality of Bargaining Power', 1986, 6 *Oxford Journal of Legal Studies*, no. 1, p. 133). His point seems to be that bargaining power disparities in contracts are not necessarily a problem, and that even the fact that certain terms appear all over the market are not a sign of unfairness. He even goes to add that "*if sufficient buyers protest, businesses may find it worthwhile to alter the standard terms to capture their custom-they may offer a 'two tier' service, or (to save administrative cost) simply offer better terms to everyone at a slightly higher price"* (ibid., p. 134). This shows a flawed understanding of the market, particularly in the case of maritime law, where we know for a fact that the pleas of the cargo interests to obtain better terms did not obtain any real changes until regulatory action was taken. This is simply the consequence of a market in which the service in question has no real substitutes, meaning that the shippers cannot simply boycott carriers altogether, since they do need to send their products overseas.

reasonable limitations on liability so as to prohibit carriers from contracting out of liability".[1418] In the words of GILMORE and BLACK, this regulation allowed the parties

> *"a freedom of contracting out of its terms, but only in the direction of increasing the shipowner's liabilities, and never in the direction of diminishing them. This apparent onesidedness is a commonsense recognition of the inequality in bargaining power which both Harter and COGSA were designed to redress, and of the fact that one of the great objectives of both Acts is to prevent the impairment of the value and negotiability of the ocean bill of lading."*[1419]

In general, whenever maritime trade is regulated, the sentiment has been that "*the ocean carrier enjoys greater bargaining power than ocean shipper/cargo owner and as such this inherent bias needs to be off-set in order to protect the latter against the ocean carrier.*"[1420] It is this often enormous difference between the bargaining power of the parties that has motivated the regulation of the trade.

The stark contrast between the power of the carrier and the power of the shipper has traditionally been such, that some go as far as practically seeing the latter as a consumer. Indeed, as SIMON put forward, the US COGSA provisions on package limitation (which were, to an extent, those contained in the Hague Rules), "*could be described as an early consumer protection law*."[1421] While certainly not consumers in the traditional sense, shippers do often find themselves in a similar situation, at least in comparison to the power of the carriers. Like consumers, they are often rather powerless actors who, in a market full of other shippers, must deal with a reduced number of carriers, most of them offering similar pro-carrier terms, on a take-it-or-leave-it basis.

Although the landscape has changed, concerns in regards to the power of the parties continue to be relevant in the drafting of maritime rules. Indeed, even though the level of power held by carriers at the time of the Harter Act or the Hague Rules has certainly decreased, it is still a matter of concern for the regulators. If we look at the Rotterdam Rules, for example, it seems undeniable that the debate surrounding their liability

---

[1418] LEARY, M., 'Say What You Mean and Mean What You Say: Edging Towards a Workable Container Solution', 2003, 28 *Tulane Maritime Law Journal*, no. 1, p. 193.

[1419] Cited in the dissenting opinion of Justice STEVENS in *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer* [1995], 515 US, 528–556, p. 547.

[1420] KHOURY, A. H., 'Of Trucks, Trains & Ships: Relative Liability in Multimodal Shipping', 2015, 14 *Richmond Journal of Global Law and Business*, no. 1, p. 51. *See* also MUKHERJEE, P. K. & BAL, A. B., 'A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective', 2009, 40 *Journal of Maritime Law and Commerce*, no. 4, p. 581 ("[s]*ince the time of the Harter Act the debate on contractual imbalance has revolved around the need to protect cargo interests by certain mandatory minimum liability rules for the carrier*").

[1421] SIMON, S., 1976, supra note 1294, p. 489. Similarly, SWEENEY uses the same language to refer to the Harter Act, calling it "*one of the first consumer protection acts"* (SWEENEY, J. C., 1993, supra note 1265, p. 1).

provisions was shaped by *"the contractual imbalance between carrier and shipper due to the unequal bargaining power."*[1422]

Although, as we have seen, acknowledging the contractual imbalance in bills of lading appears to be part of conventional wisdom, the courts often treat bills of lading as if, by their very nature, they were balanced and fair agreements. This appears to be an example of cognitive dissonance, as we find courts applying norms that were created to address bargaining power disparities, treating those contracts as if no disparities existed.

> *"For all intents and purposes, English law recognises the bill of lading as an agreement that conforms with classical contractual principles on validity and enforceability, without scrutinising the bargaining reality behind such contracts."*[1423]

An example of this cognitive dissonance appears in the 1974 House of Lords case of *Schroeder Publishing v. Macaulay*.[1424] In this case, dealing with bargaining power disparities and boilerplate agreements, Lord DIPLOCK stated:

> *"Standard forms of contracts are of two kinds. The first, of very ancient origin, are those which set out the terms upon which mercantile transactions of common occurrence are to be carried out. Examples are* ***bills of lading****, charterparties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade. Contracts of these kinds affect not only the actual parties to them but also others who may have a commercial interest in the transactions to which they relate, as buyers or sellers, charterers or shipowners, insurers or bankers. If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable."*[1425]

Lord DIPLOCK's comments on bills of lading, made merely in passing, certainly appear strange. This was a case decided in 1978, only 10 years after the drafting of the Hague-Visby rules, a regulation that, as we have seen, raised the minimum liability limits for the carriers, due to the difficult situation of the cargo interests. Perhaps his opinion was

---

[1422] MUKHERJEE, P. K. & BAL, A. B., 2009, supra note 1420, pp. 580–581. *See* also YU, X. & LI, T., 2012, supra note 1309, p. 586 (explaining how the purpose that "*all existing international liability regimes*" have in common "*is to reduce the potential abuse in the context of contracts of adhesions, which is used where parties with unequal bargaining power contract with one another*").

[1423] OLAWOYIN, A. A., 'Forum Selection Disputes under Bills of Lading in Nigeria: A Historical and Contemporary Perspective', 2004, 29 *Tulane Maritime Law Journal*, no. 2, p. 263.

[1424] For details on the case, *See* p. 112.

[1425] *A. Schroeder Music Publishing Co. Ltd. v Macaulay* [1974], p. 1316 (emphasis added).

"tainted" (for lack of a better word) by England's own interest in maintaining a *laissez faire* approach in regards to the liability of the carrier and, therefore, was reluctant to concede that an even playing field did not actually exist in that area.

Stranger still are the comments that Lord DIPLOCK made on how to identify unfair standard form contracts, as he characterized them as those in which

> "[the terms] *have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.*
>
> *To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power."*

The reason why Lord DIPLOCK's comments are so bizarre is that this is precisely the situation in which shippers often found (and continue to find) themselves *vis à vis* the carrier. Indeed, shippers will usually realize that all carriers offer basically the same terms, and that they are in no position to change them. They have to either take the terms as they come, or simply accept that their cargo will never leave the port.

The fact that the parties to a carriage contract are, by and large, commercial in nature, seems to lead many to assume that the resulting bargain must be fair and the result of a thorough bargaining process. As we have seen before, however, the fact that a party is acting in a professional manner does not mean, in any way, shape or form, that she is necessarily on an even playing field with the other.

The above notwithstanding, it is also undeniable that the current state of the market is not the same as what existed in the 19th century. Beyond the technological advances that have benefitted the trade, there have been significant changes in the power dynamics affecting those that participate in it. In a fairly recent article, for example, an author argued that:

> *"The fact is that ship-owners no longer hold strong bargaining power. This is especially the case since the global economic downturn in late 2008 which has caused ship-owners to fight for trade. Shipowners who unscrupulously increase the freight will be sanctioned by industrial mechanism."*[1426]

[1426] SOOKSRIPAISARNKIT, P., 2014, supra note 318, p. 314.

Although this view seems to generalize a situation that continues to be exceptional, since the large majority of individual shippers continue to be much weaker than the majority of individual carriers, its conclusion does have some truth to it.[1427] Certainly, the existence of a much larger number of carriers has brought as a result that no individual carrier will be able to be exceptionally abusive against shippers; put in a different way, what this means is that the market has acted as a homogenizing force in regards to both the terms and the price of these contracts, pushing any exceptionally abusive party out of business. What is more, it is also true that the aftermath of the 2008 economic crisis brought forward significant troubles to carriers, who then found themselves in need of adjusting their prices to become competitive. This economic recession, however, does not necessarily mean that the power of the carriers was diminished as a result. In fact, one of the results of the crisis was an increased concentration of the liner shipping industry in an even smaller number of hands.[1428] With market concentration being one of the root causes of abusive terms, it is easy to see that the result of the economic crisis might not be as "positive" for shippers as we might have been led to believe.

> *"As Kessler suggested, one cause of oppressive contract terms may be market concentration or the presence of monopoly power. If only a few sellers exist each will know, or quickly learn, that its behavior affects the behavior of the other sellers and vice versa. Joint action, arrived at tacitly or expressly, may become desirable as a means of increasing profits beyond the competitive levels. Where market concentration exists one will probably observe 'too high' prices (ones above the competitive price), shoddy or less durable goods, or oppressive contract terms assigning risks to buyers that might be borne by sellers were there less market concentration."*[1429]

Of course, the existence of a highly concentrated market does not, necessarily, mean that there will be rampant abuses.[1430] Concentration, however, does create the kind of opportunity that, as a rule, can lead to abusive practices.

It is true that in the last few decades we have seen the rise of powerful cargo interests. Particularly when it comes to contracts involving large shippers, the power dynamics of

---

[1427] FRESNEDO DE AGUIRRE, C., 2009, supra note 1350, p. 876 ("*the protection*[s] *of small shippers are logical and derive from the fact that they have little or no bargaining power*").

[1428] SAMARAS, I. & PAPADOPOULOU, E. M., *The Global Financial Crisis–the Effects on the Liner Shipping Industry and the Newly Adopted Leading Practices*, in Aidonis, D. et al. (eds.), *Proceedings of the 1st Olympus International Conference on Supply Chains (Olympus ICSC 2010)*, 2010, p. 6 (noting that the 2008 crisis "*has led to the increased concentration in the Liner Shipping Industry. This is evident from the data* [...] *mentioning that the 50% of total capacity in service was provided by 16 ocean carriers in 1995, which were reduced to 11 in 2000, remained 10 in 2003 and finally only 7 in 2008*").

[1429] KORNHAUSER, L. A., 1976, supra note 498, p. 1169.

[1430] BEALE, H., 1986, supra note 1417, p. 131 (noting that, "[e]*mpirical analysis of manufacturers' guarantees has shown no correlation between market concentration and the use of exclusion clauses*").

the contracts of carriage have shifted dramatically. In these cases, the balance of the bargaining power between the carrier and the cargo interest will be on the side of shipper, which *"may result in the cargo interest dictating terms to the carrier."*[1431] Compared to the overall trade, however, these cases remain the exception.

11.3 Volume Contracts: The Rotterdam Approach

11.3.1 Definition and History of the Volume Contracts Exception

Adapting to the new realities of the market, as well as to the varying degrees of power being wielded by its individual players, was one of the priorities of the drafters of the Rotterdam Rules. The United States' delegation, for example, in its endorsement of the provisions on volume contracts, stated that

> *"the existing mandatory regimes were developed for a commercial context that no longer exists, and that they do not meet today's commercial realities. It can no longer be assumed that carriers always have the more powerful bargaining position vis-à-vis shippers; nor can it be assumed that transport contracts are always adhesion contracts, which the shipper must take or leave."*[1432]

The Rotterdam Rules offer an interesting take on the issue of party autonomy, since they explicitly recognize the *lack* of freedom of contract in bills of lading. They do this by expressly establishing, as an exception, the possibility of the parties to actually exercise their freedom of contract and deviate from the mandatory provisions contained therein.[1433] This was a contentious issue in the discussion of the rules, as it dealt with the *"long standing debate over contractual imbalance between carrier and shipper due to unequal bargaining power."*[1434]

[1431] MUKHERJEE, P. K. & BAL, A. B., 2009, supra note 1420, p. 594.

[1432] CARLSON, M. H., 'U.S. Participation in the International Unification of Private Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention', 2006, 31 *Tulane Maritime Law Journal*, no. 2, p. 636. The position presented here by the United States is in line with the traditional recognition that has existed there of the *"uniqueness of individual contracts between shippers and carriers"* (MUKHERJEE, P. K. & BAL, A. B., 2009, supra note 1420, p. 582).

[1433] In his analysis of volume contracts, RAFENOMANJATO seems to agree with the idea that, in general, maritime law does not allow for freedom of contract. He asks "[w]*hat justifies the introduction of provisions allowing freedom of contract, provisions which represent a significant change from the existing sea carriage conventions?"* (RAFENOMANJATO, N. M., 'Volume Contracts Under the Rotterdam Rules: One Step Forward Or Two Steps Backward?', 2013, 19 *Revue Juridique Neptunus*, no. 2, p. 2).

[1434] MUKHERJEE, P. K. & BAL, A. B., 2009, supra note 1420, p. 601.

Like all other maritime conventions to date, the Rotterdam Rules adopt a mandatory minimum of liability, so that the parties cannot agree that the carrier shall be liable for a lesser amount than that established in the convention, aware of the imbalanced power dynamics that exist in these agreements.[1435] These Rules, however, adopted a novel method, applying special rules to so-called "volume contracts," allowing the parties to depart from some of the provisions contained in the Rotterdam Rules, including those related to jurisdiction and minimum liability limits, as long as they fulfill the requirements established therein.[1436]

According to article 1(2) of the Rotterdam Rules, a "volume contract" is:

> *"a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range."*

Despite defining volume contracts in what might appear to be a straightforward and simple way, some see the volume contracts exception as "*the single most inexplicable part"* of the Rotterdam Rules.[1437] In fact, according to some authors, they have *"no antecedents in preceding conventions,"* something that certainly raised concerns among the delegates.[1438] This concerns are demonstrated by the fact that, as has been reported, the definition and effects of volume contracts were some of *"the most debated issues throughout the drafting process"* of the Rotterdam Rules.[1439]

Proponents of this exception argue that these contracts offer important benefits, since in them the "*shippers agree to provide a minimum volume of goods over a designated period of time and the carrier provides rate discounts in return*," so it makes sense to allow the parties,

---

[1435] RAFENOMANJATO, N. M., 2013, supra note 1433, p. 2 (noting that "*the rationale behind the establishment of an imperative regime by The Hague, Hague-Visby and Hamburg Rules lies in the protection of the weaker party, namely the shipper*").

[1436] LIANG, C., 2013, supra note 1239, p. 232. *See* also LANNAN, K., 2009, supra note 1194, p. 307 ("[t]*he volume contract provision recognises that in certain cases, where commercial actors are on a reasonably level playing field in terms of bargaining power, contracting parties should be allowed certain contractual freedoms*").

[1437] JOHANSSON, S. O. & OLAND, B. et al., 2009, 'A Response to the Attempt to Clarify Certain Concerns Over the Rotterdam Rules', <http://www.pysdens.com/v2/material/Rotterdam%20Rules%20Summation.pdf> (last visited 20 March 2016), p. 4.

[1438] YU, X. & LI, T., 2012, supra note 1309, p. 585. Despite these criticisms, BRISCOE argues that volume contracts are not "*new to the shipping industry"* (BRISCOE, J. P., 'The Rotterdam Rules: A Port in the Storm of Liability Limitations and the Fair Opportunity Split', 2011, 9 *Loyola Maritime Law Journal,* p. 91). Although, strictly speaking, this is correct, such a statement might lead us to believe that there is a wide range solutions and regulations referring to these issues. The truth, however, is that besides the Scandinavian region, only the United States possesses a legal framework that even recognizes the concept (HASHMI, S., 'The Rotterdam Rules: A Blessing?', 2011, 10 *Loyola Maritime Law Journal*, no. 2, p. 261).

[1439] YU, X. & LI, T., 2012, supra note 1309, p. 600. *See* also DIAMOND, A., 2009, supra note 1198, p. 485 (stating that the volume contract provision "*has given rise to perhaps more controversy than any other*").

on the basis of this *quid pro quo* to depart from the rules.[1440] It should be noted, however, that the Rotterdam Rules do not mention rate discounts as part of their regulation of volume contracts, nor do all authors consider such discounts as an element that is inherent to them. In other words, and the definition provided by the Rules confirms it, volume contracts are determined by volume of cargo, the number of shipments, and the period of time related to the performance.[1441] Discounts or other benefits given to the shipper are, therefore, not an inherent part of these contracts.

Some might argue that the issue of discounted rates might have been considered so obvious that it did not need to be mentioned in the definition, since an absence of discounts would mean that the shipper would have no real incentive to conclude these agreements. The problem, however, is that since the Rotterdam Rules do not require discounts to qualify a series of shipments as a "volume contract," it is certainly possible that savvy, powerful carriers will simply use this figure as a device to avoid the otherwise mandatory application of the Rules. What is more, as critics have pointed out, a case can be made that discounts being provided for repeated business have always existed, and that this, in and of itself, should not bring as a result that the liability system is changed.

> *"From the most basic standpoint, if one seeks to bring back uniformity to carriage of goods by sea law why allow any such exemption? It is hardly unusual in terms of commercial trade that one should get some kind of a discount in price for volume whether one is trading in apples, electronics or carriage but that does not lead to a change in liability in respect of such contracts. The liability is related to the risks of the adventure, not the amount of business done. Therefore, this is a totally fallacious and unacceptable standpoint."*[1442]

Beyond the definition provided by the Rotterdam Rules, we can also see that discounts are not an inherent part of these contracts under US law, where a figure similar to "volume contracts" exist under the moniker of "service contracts".[1443] Indeed, according to

---

[1440] ZHAO, L., 2015, supra note 1232, p. 163.

[1441] RAFENOMANJATO, N. M., 2013, supra note 1433, p. 2. *See* also BRISCOE, J. P., 2011, supra note 1438, p. 91 ("[v]*olume contracts are merely contracts between shippers and carriers that cover multiple shipments across a period of time*") and YU, X. & LI, T., 2012, supra note 1309, p. 600 ("[a volume] *contract only requires three elements that will make a contract of carriage into a volume contract: (a) the specification of the quantity of cargo (or a range thereof) to be shipped in; (b) more than one shipment throughout; (c) a specified period of time*").

[1442] JOHANSSON, S. O. & OLAND, B. et al., 2009, supra note 1437, pp. 4–5.

[1443] YIMER, G. A., 'Adjudicatory Jurisdiction in International Carriage of Goods by Sea: Would the Rotterdam Rules Settle the Controversy', 2013, 21 *African Journal of International and Comparative Law*, no. 3, p. 483 ("[t]*he concept of a volume contract is used to reflect the concept of a service contract that is a very popular form of carriage of goods contract in the US, constituting about 90 per cent of the liner trade in the country*"). The volume contracts exception owes a lot to the US delegation, which pushed for its inclusion, due to the fact that, under the moniker of "service contracts," volume contracts (or, at least, a similar legal figure) have been part of maritime trade in the United States since the mi-1980's (KHALID, N. & SUPPIAH, R., 2010, supra note 1370, p. 449). *See* also

§ 40102 (20) of the Shipping Act of 1984, the carrier is only expected to "commit" to a given rate:

> *"(20) SERVICE CONTRACT.—The term 'service contract' means a written contract, other than a bill of lading or receipt, between one or more shippers, on the one hand, and an individual ocean common carrier or an agreement between or among ocean common carriers, on the other, in which—*
>
> *(A) the shipper or shippers commit to providing a certain volume or portion of cargo over a fixed time period; and*
>
> *(B) the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features."*[1444]

Under the US definition, we also see the added requirement of the contract being contained in something *"other than a bill of lading or receipt,"* and which aims to exclude the applicability of the US COGSA rules. Indeed, since the US COGSA which, as we have seen, is largely based on the Hague Rules, only governs contracts of carriage evidenced by a bill of lading or similar document of title, if the contract of carriage is evidence by a service contract, then the US COGSA would not apply. This is similar to what happens with volume contracts and the Rotterdam Rules, since they *can* also have the effect of avoiding their application. Indeed, as the relevant part of article 80 of the Rotterdam Rules clearly state that "*as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention*."

HASHMI, S., 2011, supra note 1438, p. 261 (arguing that the US delegation "*was the coercive force at the deliberation of Working Group sessions that prompted to include volume contract in the Convention*").
When it comes to the relation between service and volume contracts, however, it does not seem to be correct so simply treat them as identical. Indeed, although the similarities are numerous, it is not clear that they are the same. As FORCE has noted, equating the two

> *"is not axiomatic, because the term 'volume contract' as used in the Rotterdam Rules is vague and the Rules provide no helpful definition. It is* ***possible*** *that Congress and/or the courts would simply equate 'volume contracts' with 'service contracts' and apply the criteria that must be met to qualify as a 'service contract' to provide a workable definition for the term 'volume contracts.'"*

FORCE, R., 'Regal-Beloit Decision: What, if Anything, Would Happen to the Legal Regime for Multimodal Transport in the United States if it Adopted the Rotterdam Rules, The', 2011, 36 *Tulane Maritime Law Journal,* p. 700 (emphasis added). MUKHERJEE & BAL are more confident on this issue, as they consider the system of volume contracts to be "*much in line with the present liner service agreements or service contracts in vogue in the US trades"* (MUKHERJEE, P. K. et al., 2013, supra note 1179, p. 335).

[1444] As MUKHERJEE & BAL note, this definition is narrower than the one contained in the Rotterdam Rules, since the latter "*does not require the carrier to undertake any 'defined service level' or to commit to a certain rate or rate schedule. Instead, volume contract is defined solely by reference to the undertakings of the shipper to provide a certain quantity of goods for shipment*" (MUKHERJEE, P. K. & BAL, A. B., 2009, supra note 1420, p. 584).

11.3.2 The Effects of the Volume Contracts Exception

The inclusion of special rules for volume contracts in the Rotterdam Rules was one of the most controversial issues during their negotiation. They were seen by some as a provision that *"will benefit the carrier and may leave small shippers vulnerable in light of their minimal bargaining power."*[1445]

It is this departure from the application of the Rules that has motivated many to decry this provision as potentially nefarious. The fear seems to be, and experience might justify it, that, as we have seen, a rule like this will allow shrewd carriers to leave shippers unprotected:

> *"In theory, the* [...] *requirements* [established in the definition of volume contracts] *should give the shipper an opportunity to negotiate a higher freight rate for a higher liability under the Rotterdam Rules. In reality, creative carriers will use contractual forms that arguably comply with the Rotterdam Rules, but without real negotiation. Thus the opting-out is very likely and possible."*[1446]

This situation is not at all improved by the fact that the Rotterdam Rules merely speak of "*a series of shipments,"* without establishing a minimum amount. If anything, the definition seems to distinguish itself precisely by being vague, since it does not elaborate in terms of the duration of the contractual bond between the parties, the number of shipments, or the quantities of cargo being carried.[1447] Proponents of the Rotterdam Rules in general, and of this provision in particular, have argued that the vagueness of the definition is actually a positive thing since, supposedly, requiring a specific number of shipments would increase uncertainty. As LANNAN explains:

> *"It was not possible despite repeated efforts to insert specific numbers into the definition of the volume contract (for example, a minimum number of shipments) in order to protect small shippers, since such specific numbers or amounts would create uncertainty for both the shipper and the carrier in terms of predicting at the outset of a commercial arrangement whether they would eventually fall into the category defined as a volume contract."*[1448]

[1445] ANDERSON, V., 2015, supra note 1355, p. 30. *See* also LANNAN, K., 2009, supra note 1194, p. 307 ("[c]*oncerns were raised in the negotiation of these pro- visions regarding the protection of small shippers, who some thought could be subject to abuse*").

[1446] JOHANSSON, S. O. & OLAND, B. et al., 2009, supra note 1437, p. 5. *See* also MUKHERJEE, P. K. & BAL, A. B., 2009, supra note 1420, p. 600 (stating that, according to its critics, the volume contracts exception *"is detrimental to the interests of small shippers and opens up the possibility of abuse by their carriers*").

[1447] YU, X. & LI, T., 2012, supra note 1309, p. 600

[1448] LANNAN, K., 2009, supra note 1194, p. 307.

LANNAN's logic on this topic is rather hard to follow, since it is not really clear how including, for example, a minimum number of shipments would increase uncertainty for the shipper. On the contrary, it would seem to be that if the Rules had established a minimum of shipments, it would have been possible to, on the one hand, allow parties who are in a long contractual relationship to profit from some of the liberties offered by the volume contracts exception; on the other hand, such specificity would have prevented parties who simply contract for just a couple of shipments to be left unprotected by unknowingly signing up to an adhesive volume contract. This criticism is far from new, as many have pointed out how this lacuna in the definition makes it just too imprecise.[1449] Indeed, it is so vague that

> *"a volume contract could potentially cover almost all kinds of carriage of good by shipping lines falling within the scope of the convention* [...] *this is likely to leave a loophole in the convention that will enable the parties to release themselves from the binding provisions of the instrument, which lends itself to the abuse of rights* [...] *as there is no minimum quantity, period of time or frequency."*[1450]

In his extensive and critical analysis of the Rotterdam Rules, DIAMOND actually sees the lack of specificity of the volume contracts exception as a clever workaround to introduce freedom of contract and unrestricted party autonomy:

> *"Starting with the definition in art. 1.2, to constitute a 'volume contract,' the contract need only provide for the carriage of a specified quantity of goods in a 'series' of shipments during 'an agreed period'. It seems that, if a contract provides for the carriage of a quantity of goods in a 'series' of just two shipments in a year, it will fall within the definition. The term 'volume contract' is thus no more than a cover for an article whose real purpose is to allow a measure of freedom of contract between the carrier and the shipper."*[1451]

BERLINGIERI was similarly critical of this provision. In his view, it represents a risk for the shipper, who is left at the mercy of the carrier, provided he "agreed" to a volume contract.

> *"The need for a protection of the shipper is justified in view of the fact that the definition of volume contract is very wide: there is, in fact, no reference to the quantity of goods but only to a number of shipments, it being necessary that the goods be carried in 'a series of shipments.' Even if it is not certain that the word 'series' may apply when the shipments are only two, this is probably the case. In any event, since no minimum quantity is required, each shipment may consist also of a*

[1449] MUKHERJEE, P. K. & BAL, A. B., 2009, supra note 1420, p. 600. *See* also DIAMOND, A., 2009, supra note 1198, p. 486 ("[i]*t is said that, in principle, the great majority of contracts for the carriage of goods could be framed so as to fall within the definition of 'volume contracts'*").
[1450] YU, X. & LI, T., 2012, supra note 1309, pp. 600–601.
[1451] DIAMOND, A., 2009, supra note 1198, p. 487.

> *very small quantity of goods: for example, one contained. It appears, therefore, that a volume contract may be used also for the carriage of a very small quantity of goods or a very small number of containers, in which event, the negotiating power of the shipper would normally be minimal, even though it is difficult to conceive why a shipper of a small number of container might have an interest to enter into a volume contract."*[1452]

Besides seeing specificity as a risk, LANNAN argues that the Rotterdam Rules protect the shipper from those situations in which a carrier might try to deceive him into a volume contract. Instead of specificity, therefore, *"very strong protections for the shipper were built into the operative volume contract provision itself."*[1453] It is argued, for example, that the shipper will always have an opportunity (as well as a notice of this opportunity) to refuse the derogations imposed by the volume contract exception, and default to the general rules. Indeed, according to Article 80 (2) of the Rotterdam Rules, the contract must:

a. Contain a prominent statement mentioning that it derogates from the general rules.
b. Have been individually negotiated, and prominently specify the sections that include the derogations.
c. Give the shipper an opportunity, as well as notice of that opportunity, to conclude the contract based on the general rules, without any derogation.
d. Not include the derogation by reference to another document, or include it as part of a contract of adhesion that was not subject to negotiation.

The problem is that these protection are not really as strong as LANNAN seems to believe. Notices to terms, as well as opportunities to react to them, mean little to parties with no bargaining power.[1454] If the alternative to a volume contract is simply not to ship the cargo, then it is hard to see how a shipper will be in a position to reject the terms offered by the carrier. What is more, by not having any clarity as to what it means that the provision must have been, *"individually negotiated,"* cargo interests are really left at the mercy of the carrier.

[1452] BERLINGIERI, F., *International Maritime Conventions Volume I: The Carriage of Goods And Passengers by Sea*, 2014, Informa Law from Routledge, Great Britain, p. 251.
[1453] LANNAN, K., 2009, supra note 1194, p. 307.
[1454] *See* section 2.6 supra.

11.3.3 Volume Contracts and Freedom of Contract

As one author noted, through the inclusion of the volume contracts exception,

> *"the UNCITRAL Convention adopts an indirect approach in order to introduce freedom of contract: the mandatory nature of its rules is clearly stated with regard to international maritime contracts but, in parallel, it allows a specific contract - the volume contract - to be entered into, with the parties being free to determine the main features of their agreement and so to deviate from the Convention, subject however to some restrictions and guarantees. This is an absolute innovation.*
>
> *The Convention accordingly includes two different core regimes for international door-to-door and port-to-port carriage including a maritime leg: first, an ordinary regime entirely subject to the mandatory nature of the Convention according to its Article 79 and, second, the volume contract regime that confers upon the parties a high degree of freedom, but with some non-negotiable legal requirements."*[1455]

As we have seen, the proponents of the Rotterdam Rules see this exception as a great success, since it allows similarly-sized players to enjoy a larger amount of freedom in their business.[1456] There is evidence that there were demands for increased flexibility by, at least, sections of the industry, who sought to negotiate lower freight rates in exchange for a lower level of risk for the carrier.[1457] From this standpoint, the volume contracts exception reflects this changing face of the maritime trade, as some carriers are no longer seen as behemoth organizations, while shippers are no longer presumed to be "*economically weaker"* than the carriers.[1458]

[1455] ORTIZ, R. I., 2009, supra note 1358, p. 896. *See* also STURLEY, M. F., *General Principles of Transport Law and the Rotterdam Rules*, in Güner-Özbek, M. D. (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the "Rotterdam Rules"*, 2011, p. 84 (noting that the volume contract provision "*grows out of the recognition in the Hague, Hague-Visby, and Hamburg Rules that some contracts in which the parties are more likely to have equal bargaining power (i.e., charterparties) need not be subject to the regime on a mandatory basis"*).

[1456] KHALID, N. & SUPPIAH, R., 2010, supra note 1370, p. 449. Some commentators do not see the volume contract exception as necessarily enhancing freedom of contract in the trade, seeing them instead as merely a small patch in a convention that otherwise severely restricts them. In fact, they see them as a symptom of a trend where "*freedom of contract is falling*," as a result of which *"the pendulum will not swing back to the interests of the carrier in this sense for years to come*" (LIANG, C., 2013, supra note 1239, p. 234).

[1457] DIAMOND, A., 2009, supra note 1198, p. 485.

[1458] ZHAO, L., 2015, supra note 1232, p. 164. *See* also MUKHERJEE, P. K. & BAL, A. B., 2009, supra note 1420, p. 600 (explaining that one of the arguments in favor of the volume contracts exception is that *"the existing mandatory regimes were developed in a commercial environment that is no longer pertinent, and that they are inadequate to meet present day commercial needs*") and FERNÁNDEZ, A. M., 'La Autonomía de la Voluntad en las Reglas de Rotterdam', 2012 *Revista de Derecho del Transporte: Terrestre, Marítimo, Aéreo y Multimodal*, no. 9, p. 13 (arguing that the volume contracts exception in a way implies *"the acceptance of the thesis that the existing*

Critics, as we have seen, are cautious when it comes to this provision. They do not seem to partake in the celebratory tone demonstrated by some, and are quite skeptical of this supposedly "new dynamic" affecting the power of the parties. What is more, even in the restricted sphere in which the Rotterdam Rules allow for freedom of contract, they see that the landscape is so rife with potential for abuse by powerful shipowners and carriers, that what the volume contracts exception might do is to simply take a step back towards the situation that existed before the Hague Rules were enacted.[1459] There is a real fear that what this provision would actually do is to *"disadvantage smaller or less sophisticated shippers,"* particularly those with less bargaining power than the carriers.[1460] As one commentator noted:

> *"The changed balance of the new Convention now leaves more issues to freedom of contract, a situation that the current Law had tried to move away from. Although some large shippers or break bulk cargo owners may have the bargaining power to negotiate favourable terms, the majority of small and medium sized shippers will be disadvantaged having to accept the terms of the Carriers, probably at an increased risk or cost to themselves. This greater risk of shipping goods, transforms into higher insurance, therefore greater costs of good."*[1461]

As it has often been the case in discussions involving nations from all over the world, this was a topic that was deeply related to the political feelings of each country. In the negotiations that lead to the Rotterdam Rules, for example, the US delegation, who introduced the discussion, proposed an approach that was much more in accordance with free market principles, moving away from some of the protectionism that had been established since the Harter Act.[1462] Other nations, wary of possible abuses by powerful carriers, opposed such a move in general, as well as volume contracts in particular, arguing that it was *"unfair in principle to small shippers."*[1463] The compromise between both positions is the volume contracts exception and its somewhat restricted area of application; an island of party autonomy in a sea of heavily regulated trade.[1464]

---

mandatory regimes answered to a commercial reality that is no longer present, and therefore are not adequate for the current commercial needs").

[1459] MUKHERJEE, P. K. & BAL, A. B., 2009, supra note 1420, p. 600

[1460] DIAMOND, A., 2009, supra note 1198, pp. 485–486

[1461] Cited in ALCÁNTARA GONZÁLEZ, J. M., 'The Rotterdam rules. Prelude or premonition?', 2010, 2 *Cuadernos de Derecho Transnacional*, no. 1, p. 39

[1462] DIAMOND, A., 2009, supra note 1198, p. 486 ("*the US delegation, which drew attention to the fact that much international trade was carried under competitively negotiated liner service contracts and proposed that* […]*it should be possible for the contracting parties expressly to agree to derogate from all or part of the instrument's provisions"*).

[1463] ibid., p. 486.

[1464] As it was noted by Mary Helen CARLSON, US delegate to the discussions on the Rotterdam Rules:

> *"When the United States first proposed to the Working Group that the new convention should allow parties to certain types of contracts to opt out of one or more of the convention's rules, there was strong opposition. There was objection to the whole notion of freedom of contract from countries that take a*

11.4 Should Party Autonomy be Allowed in Maritime Trade?

Maritime contracts are, as we have seen, often the product of imbalanced relationships. This is a situation in which, like in any other imbalanced contract, one of the parties has the power to impose his will on the other.[1465] The very history of the regulation of these contracts makes this imbalance clear, as the reason why regulation became necessary was the fact that carriers were abusing their bargaining position at the expense of the shippers.[1466]

It is the experience of witnessing the abuse of market power on the part of the carriers that has lead to the reluctance (if not downright refusal) on the part of many to allow even a modicum of contractual freedom in this realm. This is why many have opposed the "volume contracts" exception created by the Rotterdam Rules, and which they see as *"reviving the chaotic freedom of contract which necessitated the creation of the Hague Rules in 1924."*[1467] Clearly, some commentators see freedom of contract in this area as a serious threat, to the point of its acceptance being a disaster waiting to happen:

> *"Allowing such freedom on an international basis in the banking sector recently created a worldwide financial crisis. We could end up with the large scale stakeholders gaining such sufficient market power to enable them to hold the international supply chain to ransom. Do we really want to facilitate what happened in the banking world becoming a potential reality in the field of international transport?"*[1468]

> *more regulatory approach to trade issues, as opposed to the free-market approach the United States endorses.* […] *I think we have persuaded the Working Group that if the new convention is to be forward-looking and able to respond to the changing needs of industry, it has to provide, along with a strong framework of generally applicable rules, the flexibility that the commercial parties need to be successful. The Working Group has tentatively agreed to a proposal that would allow 'volume contracts,' under certain conditions that would ensure that the shipper was not taken by surprise, to derogate from all but a few of the convention's rules."*

CARLSON, M. H., 2006, supra note 1432, p. 636.

[1465] FERNÁNDEZ, A. M., 2012, supra note 1458, p. 12 (noting that bill of lading contracts are generally "*of adhesion, and their clauses, which are usually printed in the back of the document, aim to limit or exclude the liability of the carrier, and the shipper is forced to accept them*").

[1466] ibid., p. 12 ("[t]*he relation between carrier and shipper is clearly imbalanced. Any norms that aim to regulate maritime trade must take this into consideration. The origin of the rules on maritime carriage was the need to stop the abuses of the carriers*"). *See* also ALBA, M., *Déjá Vu? Maybe, Maybe Not: The Rotterdam Rules, Maritime Policy and Contract Law*, in Xu, J. (ed.), *Contemporary Marine and Maritime Policy*, 2014, p. 170 ("[t]*he Hague Rules were preceded by a conflict in the international market of sea transportation services* […] *essentially linked to the then existing asymmetries in market power between carriers and users of such services*").

[1467] ALCÁNTARA GONZÁLEZ, J. M. et al., 'Particular Concerns with Regard to the Rotterdam Rules', 2010, 2 *Cuadernos de Derecho Transnacional*, no. 2, p. 12.

[1468] ibid., p. 15.

While such stern warning could be easily dismissed as a dramatic exaggeration, it is important to analyze it carefully. In our view, the risk of allowing unfettered freedom, even in a sphere as restricted as that of volume contracts, is enormous. Its real effect, as we have already argued, will be to allow the parties to avoid the application of mandatory rules altogether, well beyond those cases that the drafters envisioned.

While nobody denies that the market has undergone important changes, and that some shippers do possess the kind of power that only a few decades ago was reserved for carriers and owners only, the fact remains that the majority of shippers do not conform to that description.[1469] Indeed, most shippers are not able to dicker over the terms of their contracts, nor do they possess the kind of market power that they would need to pressure the carriers to modify their business. They have to, therefore, accept whatever terms they are offered. If these shippers were to shop around for better terms (and, as we have seen, even among businesses this would be a tall order) they will find that there are no real alternatives, and that issues such as limitations of liability and jurisdiction clauses are the same all across the board.

While it is true that nobody seems to be suggesting that protections for the shippers should be scrapped altogether, we should also be careful with small loopholes, like those allowed through the volume contracts rule. Even in this small sphere, the opportunities for exploitation are enormous.

By leaving the definition of volume contracts as wide as they did, the drafters of the Rotterdam Rules have, in essence, opened a door that simply cannot be shut. The protections that they supposedly established for the shippers are so minimal and ineffective that, if this Convention was to one day enter into force, it is easy to predict that carriers will soon adapt their practices to consider as many contracts as possible as "volume contracts." While supporters of the Rules see them as a tool that was included to benefit *"sophisticated parties,"* nothing in the Rules actually ensures that only the prepared and sophisticated will be affected by them.[1470] Quite the contrary.

[1469] SPARKA acknowledges that there have been some changes in the makeup of the market, but argues that these changes do not affect the majority of participants:

> *"It has been argued that despite the partly cartelized structure of maritime transport, many shippers today are powerful multinational companies who can meet with carriers at eye level and even dictate the terms of shipment. Nonetheless, at least shippers claim that only overcapacity problems during times of low demand may force carriers to make temporary concessions to some shippers. Whatever the bargaining position of large-scale shippers may be, the majority of shippers consist of businesses too small to dispute any clause with the liner carrier."*

SPARKA, F., 2010, supra note 927, p. 14.

[1470] *See*, for example, BRISCOE, J. P., 2011, supra note 1438, p. 76 (arguing that the Rotterdam Rules "*allow greater freedom for sophisticated parties to contract issues of liability*").

> *"*[O]*ne might have expected that the drafters of the new improved Rotterdam Rules would take advantage of past experience and produce an anti-avoidance provision that was clear, foolproof and up to date. To put it mildly, this has not been done. The new provisions not only retain most of the uncertainties of the old (despite taking up a great deal more paper); they actually add to them, not to mention introducing further classes of restriction on freedom of contract that seem unlikely to benefit either carriers or shippers, but admirably suited to lining the pockets of the lawyers that represent them."*[1471]

The Rotterdam Rules base their protection of "potential volume shippers" on disclaimers and disclosures. They require the contract to, among other requirements, prominently display that it derogates from the Convention, as well notifying the shipper of his opportunity to refuse this. The drafters seem to have hoped that adding these bells and whistles to the agreement, including extra clauses that would provide more information to the shipper, will protect him.

As we have already seen, increasing disclosure of contractual terms, as well as giving the adherent an "opportunity to read" does not increase the readership of the terms, let alone their comprehension. Commercial parties are not free of the biases or psychological shortcomings that affect individual people, and they too will fall prey to extensive contracts that, somewhere in the fine print, let them know that their rights have been dramatically reduced.

> *"Although we know as a fact that not all business entities are in all cases 'sophisticated', especially in regard to the legal implications of the terms they have agreed upon, nevertheless courts treat them as such. Perhaps this conclusion is based on an assumption that business people, even if they do not completely understand the legal implications of the terms of their agreements, have access to counsel who can provide that expertise during negotiations before a contract has become a legally binding instrument."*[1472]

Just like consumers, whose protections are traditionally seen as non-waivable, small merchants (called by some "*merchant/consumers*," due to their evident similarities to consumers) *"do not have a meaningful opportunity to read, understand, or negotiate terms in a seller's standard form."*[1473] Assuming that contractual provisions would be read, and that a

---

[1471] TETTENBORN, A., *Freedom of Contract and the Rotterdam Rules: Framework for Negotiation or One-Size-Fits-All?*, in Thomas, D. R. (ed.), *The Carriage of Goods by Sea Under the Rotterdam Rules*, 2010, pp. 73–74.

[1472] DAVIES, M. & FORCE, R., *Forum Selection Clauses in International Maritime Contracts*, in Davies, M. (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, 2005, p. 1

[1473] WARKENTINE, E. R., 'Article 2 Revisions: An Opportunity to Protect Consumers and Merchant Consumers through Default Provisions', 1996, 30 *John Marshall Law Review*, no. 1, p. 84.

concept as flexible as that of volume contracts in the Rotterdam Rules would not be abused, shows an enviable-yet-unrealistic optimism.

> *"It is submitted that in theory these conditions provide substantial protections for small shippers, however practically they may not be able to prevent abuse of this new system.* [...] [C]*arriers are likely to offer a more commercially attractive contract under the one that derogates from obligations and liabilities in their favour.* [...C]*arriers may reduce prices in order to get shippers to agree to derogations, an option that may be increasingly open to them in the more competitive market that will be created by the introduction of the volume contract exception."*[1474]

What is more, based on the benefits that they would render for carriers, and as some commentators have already noted, it would only be a matter of time before virtually all contracts are treated as if they were volume contracts. Under the guise of liberalism and freedom of contract, shippers would be left unprotected.[1475] In the best-case scenario, shippers will be offered the possibility of either accepting volume contract terms (with the related increase in their insurance costs), or pay a much higher freight in exchange for the normal mandatory liability conditions; in the worst-case scenario, however, the only alternative to volume contract terms will be to simply not ship anything.[1476]

There is no question that trade in the 21st Century is conducted differently from how it was done at the time the Hague Rules were drafted. The improvement of the market position of some shippers, however, should not be used as a springboard towards deregulating the market. What is more, while an argument can be put forward to allow more flexibility, the merits of permitting the waving of otherwise mandatory protective measures are, certainly, up for debate.[1477] Indeed, the carriage of goods by sea is one of the areas where, traditionally, it has been understood that some controls and regulations are

---

[1474] ANDERSON, V., 2015, supra note 1355, p. 31

[1475] ANDERSON is supportive of this result, arguing that "*the concession of practical difficulties for small shippers are necessary to permit a system with improved freedom of contract*" (ibid., p. 31). The problem with this logic is that it places freedom of contract as a desirable goal in and of itself, a sort of "freedom (of contract) for freedom(of contract)'s sake," without apparently recognizing that there are plenty of areas where we have accepted that freedom of contract is not necessarily the best solution.

[1476] FERNÁNDEZ, A. M., 2012, supra note 1458, pp. 13–14

[1477] It is worth noting that the inclusion of the volume contracts exception also serves a more pragmatic function. As some have noted, its inclusion was *"crucial to ensuring the ratification of the Rotterdam Rules, given that it appears that the United States are significantly invested in the introduction of the provision"* (ANDERSON, V., 2015, supra note 1355, p. 31). The problem with this rationale, the veracity of which we do not dispute, is that it shows, once again, a convention reaching an unsatisfactory solution by means of a compromise. Even worse, in the aims of pleasing the United States it might have hurt any real chance of entering into force, by alienating those developing nations that see this provision as too dangerous.

required. The very way in which contracts are concluded in this area creates too many possibilities for abuse, and thus cannot be left unregulated.[1478] As TETTENBORN explained:

> *"Freedom of contract, like spread-betting, is not ideal for everyone. For nearly 100 years no-one has doubted that one area where it has to be controlled is carriage by sea, the reason being the largely correct perception that if it is not then carriers will abuse it."*[1479]

[1478] FERNÁNDEZ, A. M., 2012, supra note 1458, p. 14
[1479] TETTENBORN, A., 2010, supra note 1471, p. 73

Chapter 12
Forum Selection Clauses in Bills of Lading

> "*Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules or the mode of enforcing them.*"
>
> Justice Joseph P. Bradley[1480]

12.1 Introduction

As we have already seen, forum selection clauses are among the most important tools that are at the parties' disposal. They allow them to minimize costs, increase their certainty and, generally, protect their rights in case of a dispute.

Because of the very nature of international transactions, forum selection clauses are particularly relevant in that environment. In the maritime trade, for example, where contracts between parties from different countries, dealing with cargoes from third states, transported aboard ships crossing both international and national waters, the use forum selection clauses is simply essential.[1481] In the words of SPARKA:

> *"Jurisdiction and arbitration clauses are closely connected to maritime transport documents. Maritime trade is inherently international and choice of forum agreements are part of every sea carriage document, and conversely, due to the sheer number of these documents, a large portion of all international choice of forum agreements is rooted in maritime contracts. Therefore, the development of a coherent system for jurisdiction and arbitration clauses in maritime transport documents is an essential element within the larger framework of maritime*

[1480] *The Lottawanna* [1874], 88 US, 558–609, p. 572

[1481] TETLEY, W., *Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea*, in Davies, M. (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, 2005, p. 183 (noting that it is "*of major importance in maritime law, because of the mobility of ships (the usual defendant) and the fact that carriage by sea very often involves more than one jurisdiction*").

> *transport and is seen as the second most important issue behind achieving realistic limits of liability."*[1482]

While the importance of these clauses is hardly up for debate, the way in which they are employed does occasionally raise some concerns. Indeed, even though maritime trade is conducted within a commercial setting, the ability of one of the parties (often the carrier) to impose his will upon the other raises questions as to the convenience and justice of establishing a blanket acceptance of these clauses. What is more, even though the freedom to choose a tribunal to have jurisdiction over substantive disputes in commercial contracts is generally upheld, different rules can apply in a maritime setting.[1483]

12.2 Jurisdiction and the Carriage of Goods

For a practicing lawyer, jurisdiction is one of the most important issues in any litigious matter. Once the forum is determined, the parties are able to predict the costs, inconvenience, and, to a lesser degree, even the outcome of the dispute. In fact, this is so important that once jurisdiction is determined, the parties will often *"settle the case out of court without further litigation."*[1484]

In a field like that of the carriage of goods by sea, an accurate and fast determination of the competent forum is essential since, almost without exception, suits dealing with cargo claims must be brought in a very specific, often extremely short, period of time.[1485] The importance of jurisdiction on this matter is such that, in reality, *"jurisdiction becomes the essential feature of the claim itself,"* so that failure to act adequately can result in the loss of the claimant's ability to secure his rights against the carrier. [1486]

The importance and complexity of jurisdictional issues in maritime claims are also exacerbated by the fact that, as VON ZIEGLER has noted, a contract of carriage,

> *"at least in the civil law system,* [..] *is a contract to the benefit of a third party. The claimant, therefore, is not always the contracting party of the carrier but a mere third party somehow inheriting the rights of suit by way of the contract of carriage, whether related or not to the transfer of any transport document.*

[1482] SPARKA, F., 2010, supra note 927, p. 3.
[1483] BAATZ, Y., *Jurisdiction and Arbritration*, in Thomas, D. R. (ed.), *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2009, pp. 259–260.
[1484] YIMER, G. A., 2013, supra note 1443, p. 468.
[1485] ZIEGLER, A. V., *Jurisdiction and Forum Selection Clauses in a Modern Law on Carriage of Goods by Sea*, in Davies, M. (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, 2005, p. 85.
[1486] ibid., p. 86.

> *Thus, matters are even more complicated since one of the typical features of a maritime transaction is the fact that the consignee might change during the transactions by the on-sale of the goods while at sea. As a result, the ultimate claimant is, technically speaking, an 'unknown third party' at the time of the entering into the basic transaction. The ultimate claimant that sues for breach of contract by the contracting carrier must have a predictable and clear access to the proper court before which it is entitled to bring its claim."*[1487]

Even beyond the issue of protecting the rights of third parties, there is the issue of applicable law, as different forums might apply different rules to a given dispute, drastically affecting the outcome. As we have seen, absolute harmonization of maritime law does not exist, so different conventions, even different versions of the same conventions, apply in different states. What is more, even among those countries where *some* degree of harmonization does exist, as they have adopted the same conventions, different forums can apply them very differently.[1488] *"Even with the best harmonized law,"* writes VON ZIEGLER, *"jurisdiction still may matter, because it may lead to a more favourable or a less favourable place for the case, depending on which side of the dispute the respective party is positioned."*[1489] In the very candid words of STURLEY:

> *"Perhaps in an ideal world the choice of forum would not affect the substantive result, but in the real world of legal practice the choice of forum is often the only issue worth litigating in a case. Once the forum issue is settled, the parties in many cases are able to resolve their dispute without further ado. Thus it is no surprise that the parties to a dispute will vigorously seek to advance their interests by trying to have the dispute resolved in a forum that will be sympathetic, convenient, or otherwise beneficial to their side."*[1490]

Indeed, as some authors have noted, "*the battle about jurisdiction is a surrogate for the battle about liability,"* and this issue, that some might see as merely procedural in nature, ends up having consequences in the substance of the claim.[1491] Because of this great importance of the jurisdictional issue, it is no wonder that the parties seek to ensure, from the very outset, that jurisdictional matters are clearly laid out and pre-determined in their contracts. For all of their good intentions, however, and as we have already noted, the hopes of ensuring predictability often clash with the reality of a still unpredictable jurisdiction.

[1487] ibid., p. 86.
[1488] ibid., pp. 87–88. *See* also YIMER, G. A., 2013, supra note 1443, p. 468 (noting that, beyond determining the applicable law over the case, "*the issue of jurisdiction is important because courts often differ in their interpretation of the uniform conventions*").
[1489] ZIEGLER, A. V., 2005, supra note 1485, p. 88
[1490] STURLEY, M. F., 2009, supra note 1194, pp. 945–946.
[1491] DAVIES, M., 2002, supra note 783, p. 367. *See* also page 299 supra and accompanying footnotes.

12.3 Forum Selection in Maritime Law

12.3.1 Advantages of Forum Selection in a Maritime Context

In contracts for the carriage of goods by sea, forum selection clauses, as well as clauses dealing with the choice of law, are ubiquitous.[1492] The very nature of the international maritime trade shows why jurisdictional matters can be of such great importance for the contractual parties, and why they so desperately try to eliminate uncertainty. While, in principle, any international business will seek to limit uncertainties in regards to the law governing the contract and the courts that will have jurisdiction over any disputes, this desire is particularly strong in the case of maritime trade. Due to the fact that before a vessel has reached her destination and unloaded the cargo, she will most likely have crossed many jurisdictions,

> *"a carrier is often faced with the prospect of being sued in the courts of many different countries. All of these countries apply their own procedural law and their own conflict of laws rules, which may stipulate the application of one or the other law."*[1493]

While it might be reasonable to expect the parties to a contract of carriage to be familiar with some of the legal provisions of the ports of loading and discharge, it would be ridiculous to expect them to draft their agreements taking into consideration *all* the legal systems that might, in one way or another, affect the carriage. The solution to this problem comes in the shape of forum selection clauses which, as we have discussed, can have the benefit of reducing the uncertainties associated with a given transaction. In a context like that of maritime carriage, it seems to be undisputed that forum selection clauses represent a solution to this complex situation.

> *"When parties from different countries enter into an agreement, there may be an inherent ambiguity as to the substantive law to be applied and the appropriate forum for resolving disputes. Choice of law and choice of forum clauses may eliminate this ambiguity so that the parties can know from the outset the rules that will be applied in resolving their disputes and the forum in which those disputes will be heard."*[1494]

Beyond the geographical factors that come into play when it comes to jurisdiction and the carriage of goods, there are several other reasons why forum selection clauses can be

---

[1492] DAVIES, M., 'Forum Selection, Choice of Law and Mandatory Rules', 2011 *Lloyd's Maritime and Commercial Law Quarterly*, no. 2, p. 237.
[1493] SPARKA, F., 2010, supra note 927, p. 6.
[1494] DAVIES, M. & FORCE, R., 2005, supra note 1472, p. 2.

essential for the parties to these contracts. First is the fact that this trade is usually conducted under negotiable bills of lading, documents that can be transferred (often more than once) to third party cargo interests who will, in turn, assume all the rights and obligations contained therein. Second, in certain jurisdictions a vessel can be arrested *in rem* or *in personam*, not only as a way to provide security for the claim, but also to found jurisdiction before courts that would otherwise not be able to hear the dispute. Third, the trade is generally conducted under mandatory rules that provide minimum standards of liability and care, and from which the parties cannot depart.[1495] Fourth, due to the many international factors that play a role in the trade, "forum shopping," seeking the best (or most convenient) jurisdiction to a given claim is par for the course for maritime attorneys.[1496] Fifth, the court before which a dispute is brought can apply different time bars for a given claim, forcing the counsel of the aggrieved party to make very fast decisions in order to protect her client's position.

Forum selection clauses in the maritime this field are often employed as a safety device against uncertainties. They even serve a role when it comes to the applicable law, since the parties can ensure that the forum being selected will be one that will also respect their choice of law. Indeed, *"*[o]*ne of the main objectives of a choice of forum agreement is* [...] *the determination of the applicable law,"* as they, once again, allow the parties to prevent surprises in an inhospitable forum.[1497]

12.3.2 Disadvantages of Forum Selection in a Maritime Context

As we have seen, maritime contracts are shaped by the serious imbalances that are an almost constant part of their anatomy. As a result of the carrier's bargaining position, he will often be able to impose the terms of the carriage contract on the shipper, who will in turn be forced to either accept them or to face the consequences of not being able to ship

---

[1495] *See* Chapter 10 supra.

[1496] SANCHEZ, N. I., *An Historical and Multi-Jurisdictional Study of Jurisdiction Clauses in International Maritime Carriage contracts*, 2011, Cape Town, South Africa, p. 1. According to STURLEY, the practice of forum shopping in maritime trade is not only commonplace but, actually, part of the tasks that a party's legal counsel (both of the shipper and carrier) will engage in as part of their work:

> *"Any party represented by competent counsel will engage in 'forum shopping' when doing so advances its interests, but cargo claimants and carriers have 'shopped' in different ways. Cargo claimants traditionally shop for a forum by deciding where they will bring a claim against a carrier. Carriers traditionally shop for a forum by inserting a choice-of-court agreement in the bill of lading or other transport document that governs a particular shipment. In transactions in which the parties have essentially equal bargaining power, which have included transactions governed by charterparties and volume contracts, the parties have traditionally shopped together, mutually agreeing in advance on a forum that is acceptable to both of them (even if it is a forum that would not otherwise have jurisdiction over the dispute)."*

STURLEY, M. F., 2009, supra note 1194, p. 946.

[1497] SPARKA, F., 2010, supra note 927, p. 7.

his cargo at all. It would be prohibitively expensive for the parties, if not downright impossible, to negotiate every clause of every carriage contract, including the forum clauses, so the terms drafted by the carrier are the ones that end up being used.[1498]

This lack of negotiation of the terms of the bill of lading is, more often than not, the source of the problems associated with forum selection in a maritime context. Just like the terms of the bill of lading, the forum clause will not have been negotiated, but rather merely accepted on a take it or leave basis. The result of this situation is that the shipper will often end up obligated to appear before jurisdictions that are convenient only for the carrier (e.g. his main place of business).[1499]

Due to the benefits that they can report to the carriers, these forum selection clauses are commonplace in the carriage of goods by sea. Because of this, if a party wishes to ship her cargo, she will have to accept that any litigation will have to be conducted wherever the carrier decided. The problem with this is that, in many cases, the mere prospect of litigating in a distant forum might be sufficient to extinguish a claim altogether. This is particularly true in the case of small claims (as might be the case of a cargo claim, already reduced by the package limitation included in the applicable conventions), when the added expenses and inconvenience of litigating abroad can result in the aggrieved party not obtaining any redress whatsoever.

While the above issues are hardly exclusive to maritime trade since, as we have seen, forum selection clauses have become ubiquitous all across the board, certain characteristics do give them a special character. The issue of minimum liability regimes, for example, has led many to look at forum selection clauses as rather dangerous tools, as they can lead to a lowering of the liability of the carrier, be it by design or by default. As we have seen, different regulations have sought to prevent the liability of the carrier being lowered, and so avoiding that this becomes a consequence of forum selection has been an important concern.[1500] Indeed, both on an international as well as a domestic

---

[1498] ibid., pp. 14–15 ("[c]*arriers draft and issue bills of lading or other maritime transport documents and there is hardly a practical possibility of renegotiating the terms of contract in liner trade. Container operations in particular are largely a mass market offering customers very little opportunity to negotiate individual contracts*").

[1499] CORDERO ÁLVARO, C. I., 'La Cláusula Atributiva de Jurisdicción en el Conocimiento de Embarque', 2008, 41 *Anuario Jurídico y Económico Escurialense,* p. 202. *See* also SMART, H., *United Nations Convention on the Carriage of Goods by Sea: 1978 (Hamburg Rules): Explanatory Documentation*, 1989, Commonwealth Secretariat, p. 27 ("[i]*t has been the practice for the parties to stipulate in the bill of lading the place where an action may be instituted which invariably is selected by the carrier thus giving him the advantage to choose a place convenient for him which is usually his place of business without taking into consideration the inconvenience of the cargo owner whose location may be far away*").

[1500] YIANNOPOULOS, A. N., 1957, supra note 1255, p. 620 (arguing that if all maritime forum selection clauses were generally enforceable then "*the carrier would be able to effect a change in the applicable law by selecting a forum, and thus, indirectly, succeed in limiting his liability*" under the mandatory limits).

level, different rules have been enacted seeking to prevent the enforcement of clauses that would lead to an application of a lower liability standard.[1501]

12.3.3 The Significance of the Maritime Forum

In international shipping litigation, it will often be the case that a given action can be brought in more than one jurisdiction. Even if, exceptionally, all the possible jurisdictions apply the same laws, this application can be so different as to change the outcome of the case. Because of this, determining the forum that will hear a case is an essential consideration for any diligent litigant. This importance was better illustrated in a 1933 case, where the US Court of Appeals for the Second Circuit stated that

> *"the choice of court may be more important than many of the express terms of the contract; may indeed be determinative of the outcome."*[1502]

Jurisdictional issues are often a central element of international litigation. Differences in procedural and evidentiary rules can have such a significant impact on a given case, affecting the litigation from beginning to end, that the outcome of a case might end up being determined by those procedural issues, and not by the substantive merits.

> *"Therefore, procedural laws that are applicable notwithstanding the involvement of a foreign element in the case have a considerable impact on the parties' decision where to litigate. The impact of evidence rules on the outcome of the case is not difficult to appreciate, only the different attitudes courts hold towards discovery tells us a lot about its significance for the parties. Furthermore, litigation costs, the possibility of enforcing the judgment and the obligations to employ local lawyers are important elements that affect the parties' choice of forum. In brief, the issue of jurisdiction is important for the parties as it tells them which way the wind of winning the case is blowing and the range of costs involved in the given litigation."*[1503]

What is more, and as we have already mentioned, different forums will often apply laws, even the same "uniform" laws, in different ways. In a field like that of shipping, where the determination of liability is at the forefront of regulatory efforts, failure to secure an amicable jurisdiction can be the difference between a claimant obtaining redress or, effectively, being left hanging out to dry.

This perception is more than a mere guess, as the available evidence on the topic clearly shows how significant jurisdiction can be. In the United States, for example, a survey

---

[1501] SPARKA, F., 2010, supra note 927, p. 12.
[1502] *United States M. & S. Ins. Co. v. A/S Den Norske A. Og A. Line* [1933], 65 F. 2d, 392–394, p. 393.
[1503] YIMER, G. A., 2013, supra note 1443, pp. 468–469.

conducted among *"the counsel of record on each side of every reported post-Sky Reefer case"* by DAVIES and FORCE, shows exactly the consequences that forum selection clauses have in regards to the substantive dispute.[1504] Having asked about the outcome of cases in which a US court had dismissed an action brought in violation of a forum selection clause, they noted how

> *"*[o]*verall, the responses to our survey show overwhelmingly that is unrealistic to assume that the plaintiff's claim will be pursued in the foreign forum if it is dismissed or stayed from the US court. In only four of the 34 cases about which we received responses (or 11.8%) were any steps taken to bring the case before the chosen foreign forum. In one of those four cases, the case was settled 'soon after' proceedings had been instituted in the foreign forum; in another, the claim was held by the foreign forum to be time-barred. Thus, only two of the 34 cases (or 5.9%) proceeded to resolution in the forum designated in the forum selection clause. The large majority of cases (24 out of the 34, or 70.6%) settled or were discontinued after dismissal in the United States, and when there was a settlement, it was almost always settlement at a discount. In half of the cases (17 of the 34 cases, or 50%), we know that no steps were taken to bring the case before the chosen foreign forum* […]*"*[1505]

Although the authors of this survey acknowledge that its statistical significance is dubious at best, it is better than the mere collection of anecdotal evidence that had shaped the discourse so far.[1506] What is more, relying on information provided by counsel that actively participated in the cases, they were able to truly grasp the effects that enforcement of a forum selection clause can have *after* the dismissal can happen, registering whether or not further actions were taken at the contractual forum.

12.4 The Regulation of Maritime Forum Selection

Even before the Hague Rules had been enacted, many were already raising alarm about the risk of allowing jurisdiction clauses in this imbalanced market. As a result, countries that had passed domestic regulations of maritime carriage often took an unfavorable view

---

[1504] On the *Sky Reefer*, *See* page 419 infra.

[1505] DAVIES, M. & FORCE, R., 2005, supra note 1472, p. 11.

[1506] As the authors themselves noted:

> *"We do not suggest that this was a statistically reliable survey. For example, we did not compare the answers we received with a similar cohort of non-maritime cases, nor was it possible to perform a regression analysis on the answers we received. Nevertheless, the survey is a considerable improvement on purely anecdotal evidence that Sky Reefer dismissal or stay often brings the litigation to an end, which is all that has been available before now."*

ibid., p. 8.

of such contractual terms. In the United States, for example, even though the Harter Act did not cover jurisdictional issues, the courts quickly realized that forum selection could be used as a way to avoid the application of the mandatory rules that it contained.[1507] Because of this, courts held that such clauses would be void and of no effect, since allowing vessels to avoid the jurisdiction of the American courts by stipulation would be against public policy.[1508] Other countries did not leave the interpretation of these terms to the courts, and specifically invalidated forum selection clauses in their domestic maritime regulation.

The Australian experience on this issue is quite interesting, as it evidences the motivations behind the reluctance to accepting forum selection clauses. According to section 6 of the Australian Sea-Carriage of Goods Act of 1904:

> *"All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect."*

Even though this Act was based on the Harter Act, it went beyond its constraints and specifically addressed the issue of jurisdiction and forum selection. If we pay attention to the history of this Act, we can clearly see what the intentions of the drafters were. For starters, the Act itself had been approved with the goal of preventing *"ship-owners from escaping liability for their own negligence."*[1509] This being the objective, the drafters were very sensitive to the possibility of contractual stipulations being used to thwart such goal, and sought to ensure that the system established in the Act would be *"absolutely without a loophole."*[1510] Aware of the fact that a forum selection clause could easily lead to a *de facto* lessening of the liability, and also of the costs that could result from enforcing such clauses and force the plaintiff to litigate abroad, the above cited Section 6 was adopted into the final text.[1511]

Of course, Australia, was not alone in its reluctance to accept jurisdiction clauses in bills of lading. Similar provisions can also be found in the pre-Hague laws of Morocco, Canada and New Zealand.[1512] The kind of disunity that existed on this topic, might lead one to

---

[1507] On the lack of jurisdictional rules on the Harter Act, *See* a MILHORN, B. L., 'Vimar Seguros y Reaseguros v. M/V Sky Reefer: Arbitration Clauses in Bills of Lading under the Carriage of Good by Sea Act', 1997, 30 *Cornell International Law Journal*, no. 1, p. 191.
[1508] EVANS, I. L., 1910, supra note 1263, p. 647.
[1509] ALLISON, S., 2014, supra note 1242, p. 640.
[1510] ibid., p. 641.
[1511] ibid., p. 641.
[1512] MILHORN, B. L., 1997, supra note 1507, p. 191.

think that this matter would have been a decisive issue at the negotiating table for a uniform international system. The reality, however, was the opposite.

Even though, as we have seen, forum selection clauses can have a tremendous impact in the ability of the shipper to obtain redress, and despite the desire of the regulators to ensure that damage to the shippers is not left unrepaired, both of these ideas have not always made it into the international rules. Although some regulation was attempted on both the Hamburg Rules and the Rotterdam Rules, the most important conventions on this topic, the Hague (Visby) Rules, contain no such provision.[1513] The result of this lacuna has been the creation of a mishmash of interpretative solutions seeking to determine the validity of such clauses. Clearly, this situation has damaged the goal of uniformity that has informed the regulatory process, as it can lead to an avoidance of the rules by the contract drafters.

12.4.1 The Hague (Visby) Rules

Although in the period leading to the enactment of the Hague Rules there were already some domestic regulations that, like the already mentioned Australian Act of 1904, specifically addressed forum selection clauses, the Rules took a different approach. Indeed, by design, and likely as a result of being the compromise of several commercial interests, the Hague Rules deliberately omitted any regulation on jurisdictional matters (a situation that did not change with any of the revisions that, later, were made to the Hague Rules).[1514] As a matter of fact, during the negotiation of the Hague Rules, the Argentinean delegate proposed settling this issue by recognizing the jurisdiction of the courts in the port of loading. The general response that he received from the conference was that this was a topic that was much too broad to be addressed in the convention, as it went way beyond their scope.[1515] As Louis FRANCK, then-president of the CMI, explained:

> *"I hear that it has been suggested that we should increase the burden of the proposed Convention and of the Rules and include such matters as jurisdiction in it .... It may be an abundant source of litigation, but really it is not business. But surely this is not*

[1513] BUHLER, P. A., 'Forum Selection and Choice of Law Clauses in International Contracts: A United States Viewpoint with Particular Reference to Maritime Contracts and Bills of Lading', 1995, 27 *The University of Miami Inter-American Law Review*, no. 1, p. 16.

[1514] CORDERO ÁLVARO, C. I., 2008, supra note 1499, p. 201 (stating that under Hague-Visby Rules, there are no jurisdictional rules *"based on the party autonomy principle"*). Although when the Visby amendments were being discussed, some argued that there was *"a need to set out a provision on jurisdiction,"* this lead to little discussion, and the CMI Conference refused to recommend any such term (MANKABADY, S., *Comments on the Hamburg Rules*, in Mankabady, S. (ed.), *The Hamburg Rules On The Carriage Of Goods By Sea*, 1978, pp. 98–99).

[1515] Cited in STURLEY, M. F., 2009, supra note 1194, pp. 947–948.

> *a system or a problem which only arises about the negligence clauses and we cannot bring it in here."*[1516]

It cannot be said, therefore, that the Hague Rules "failed" to cover the issue of jurisdiction. On the contrary, this issue was *"specifically considered and dismissed by the drafters."*[1517] Their decision was understandable since, as the Hague Rules were already a difficult compromise seeking to end a fairly anarchic market situation, the delegates were probably confident on the fact that setting out liability rules and principles would be enough.[1518] The issue of forum selection clauses was left, therefore, to be determined based on the applicable national laws.[1519]

In fact, it seems safe to say that, at least at first, the delegates were not wrong, since the application of the Hague Rules was, initially, quite uniform, so jurisdictional issues were not that important.[1520] The consequences of not regulating the issue of jurisdiction only became evident (and painfully so) once this uniformity in their application ceased to exist.

> *"With the great disparity that ensued, in particular relating to the monetary element of the package or per kilo limitation, this situation* [of tranquility] *changed. Increasingly, it became an issue whether the Convention permitted jurisdiction clauses or whether such clauses violated the principles set forth in the Hague Rules, Article 3, r 8, because the carriers were, in fact, avoiding more stringent jurisdictions and escaping to cheaper fora where the applicable law itself and/or the interpretation of the law led to lower compensation or offered other legal or tactical advantages."*[1521]

What this situation made evident was that contract drafters were effectively avoiding the application of the Rules, though this time not through the use of express exoneration clauses. Instead, the method of choice was the selection of a more carrier-friendly law or,

---

[1516] MILHORN, B. L., 1997, supra note 1507, pp. 191–192.
[1517] ibid., p. 192.
[1518] ZIEGLER, A. V., 2005, supra note 1485, p. 89.
[1519] GEHRINGER, A., 2000, supra note 832, p. 675.
[1520] ZIEGLER, A. V., 2005, supra note 1485, p. 89.
[1521] ibid., p. 89. Noting the disparities that exist in the application of the same Rules in different jurisdictions, GOLDIE stated:

> *"When the Hague or Hague Visby Rules are applied, they are interpreted in different ways in different countries; virtually identical facts will produce wide variations in result depending on the jurisdiction, for example, differences in the calculation and application of the package limitation, in the burden of proof and in the type of evidence required to establish the exercise of due diligence to make the ship seaworthy. Moreover, there are a number of jurisdictions in which the Hague or Hague Visby Rules will not be applied because the state is not a party to the Convention and because the local law on the carriage of goods by sea excludes and overrides the application of the Rules when the Rules should be applied by virtue of the terms of the contract of carriage."*

GOLDIE, C. W. H., 1993, supra note 1395, pp. 111–112.

of course, granting exclusive jurisdiction to the courts of a country that would not apply the Rules at all.[1522] What is more, in the Common Law, if no choice of law is present then a forum selection clause will often be construed as a strong indicator that the parties wanted the selected forum to apply its own law.[1523] Through this mechanism, a savvy drafter could avoid the applicability of the Rules altogether.

The absence of jurisdictional norms in the Hague (Visby) Rules had a noticeable effect in their ability to achieve their desired goal of uniformity and certainty. Through the inclusion of *"jurisdiction clauses, forum shopping and the like,"* it was impossible to be certain that a given carriage, even within an area that was otherwise governed by these Rules, would actually be subjected to them.[1524] This was, of course, exacerbated by the fact that courts in different countries had a diverse range of approaches towards forum selection. While they were fully enforced under certain jurisdictions, others set them aside altogether, while others *could* set them aside on a discretionary basis.[1525]

Maritime Forum Selection in the United States

The United States incorporated the Hague Rules into its domestic system as the US COGSA, supplemented by the provisions of the Harter Act. Through the implementation of the US COGSA, the application of the Harter Act was limited to domestic trade, as well as to foreign trade *but* only up to the point where the goods are loaded on the ship, as well as the time between discharge and delivery. Due the problems that could arise as a result of this mixture of systems, it is a common practice for the parties to simply extend the application of the US COGSA to cover both of these periods, as well as to inland and multimodal transport contracts. As a result, the US COGSA will govern virtually *all* shipping operations in the United States, particularly due to the fact that, unlike the Hague Rules which apply to shipments *from* a Hague Rules country, the US COGSA applies to both outbound as well as inbound shipments.[1526]

Although it is not identical to the Hague Rules, the US COGSA maintained most of the original text. In regards to jurisdiction, the American instrument stayed true to the original, and did not include any specific rules regarding the choice of forum. As a result

---

[1522] YIANNOPOULOS, A. N., 1957, supra note 1255, p. 618 (referring to this situation in regards to the US COGSA).
[1523] ASARIOTIS, R., 'Contracts for the Carriage of Goods by Sea and Conflict of Laws: Some Questions regarding the Contracts (Applicable Law) Act 1990', 1995, 26 *Journal of Maritime Law and Commerce,* p. 297.
[1524] SELVIG, E., 'The Hamburg Rules, the Hague Rules and Marine Insurance Practice', 1980, 12 *Journal of Maritime Law and Commerce*, no. 3, p. 320.
[1525] ibid., p. 322. *See* also STURLEY, M. F., 'Proposed Amendments to the Carriage of Goods by Sea Act', 1996 *Houston Journal of International Law*, no. 3, p. 657 ("[t]*he delegates* […] *left the issue to national law. Some nations responded to this situation by enacting an explicit statute to prohibit forum selection clauses in bills of lading; other nations simply left the issue to be determined by general principles. Either course is consistent with the Hague Rules"*).
[1526] SPARKA, F., 2010, supra note 927, p. 24.

of this gap in the regulation, the issue of the validity of these clauses became a paramount concern.

In the absence of a provision that expressly regulated the matter, and without prejudice to the occasional denial of enforcement for other reasons, the debate on forum selection then centered on the interpretation that should be given to US COGSA §3(8) (analogous to the same provision in the Hague Rules), dealing with the minimum mandatory liability. The question was (and continued to be) whether jurisdiction clauses should be seen as *lessening* the liability of the carrier beyond the allowed limits.[1527]

According to STURLEY, there is *"substantial support"* in the legislative history of the US COGSA for the view that it was not the legislator's intention to use the minimum liability limit of section 3(8) to also cover forum selection clauses.[1528] A 1955 decision from the Court of Appeals for the 2nd Circuit confirms this view:

> *"*[T]*his section does not expressly invalidate the jurisdictional agreement contained in the bill of lading here involved. Nor, we hold, may the Act properly be interpreted to invalidate such agreement. It is perhaps worth noting that the present Australian Carriage of Goods by Sea Act does declare provisions of the sort here involved to be null and void. Formerly the Canadian Act did likewise. We think that if Congress had intended to invalidate such agreements, it would have done so in a forthright manner, as was done in the Canadian Act of 1910. The Carriage of Goods by Sea Act contains no express grant of jurisdiction to any particular courts nor any broad provisions of venue* […] *On that account, as indeed in other respects, this case must be distinguished from that. Certainly the clause here involved is not one necessarily 'relieving the carrier or the ship from liability.'"*[1529]

Applying a "reasonableness" test, the Court in *Muller* found that the chosen Swedish forum, despite the added costs that the claimant might have to incur in, did not represent a lessening of the liability of the carrier.[1530] The Court based its finding of

---

[1527] ibid., p. 154.

[1528] STURLEY, M. F., 1996, supra note 1525, p. 657.

[1529] *Wm. H. Muller & Co. v. Swedish American Line Ltd.* [1955], p. 807. The clause in question read

> *"Jurisdiction. Any claim against the carrier arising under this bill of lading shall be decided according to Swedish law, except as provided elsewhere herein, and in the Swedish courts, to the jurisdiction of which the carrier submits himself."*

ibid., p. 807.

[1530] ibid., p. 807. The Court stated:

> *"The appellant, in an effort to bring this case within the phrase* […] *§ 1303(8), argues that if trial is to be had in Sweden it will have to undergo a substantial expense in transporting expert witnesses there to testify as to the market value of the lost cargo. It is urged that such an expense is a 'lessening' of liability within the meaning of the above quoted section of the Act. We note that appellant might reduce this expense by taking deposition of these witnesses, as he appears to have done already. But that aside, we do*

"reasonableness" on the fact that the vessel in question was built in Sweden, had Swedish owners, the majority of the evidence was available in Sweden, and that all of the crew resided in Sweden.[1531]

As we have seen, at the time *Muller* was decided there was a general disapproval of forum selection clauses in American courts.[1532] Because of this, and by the failure of the *Muller* Court to specifically address the general hostility towards these clauses, it did not take long before the courts returned to their otherwise hostile approach to forum selection.[1533] Still, it would take another 12 years before the same Court analyzed forum selection clauses under the light of US COGSA §3(8). This time, however, the result would be the exact opposite.[1534]

In *Indussa Corporation v. SS. Ranborg*, the Court of Appeals for the 2nd Circuit reversed its previous stance in regards to US COGSA §3(8) and its relation to forum selection clauses, finding that the latter actually *did* go against the former.[1535] The Court reached its conclusion by referencing the enormous difficulties that a court would have to endure in order to either *"forecast the result of litigation in a foreign court or attempt other expedients to prevent a lessening of the plaintiff's rights."*[1536] The "reasonableness" test of *Muller*, therefore, might prove to be too complex to be actually useful.

> *"We think that in upholding a clause in a bill of lading making claims for damage to goods shipped to or from the United States triable only in a foreign court, the Muller court leaned too heavily on general principles of contract law and gave insufficient effect to the enactments of Congress governing bills of lading for shipments to or from the United States.* [... Although the US COGSA provisions] *do not speak directly to a clause which simply vests a foreign court with exclusive jurisdiction, giving effect to such a clause is almost as objectionable as enforcing a clause subjecting the bill of lading to foreign law since, despite hortatory efforts, there*

---

not think that such possible expense, which is only incidental to the process of litigation, is enough to bring this jurisdictional agreement within the ban of § 1303(8)."

[1531] ibid., p. 808. *See* also FAHRENBACK, C. C., 'Vimar Seguros y Reaseguros v. M/V Sky Reefer: A Change in Course: COGSA Does Not Invalidate Foreign Arbitration Clauses in Maritime', 1995, 29 *Akron Law Review,* p. 379.

[1532] *See* section 7.1 supra.

[1533] DENNING, S. M., 1970, supra note 1003, p. 29

[1534] *Indussa Corporation v. S.S. Ranborg* [1967], 377 F. 2d, 200–205. Although there were plenty of US COGSA decisions that denied the enforcement of forum selection clauses between *Muller* and *Indussa*, they generally did so by finding that the selected forum was unreasonable (v.gr. *Sociedad Brasileira de Intercambio Comercial e Industrial, Ltda. v. S.S. Punta Del Este* [1955], 135 F. Supp., 394–397), or applying the doctrine of *forum non conveniens* (v.gr. *Carbon Black Export Inc. v. The SS Monrosa* [1958], 254 F. 2d, 297).

[1535] SPARKA, F., 2010, supra note 927, p. 154 (stating that the Court reached the decision that *"Congress did intend to band jurisdiction clauses in bills of lading"*). DENNING, S. M., 1970, supra note 1003, p. 33 (calling *Indussa* the first time in which a "*forum clauses had been avoided by section 3(8) of the US COGSA"*).

[1536] *Indussa Corporation v. S.S. Ranborg* [1967], p. 202.

> *would seem to be no way, save perhaps stipulation by the parties, that would bind the foreign court in its choice of applicable law."*[1537]

The *Indussa* court was clearly concerned about the opportunity that a forum selection clause could give the drafter of the contract to avoid the application of the US COGSA. This is significant, as it echoes some of the same concerns that, later, would inform the move to address jurisdictional issues in both the Hamburg Rules as well as the Rotterdam Rules. The *Indussa* Court argued that through the use of forum selection clauses, the liability of the carrier could actually be lowered, in direct contravention of the US COGSA provisions:

> *"From a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially, particularly when the claim is small. Such a clause puts 'a high hurdle' in the way of enforcing liability* [...] *and thus is an effective means for carriers to secure settlements lower than if cargo could sue in a convenient forum.* [...] *A clause making a claim triable only in a foreign court could almost certainly lessen liability if the law which the court would apply was neither the Carriage of Goods by Sea Act nor the Hague Rules. Even when the foreign court would apply one or the other of these regimes, requiring trial abroad might lessen the carrier's liability since there could be no assurance that it would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court, and § 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability.*
>
> *We think that Congress Meant to invalidate any contractual provision in a bill of lading for a shipment to or from the United States that would prevent cargo able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the substantive rules Congress had prescribed."*[1538]

The Court's ruling in *Indussa* is in line with the criticisms that, by then, had already been leveled against *Muller*. Indeed, many authors saw *Muller* as a completely flawed ruling which eroded the protections of the US COGSA. In their view, several elements of the Act demonstrated a clear zeal on the part of the legislator to prevent the "*abuse of the carrier's bargaining power,"* and which had been ignored in *Muller*.[1539] Especially telling among these elements was the fact that, unlike the Hague Rules, the US COGSA applies to both inbound and outbound shipments, something that, in effect, prevents a carrier from availing himself to less stringent regulations that might apply in any of the other countries that have a relation with the shipment.[1540] From that perspective, enforcing a

---

[1537] ibid., pp. 203–204.
[1538] ibid., p. 203
[1539] Note, 'Enforcement and Effect of the Jurisdiction Clause in Admiralty', 1959, 34 *St. John*, no. 1, p. 76
[1540] ibid., p. 76

forum selection clause would clearly go against the spirit of the US COGSA, by effectively allowing shipments that come *from* or *to* the United States, to be left outside of the scope of application of the Act.[1541] As the critics of *Muller* argued, the US COGSA *"makes no exception based upon reasonableness or availability of evidence,"* the basis of the *Muller* decision, *"nor is its applicability made subject to defeat by contractual agreement."*[1542]

The importance of the precedent set by *Indussa* was enormous.[1543] The Court took a very strict stance in regards to forum selection clauses, voiding any such clause in a bill of lading ruled by the US COGSA. Consequently, there was no space for the courts to look at the facts of each case and ponder whether the clause was reasonable or not, or whether it was the result of an unconscionable clause.[1544]

In spite of some scathing criticisms in the legal literature, the *Indussa* decision became the law of the land for almost the next 3 decades.[1545] A key criticism was that, in its interpretation of US COGSA, the *Indussa* Court had ignored the way in which the analogous provisions of the Hague Rules had been applied or implemented in other jurisdictions. In Australia and Canada, for example, the domestic implementation of the Hague Rules had included specific provisions *denying* the enforceability of forum selection clauses, which would imply that, unless such a provision existed, forum clauses should be allowed.[1546] In England, the minimum liability rule of the Hague Rules had been uniformly interpreted as not being *"sufficient to avoid choice of forum clauses."*[1547] By not paying attention to this comparative developments, the *Indussa* decision might have demonstrated a certain degree of nationalism that did not exist in other nations' approach to this issue.

[1541] ibid., pp. 76–77.

[1542] ibid., pp. 76–77.

[1543] DAVIS, C. M., 'Sky Reefer: Foreign Arbitration & Litigation under COGSA', 1995, 8 *University of San Francisco Maritime Law Journal*, no. 1, p. 75 (calling *Indussa* "*the leading case for the proposition that choice of forum clauses in ocean bills of lading impermissibly lessen a carriers liabilities in violation of COGSA*").

[1544] DENNING, S. M., 1970, supra note 1003, p. 33.

[1545] SPARKA, F., 2010, supra note 927, p. 154.

[1546] The Australian Sea Carriage of Goods Act of 1924, for example, established in section 9:

> *(1.) All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.*
>
> *(2.) Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect."*

A similar provision appeared in section 5 of the Canadian Water Carriage of Goods Act of 1936.

[1547] DENNING, S. M., 1970, supra note 1003, p. 33.

Since the denial of the efficacy of the forum selection clauses came as a result of them being seen as lowering the liability of the carrier, a major criticism against *Indussa* was that it did not seem to distinguish between "legitimate" and "illegitimate" forum selection. Although there were indeed times in which a carrier might seek to simply damage the shipper by selecting a given forum, critics argued that the *Indussa* decision had erred by assuming that all forum clauses, no matter the facts of the case, would fall under that category.[1548]

Some of these criticisms, and which would later serve as the basis for the change in the case law, appear in the *Indussa* decision itself. It was there that, in his dissenting opinion, Judge MOORE planted the seeds of what would, 28 years later, change the law:

> *"*[I]*f Congress had really intended to outlaw every agreement in a bill of lading as to choice of forum for litigation, understandingly and voluntarily entered into, it could, and undoubtedly would, have easily drafted such a clause. The forbidding of a clause 'lessening' liability in COGSA is scarcely the equivalent of a rejection of the rights of the parties to agree upon a forum. I find it singularly inappropriate for our courts to say, in effect, that the courts of all other nations are so unable to dispense justice that, as a matter of public policy, we must protect our citizens by outlawing any other tribunal than our own."*[1549]

The change came about in 1995 in the *M/V Sky Reefer* case.[1550] Even though by then the *Indussa* rule continued to be "good law" in regards to bills of lading, the legal landscape had changed significantly since the days of *Indussa*. For starters, the judicial jingoism that had affected US courts for decades was in retreat. In fact, what once had been a long-standing opposition to forum selection clauses, by 1995 was mostly relegated to legal history books. The Supreme Court had already recognized the presumptive validity of forum selection clauses in international commercial contracts in *The Bremen*, and then expanded its application with the *Carnival Cruise* decision.[1551] Forum clauses in bills of lading governed by the US COGSA, despite the changes in the law, remained a special

---

[1548] ibid., p. 37.

[1549] *Indussa Corporation v. S.S. Ranborg* [1967], p. 204.

[1550] *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer* [1995], 515 US, 528–556.

[1551] JARVIS, R. M., 'Sending Disputes Overseas: Does a Foreign-Forum Arbitration Clause Violate the Carriage of Goods by Sea Act?', 1995 *Preview of United States Supreme Court Cases*, no. 6, pp. 269–270. *See* also TETLEY, W., 2005, supra note 1481, p. 208 (stating that both "*Bremen and Carnival Cruise paved the way*" for the *Sky Reefer* decision"). It is worth noting that although *Carnival Cruise* dealt with a passenger contract, it has had a tremendous effect in commercial contracts as well, having dealt with a contract adhesion. Influenced by it, Courts have understood that if the clause is the result of an arm's-length deal between sophisticated parties, it is irrelevant whether or not the clause was the result of an *actual* negotiation (DAVIES, M. & FORCE, R., 2005, supra note 1472, p. 6).

case, a remained of a time when the courts were more protective of their own jurisdiction.[1552]

The Sky Reefer dealt with a claim for the damages affecting a cargo of oranges being transported from Morocco to the United States. The importer ("Bacchus") and his insurer ("Vimar") filed a lawsuit in a federal district court, seeking to be compensated for the damages suffered by the cargo. The defendant sought to obtain a stay of proceedings, in an attempt to enforce an arbitration clause that submitted all disputes to an arbitral tribunal in Tokyo, Japan. Both the District Court as well as the Court of Appeals for the First Circuit sided with the defendants. Vimar filed a petition for certiorari with the Supreme Court, which was granted.[1553]

In a decision that most commentators argued overruled *Indussa* and declared that jurisdiction agreements contained in a bill of lading are to be presumed valid, the Supreme Court sided with the defendants.[1554] In its ruling, the Supreme Court addressed the claim put forward by the plaintiffs that enforcing the jurisdiction clause would represent a violation of US COGSA 3(8), making a clear separation between the liability of a party on the one hand, and the costs and troubles that might be associated with pursuing it, on the other. In the words of Justice KENNEDY, who wrote the majority opinion:

> *"The liability that may not be lessened is 'liability for loss or damage … arising from negligence, fault, or failure in the duties and obligations provided in this section.' The statute thus addresses the lessening of the specific liability imposed by the Act, without addressing the separate question of the means and costs of enforcing that liability. The difference is that between explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated.*
>
> […]
>
> *Nothing in this section* […] *suggests that the statute prevents the parties from agreeing to enforce these obligations in a particular forum. By its terms, it establishes certain duties and obligations, separate and apart from the mechanisms for their enforcement."*[1555]

[1552] STURLEY, M. F., 'Overruling Sky Reefer in the International Arena: A Preliminary Assessment of Forum Selection and Arbitration Clauses in the New UNCITRAL Transport Law Convention', 2006, 37 *Journal of Maritime Law and Commerce*, no. 1, p. 2.
[1553] JARVIS, R. M., 1995, supra note 1551, pp. 268–269.
[1554] SPARKA, F., 2010, supra note 927, p. 155.
[1555] *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer* [1995], pp. 542–543

Put in another way, the view of the Supreme Court in *Sky Reefer* was that the important issue is that the carrier will not be subjected to a lower liability *by the selected forum*. In other words, the costs that the claimant might have to assume in his attempt to pursue the claim, are of little relevance. What matters is that once the parties are before the tribunal in question, the liability bar is not lowered beyond what the US COGSA establishes. Whether or not the claimant can effectively get to that tribunal is, apparently, not so important.[1556] As DAVIS notes, the problem here is that the Supreme Court might have shown quite a bit of tone deafness, presenting itself oblivious to the difficulties that are associated with many of these cases.

> *"*[I]*n litigation of relatively small cargo claims in foreign fora, there is a large gulf between theory and practice. This gulf manifests itself in two ways. First, although there exists a right, there may be no way to vindicate that right in all but relatively large claims. Second, under COGSA, Congress granted protection to shippers and consignees of cargo against adhesionary provisions in bills of lading exculpating the carriers from liability. However, the SKY REEFER decision allows carriers, by adhesionary provisions in bills of lading, to prevent cargo interests from practically enforcing the rights granted by Congress."*[1557]

Even though, strictly speaking, a forum selection clause was not before the Supreme Court in *Sky Reefer*, since the case dealt with an arbitration, the Court made sure to address forum selection anyway. It did so in two steps; first, the Court argued that arbitration clauses are *"but a subset of foreign forum selection clauses in general;"* then, the Court reasoned that since *Indussa* had also been applied to arbitration clauses (and that such an *"extension would be quite defensible"*), the principles laid out in *Sky Reefer* could also be applied, *mutatis mutandis*, to forum selection clauses.[1558]

To put it mildly, *Sky Reefer* changed the face of the American legal system in regards to bills of lading. Virtually *"every federal court"* that has analyzed similar cases has reasoned that it either overruled *Indussa,* or that, at the very least, diminished its authority so much that the case became, for all intents and purposes, irrelevant.[1559]

The effect of the *Sky Reefer* decision, the blanket acceptance of forum selection clauses in bills of lading, was just what the *Indussa* Court had wanted to prevent. What this ruling

---

[1556] DAVIS, C. M., 1995, supra note 1543, p. 78.
[1557] ibid., p. 79.
[1558] *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer* [1995], p. 542. This was not the first time the Supreme Court argued that arbitration clauses are a species of forum selection clauses, as the Court had already the same idea in *Scherk v. Alberto-Culver Co.* [1974], p. 519 ("[a]*n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of* [the] *suit but also the procedure to be used in resolving the dispute"*). Subsequent cases have not hesitated to apply *Sky Reefer* to forum selection clauses, and not only to arbitration clauses (GEHRINGER, A., 2000, supra note 832, pp. 656–657).
[1559] DAVIES, M. & FORCE, R., 2005, supra note 1472, pp. 5–6.

created was a means for carriers to either avoid liability altogether or, at least, to be able to settle claims for less than what they would have had to pay had the proceedings been conducted in the United States.[1560] It is no surprise, therefore, that since the decision was announced *"various segments of the US maritime industry"* have, unsuccessfully, tried to overturn it.[1561]

Although under US law a party could prevent the enforcement of a jurisdiction clause if she could prove that it would lead to the application of a foreign law that lowers the liability beyond the US COGSA limits, the burden of proof established by *Sky Reefer* is quite high. The mere allegation that the foreign law *"may reduce the carrier's liability is not sufficient,"* so the resisting party will have to prove beyond any doubt that the law of the forum would be damaging.[1562] There must be *"proof positive,"* not simple speculation, that the foreign forum, applying its own law, *"will in fact lessen the carrier's liability beyond the COGSA threshold."*[1563]

This is further complicated by the fact that the US COGSA has a rather low package limitation, as the United States has not adopted the Visby Amendments. Because of this, a court might limit its analysis to *that* number, without paying due attention to the other parts of the American legislation that might benefit the claimant, and which are harder to calculate in monetary terms.[1564]

Forum Selection in England

The draft convention that would later become the Hague Rules was given statutory effect in England through the Carriage of Goods by Sea Act of 1924 ("UK COGSA24"). Although the draft convention would eventually be ratified after some more amendments, these were not incorporated into this Act.[1565] Later, in 1971, after the adoption of the Visby Protocol to the Hague Rules, Parliament passed the Carriage of Goods by Sea Act of 1917 ("UK COGSA71"), repealing the 1924 Act, and incorporating the Hague-Visby Rules into the English legislation.[1566]

[1560] DAVIES, M., 2011, supra note 1492, p. 247.
[1561] STURLEY, M. F., 2006, supra note 1552, p. 3. But *See* also JIN LEE, S. S., 'Is Sky Reefer in Jeopardy: The MLA's Proposed Changes to Maritime Foreign Arbitration Clauses', 1997, 72 *Washington Law Review*, no. 2, p. 653 (stating that *Sky Reefer* "*finally harmonized U.S. law regarding arbitration clauses with that of the rest of the international community*," so that moving away from it "*would simply perpetuate a medieval approach to arbitration clauses that has finally been provided an opportunity to change*").
[1562] SPARKA, F., 2010, supra note 927, p. 155.
[1563] TETLEY, W., 2005, supra note 1481, p. 217.
[1564] SPARKA, F., 2010, supra note 927, p. 156.
[1565] DOCKRAY, M. & THOMAS, K. R., *Cases and Materials on the Carriage of Goods by Sea*, 2004, Cavendish, p. 151.
[1566] ibid., p. 151.

While the United States and England took a similar approach in regards to the Hague Rules, incorporating them into their legislation as a domestic Act, the similarities end there. We must keep in mind that while the United States, before the Hague Rules, represented cargo interests that had felt abused by English shipwoners, and thus sought a more protectionist approach towards regulation, England looked at this issue from a completely opposite standpoint. In fact, England had only legislated this issue due to the mounting pressure that could be observed coming from countries that were adopting provisions similar to those enacted in the American Harter Act, including several British Dominions.[1567]

The less protectionist approach that was present in England is also evident in the English rules on forum selection clauses which, as we have seen in previous chapters, were much more liberal than those in the United States.[1568] This liberal approach towards forum selection also extended to those present in bills of lading, the validity of which was presumed *prima facie,* except in very special circumstances.[1569]

English Courts first analyzed the validity of these clauses in 1927, in the Court of Appeal case of *Maharani Woollen Mills Co. v. Anchor Line*.[1570] The case involved a shipment from Liverpool, England, to Bombay, India, under a bill of lading containing a forum selection clause stating that *"all claims arising* [from or in connection to this contract] *shall be determined at the port of destination according to British laws."*[1571]

Since the claim was brought in England, the defendants sought to stay the proceedings on the basis of the choice of forum clause. The plaintiffs argued that the clause was invalid on the basis of Article 3(8) of the UK COGSA24, as it placed the shipowner *"in a much more favourable position than the cargo owner*."[1572] The stay was granted by the trial court, and so the plaintiffs filed an appeal, which was dismissed.

In dismissing the appeal, SCRUTTON L.J. specifically referred to the claim that a forum selection clause would lower the liability of the carrier. He was skeptical of the claim that a procedural issue such as this could be interpreted as affecting the substance of the claim. As he stated:

> "[T]*he liability of the carrier appears to me to remain exactly the same under the* [forum selection] *clause. The only difference is a question of procedure-where shall the law be enforced? -and I do not read any clause as to procedure as lessening*

[1567] FRANCK, L., 'A New Law for the Seas - An Instance of International Legislation', 1926, 42 *Law Quarterly Review*, no. 1, p. 30.
[1568] *See* Chapters 7 and 8.
[1569] DENNING, S. M., 1970, supra note 1003, p. 38.
[1570] *Maharani Wool Mills Co v. Anchor Line* [1927-1928], 29 Lloyd's Law Reports, 169.
[1571] ibid., p. 169.
[1572] ibid., p. 169.

> *liability. For these reasons seeing no difficulty in the reading of the clause, and seeing that the cargo-owners have agreed that all claims shall be determined at the place of destination, it seems to be a reasonable thing to hold them to their contract and have the case decided at the place where all the witnesses are, and where the plaintiffs themselves live."*[1573]

Maharani was a very significant case since, not only did it specifically address the question of whether a forum selection clause would go against the protections of the Hague Rules, but also did so in a case where enforcing the clause effectively deprived the plaintiffs of any remedy. The plaintiffs had only brought the action in England because they would not have had enough time to do so in India before the 1-year time bar had elapsed, something that the Court was well aware of, and still decided to rule against them.[1574]

Although decided under the UK COGSA24, *Maharani* applied just the same in regards to cases ruled by the UK COGSA71. This certainly makes sense, as the Hague-Visby Rules did not depart from the Hague Rules in regards to jurisdiction or its rules on lowering liability, so that an interpretative change was not needed by the mere adoption of the new rules. English Courts have, therefore, maintained themselves steadfast in their preference to enforce forum clauses present in bills of lading.

While it is true that the English position is not absolute, as an English court can exercise its discretion to deny the enforcement of a jurisdiction clause, the exercise of such discretion is rarely granted.[1575] In the case of forum clauses present in bills of lading governed by the UK COGSA, for example, the courts will, in principle, deny the enforcement of a clause that would lead to the application of a foreign law establishing a lower minimum liability standard than the Hague-Visby Rules.[1576] Despite this being a sort of escape valve to prevent the enforcement of forum clauses, and just as it happens in the United States in the post-*Sky Reefer* era, the burden laid on the petitioner is very high. Not only does he need to prove that the foreign law would be less favorable than English law, but also that the result of the application of that foreign law would be prohibited by UK COGSA71.[1577]

[1573] ibid., p. 169.

[1574] ibid., p. 169. *See* also STURLEY, M. F., 'International Uniform Laws in National Courts: The Influence of Domestic Laws in Conflicts of Interpretation', 1986, 27 *Virginia Journal of International Law*, no. 4, p. 784 (stating that the court "*affirmed the dismissal of the action, effectively denying the plaintiff any remedy*").

[1575] *See* Section 8.5 supra.

[1576] ibid., p. 785. *See* also SPARKA, F., 2010, supra note 927, p. 158 (arguing that this refusal to enforce the clause "*can be characterized as an application of the public policy doctrine and, more precisely, the application of a mandatory rule constituting a specific embodiment of public policy*). On public policy and mandatory rules in regards to the enforcement of forum selection clauses under English law, *See* section 8.4.2 supra.

[1577] ibid., p. 158.

In *The Hollandia*, Article 3(8) of the UK COGSA71 was applied to refuse the enforcement of a forum selection clause that would have submitted the dispute to Dutch Courts, under Dutch law. Had the clause been enforced, the liability limitation would have gone from approximately £11,500 in England (applying the Hague-Visby limits) to §250 in The Netherlands (applying the Hague limits).[1578] Delivering the ruling, Lord DIPLOCK explained the way in which the liability provision of the Hague-Visby Rules should be read and understood:

> *"The only sensible meaning to be given to the description of provisions in contracts of carriage which are rendered 'null and void and of no effect' by this rule is one which would embrace every provision in a contract of carriage which, if it were applied, would have the effect of lessening the carrier's liability otherwise than as provided in the Rules. To ascribe to it the narrow meaning* [...that jurisdiction clauses, being procedural, fall outside of its scope] *would leave it open to any shipowner to evade the provisions* [...] *by the simple device of inserting in his bills of lading* [...] *a clause in standard form providing as the exclusive forum for resolution of disputes what might aptly be described as a court of convenience, viz., one situated in a country which did not apply the Hague-Visby Rules or, for that matter, a country whose law recognised an unfettered right in a shipowner by the terms of the bill of lading to relieve himself from all liability for loss or damage to the goods caused by his own negligence, fault or breach of contract."*[1579]

Although *The Hollandia* might create the impression that it seeks to override forum selection clauses with Article 3(8), this is not accurate. The decision itself confirms that there is a presumptive validity of these clauses, limiting the overriding effect of Article 3(8) to those cases in which, as we said before, the possible outcome of the dispute in the chosen forum will lead to a result that violates the provisions of the Hague-Visby Rules.[1580]

The narrowness of *The Hollandia* is demonstrated by the way in which subsequent decisions have interpreted it. In *The Benarty*, for example, a stay was granted due to the existence of a forum selection clause designating Indonesia, even though Indonesia applied the Hague Rules. Since in this case the charterer had waived his right to rely on the package limitations of the Hague Rules, accepting instead the Hague-Visby limitations, the Court did not find that the choice represented a violation of Article 3(8). This decision was reached in spite of the fact that even though the charterer would be held accountable based on the liability limitations of the Hague-Visby Rules, he still

---

[1578] STURLEY, M. F., 1986, supra note 1574, p. 785.
[1579] *The Hollandia* [1983], pp. 574–575.
[1580] ÖZDEL, M., 'Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?', 2016, 33 *Journal of International Arbitration*, no. 2, p. 165. In a more recent case, the

retained his right to rely on the Indonesian rules on tonnage limitations, and which allowed him to obtain a significant benefit from litigating in that forum. Since Article 3(8) only prohibits a lessening of liability *"otherwise than as provided,"* however, and that tonnage limitations are allowed under Article 8, the Court saw no problem in staying the English action.[1581]

Just as it happened in *Maharani*, the plaintiff's ability to obtain redress in the chosen forum was severely limited (or downright eliminated) by the enforcement of the jurisdiction clause in *The Benarty*.[1582] Although its reputation as an inherently carrier-friendly jurisdiction might be somehow exaggerated, since exceptions to the enforcement of forum clauses do exist, it is clear that, by and large, English courts do tend to take a rather favorable approach towards such contractual terms.[1583]

Are the Hague (Visby) Rules Opposed to Forum Selection?

Before analyzing the question of whether the Hague (Visby) Rules do allow for forum selection clauses, we first must address a philosophical issue. This goes beyond the positions that have been adopted in the United States, England and elsewhere, and actually touches upon the goals that the Hague (Visby) Rules system sought to achieve.

From the Harter Act onwards, the purpose of maritime rules has been to protect cargo interests. The need for this protection comes from the fact that, as we have seen, most of the time they will find themselves in a weaker position than the carriers, effectively being at the mercy of the terms that are placed in front of them. The need for this protection is evident when we consider how most, if not all, bills of lading are adhesive contracts. In most bill of lading cases, the only freedom of choice enjoyed by the adhering party is no more than *"the freedom to ship or not to ship."*[1584] If this was not the case, if there was not a manifest imbalance, the free market, and not regulation, would be able to reach an equilibrium.[1585]

This difficult situation in which cargo interests can find themselves forces the courts to carefully analyze the terms of the contracts. They must ensure that the clauses themselves are not, directly or indirectly, lowering the protections established in favor of the cargo interests. Article 3(8) of the Hague (Visby) Rules is clear in this respect,

---

[1581] STURLEY, M. F., 'Bill of Lading Choice of Forum Clauses: Comparisons Between United States and English law', 1992 *Lloyd's Maritime and Commercial Law Quarterly*, p. 252.
[1582] ibid., p. 252.
[1583] ibid., p. 260. For an exceptional case in which an arbitration clause was not enforced, and a stay was denied, *See Owners of Cargo Lately on Board the Fehmarn v Owners of the Fehmarn (The Fehmarn)* [1958], 1 W.L.R., 159–164.
[1584] MENDELSOHN, A. I., 1970, supra note 1126, p. 664.
[1585] WATSON, H., 'Forum Selection Clauses in Maritime Contracts', 1973, 33 *Louisiana Law Review*, p. 484.

invalidating *"not only direct but also indirect attempts to lessen the carrier's liability*."[1586] It is clear, therefore, that the issue is not limited to clauses affecting the substance of the liability provisions, but also those that, "indirectly," will end up affecting such liability.

When it comes to forum selection clauses, the question then becomes whether the mere inclusion of a forum selection clause always represents a lowering of the liability and therefore should be deemed as null and void, whether these clauses should be considered *prima facie* valid, or whether there is some room for nuance.

In his 1970 criticism of the American *Indussa* decision, DENNING explained that the reluctance to accept forum selection clauses made sense during *"the anarchy which gave birth to the Harter Act and eventually to the Convention of 1924."*[1587] He added, however, that maintaining that position made no sense in a time when there were no *"irrevocable conflicts between nations as to the substantive law governing bills of lading."*[1588] The Hague Rules he argued, had attempted to standardize the law, and, for the most part, that goal had been fulfilled. Even if there were some *"marginal differences"* in interpretation, these were the kind of *"minute differences"* that should not be addressed by resorting to Article 3(8).[1589] Trying to drive his point home, DENNING finally adds:

> *"The Indussa hostility to foreign courts and foreign law might have been appropriate in the bad old days before the Hague Convention when the substantive law on bills of lading in America differed radically from most other countries. The hostility is difficult to understand, now that the law in most countries is substantially the same."*[1590]

Today, 46 years later, it is hard to overestimate exactly how wrong the author's words would seem in only a few years. It is not only that the Hague Rules have been modified through the Visby and the SDR Protocols, but also that those amendments have not been adopted by all the Hague Rules countries, and that there are even significant differences in the interpretation that is given to the same regulations in different jurisdictions. This, the existence of the competing Hamburg Rules (and, maybe one day, the Rotterdam Rules), and the many "unique" domestic systems that were the product of a mix-and-match process, shows that, at least to a degree, the chaotic uncertainty that DENNING thought was long gone in 1970, is actually alive and well in 2016.

What is more, there is certainly a benefit for those who use forum selection clauses in their contracts, as it is shown by the fact that *they use forum selection clauses in their contracts*. Clearly, if the effects of the law in all the Hague (Visby) Rules was as

---

[1586] STURLEY, M. F., 1986, supra note 1574, p. 776.
[1587] DENNING, S. M., 1970, supra note 1003, p. 35.
[1588] ibid., p. 35.
[1589] ibid., pp. 35–36.
[1590] ibid., p. 36.

harmonious as defenders of jurisdiction clauses might have us believe, then there would be no reason to use these clauses at all. Their widespread use, however, tells us otherwise. The benefit that is perceived by the carriers is, in all likelihood, perceived at the expense of the cargo interests.

As the American and English decisions that we have analyzed show, there seems to be a generalized reluctance to see "procedural" issues, like those of a forum selection clause, having an effect on the liability. SCRUTTON L.J. himself made this clear in his ruling in *Maharani*, where he unequivocally stated that he did not see *"any clause as to procedure as lessening liability."*[1591] This school of thought is not really correct since, for starters, choice of forum clauses affect not only the procedural aspects of the case, but also its substantive result, to the point that they are often *"the only issue worth litigating"* in a case.[1592] What is more, it is important to remember that the enforcement of a forum selection clause will bring as a consequence that the procedural rules of the selected forum will come into play. These rules will have a very significant impact on the case since, as some authors have argued, the very outcome of the litigation depends mainly on procedural rules.[1593] From this perspective, simply dismissing the effects that a "*clause as to procedure*" might have is, clearly, the wrong way to go.

A few exceptions notwithstanding, courts have not seen the added costs of litigation in the chosen forum as affecting the liability of the carrier in the terms of Article 3(8).[1594] *Sky Reefer*, for example, rejected this idea altogether, stating that it would be *"unwieldy and unsupported by the terms or policy"* of the Hague (Visby) Rules *"to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier."*[1595] This logic exhibited in *Sky Reefer* is far from unique, as it is also echoed in English decisions. It is, however, problematic, as it seems to be saying that although the right of the claimants to seek relief exists, he may have to find himself collecting money to be able to afford pursuing his claim in a foreign forum. And yet, those added costs, which will obviously hurt his bottom line after his eventual recovery, are seen by the courts as not having any relevance in the enforceability of the jurisdiction clause.

One author has noted how even though it is true that the expenses associated with litigating in a foreign forum are not, in themselves, a lessening of the liability, they do

---

[1591] *Maharani Wool Mills Co v. Anchor Line* [1927-1928], p. 169.
[1592] STURLEY, M. F., 2009, supra note 1194, pp. 945–946.
[1593] YIMER, G. A., 2013, supra note 1443, pp. 468–469.
[1594] Belgian courts appear to have adopted what STURLEY has referred to as a *"robust interpretation"* of Article 3(8), banning forum selection clauses that are present in bills of lading, because they impose *"practical barriers,"* to the claimant's recovery (STURLEY, M. F., 2009, supra note 1194, p. 948).
[1595] *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer* [1995], p. 536.

provide the carrier with the means by which he will be able to lessen this liability substantially.

> *"Suppose, for example, a shipper has damages in the sum of one thousand dollars. It can readily be seen that the expense of transporting expert witnesses to the foreign jurisdiction, or even of taking depositions from such witnesses for use in the litigation, might well preclude an action on the claim, however valid. The aggregate liability of the carrier is thus lessened by the total value of the claims so eliminated."*[1596]

The very strict requirement established by English and American courts to prove that a given forum selection clause "lessens" the liability of the carrier seems, to us, ill-advised. It begins from a position that seems amnesic in regards to the reasons why Article 3(8) exists at all. This article, as well as the rules that contain it, exists only as a result of the enormous bargaining power of the carriers compared to that of the cargo interests, and of the fact that carriage contracts, by their very nature, are rife with potential for abuse.

Maritime trade has been regulated in a way that has made some authors draw parallels between these regulations and consumer protection law.[1597] Fundamental among these similarities is the weak situation of the adhering party, who is forced to accept whatever terms the dominant party offers. Because of this, looking at forum selection clauses that are present in bills of lading as merely the result of the free bargain of the parties is mistaken.

The fact that we, for example, establish minimum warranty periods for consumer products and mandatory minimum liability limits for bills of lading, shows that there is a consensus on the fact that the parties to these contracts cannot agree on *everything*. Just as it might be possible to assume that a bill of lading in which the shipper agreed to a lower liability limit for the carrier, was not the result of a free bargain, a similar conclusion can often be drawn in the case of forum selection clauses. While there might be some shippers that overshadow the carriers in regards to their bargaining power, and

---

[1596] Note, 1959, supra note 1539, p. 78. Previous to the *Sky Reefer* decision, American courts had been more sympathetic towards the added costs that come with enforcement of forum clauses. *In Lloyd's of London v. M/V Steir* [1991], 773 F. Supp., 523–527, p. 524, for example, the District Court of Puerto Rico stated in this regard:

> *"The petition represents a recurring fantasy of shipowners and cargo defense lawyers. Ideally, if a choice of forum clause in a bill of lading would name the place for the resolution of the controversy, for example, Timbuktu or Byelorussia, then the expense and discomfort of pursuing the matter there would, of course, affect the exercise of the rights of the otherwise innocent cargo owner. Certain claims, because of the amount involved or other considerations regarding evidence and witnesses would not be pursued. These days, an $82,639.44 claim like the present one could not be pursued in an economically-feasible manner in France under the circumstances related here. That much would be spent in attorney's fees, witness fees, and travel expenses."*

[1597] *See*, for example, SIMON, S., 1976, supra note 1294, p. 489 and SWEENEY, J. C., 1993, supra note 1265, p. 1.

who are more than happy to accept lower liability limits or to litigate in distant forums in exchange for a significantly lower freight, regulations cannot be enacted, let alone interpreted, based on outliers.

As DAVIES has noted, the virtually indiscriminate enforcement of forum selection clauses will often have the effect of *"completely insulating the carrier from liability."*[1598] Seeing that impunity was precisely what the Hague (Visby) Rules were set to prevent, the courts should not merely rubberstamp the carriers' efforts to that effect.

As we will now see, these are concerns that have plagued the international community for a long time. Because of this, there have been attempts to rein in the ability of the carriers to choose a forum. These attempts, however, have not proven to be successful.

12.4.2 The Hamburg Rules

By the time the Hamburg Rules were being debated, the effects of forum selection clauses in bills of lading was already evident.[1599] As the UNCTAD reported at the time, the motivation behind including jurisdictional provisions in the Hamburg Rules was the consequence of the broad consensus aimed at protecting *"the shipper against onerous jurisdiction clauses in bills of lading."*[1600] The report also showed a significant empathy to the needs of those shippers who, as a result of a forum clause, would find themselves forced to bring their claims "*in the place where he* [the carrier] *does business, which may be far away from the claimant's location."*[1601]

The diverse interests that came into play during the drafting of the Hamburg Rules made clear what were their positions on this matter. The contrast between the developing and the developed world on this issue became quite evident.

> "[R]*epresentatives of most developing countries expressed their view that the Hamburg Rules should restrict the enforceability of forum selection agreements. The reason for this was that most developing countries did not have a shipping fleet to import and export their goods. Rather, they relied on foreign flag vessels. These countries were therefore interested in protecting all consignees whether shippers or*

[1598] DAVIES, M., 2011, supra note 1492, p. 248.
[1599] MURRAY, D. E., 'The Hamburg Rules: A Comparative Analysis', 1980, 12 *Lawyer of the Americas*, no. 1, p. 81 (stating that the fact that the US COGSA, and therefore the HR, did not contain rules on jurisdiction was an *"omission* [that] *has been corrected by the Hamburg Rules"*).
[1600] UNCTAD, *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention,* 1991, <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=1828> (last visited 15 May 2016), p. 138.
[1601] ibid., p. 138.

> *consignees. On the other hand, countries that carried most of their goods on their own ships, favored rules allowing forum selection agreements."*[1602]

Four possible ways to address the jurisdiction issue were proposed. First, there were those who argued that the Hamburg Rules should not contain any jurisdictional rules whatsoever, and that regulation on this topic should be left to the laws of each individual state. Second, there were those who wanted the regulation to simply declare all jurisdiction clauses to be null and void. Third, some suggested that the Hamburg Rules should expressly validate forum selection clauses. Fourth, and this was the position that finally manifested itself in the definitive text, some proposed that the Rules should provide specific alternative jurisdictions.[1603]

Jurisdiction Provisions under the Hamburg Rules

The Hamburg Rules regulate the issue of jurisdiction in Article 21, providing different forum alternatives. The plaintiff is given the right to decide in which of these alternative forums he wishes to commence proceedings.

1. *The principal place of business or, in the absence thereof, the habitual residence of the defendant* (article 21 (1)a).
2. *The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made.* (article 21 (1)b).
3. *The port of loading or the port of discharge* (article 21 (1)c).
4. *Any additional place designated for that purpose in the contract of carriage by sea* (article 21 (1)d).
5. *In the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to above for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action. The court of the port or the place of the arrest will also determine all questions relating to the sufficiency or otherwise of the security* (article 21 (2)a and 21 (2)b)
6. *Any place agreed upon by the parties after a claim under the contract of carriage by sea has arisen* (article 21 (5)).

It is worth noting that although under article 21(d) forum selection clauses are valid, the Rules severely limit their effects. They do this by leaving the chosen court as only a *possibility* for the claimant as to where to begin proceedings, still having the possibility of,

---

[1602] GEHRINGER, A., 2000, supra note 832, p. 675.
[1603] YIMER, G. A., 2013, supra note 1443, p. 474.

instead, commencing proceedings in any of the other possible forums. Although an exclusive jurisdiction clause will not be deemed invalid, the effect of its *exclusivity* will be denied, leaving the clause, as we have seen, with only an *"optional effect."*[1604]

The above notwithstanding, authors like SPARKA have argued that a cautious carrier *could* manage to maintain the exclusive character of the clause, by acting himself as the plaintiff. Indeed, since the Hamburg Rules leave the choice of jurisdiction to *"the plaintiff,"* the carrier could bring an action of non-liability in the contractual forum, seeking afterwards to prevent the shipper from commencing proceedings elsewhere based on the *litis pendens* rules established in Art. 21 (4).[1605] This view, however, is contested, with authors like BLAS SIMONE arguing that the carrier cannot use a declaratory action in order to secure the chosen forum.[1606]

Justifying the Hamburg Jurisdiction

The approach taken by the Hamburg Rules in regards to jurisdiction is a manifestation of the preference that, for a number of reasons, these Rules give to the interests of the shippers. As such, even though there was awareness of the fact that a choice in regards to the forum will certainly represent and inconvenience for one of the parties, the Hamburg Rules shifted the power that would have traditionally resided on the vessel's interests, to the cargo interests or his insurer. This shifting of the power dynamics has been justified by some as a fair solution, taking into consideration the already imbalanced contractual relation that dominates the sea carriage of goods.

> *"In most cases this* [power shift in the Hamburg Rules] *is a more equitable distribution of power as it is more likely that the carrier will have business connections in the jurisdiction selected by the consignee than the reverse, and the carrier's mobility enables him to produce evidence where necessary in foreign jurisdictions more readily than could the consignee. More importantly, at least one of the parties to the dispute will be an underwriter, and although he too can be inconvenienced by an adverse selection of forum he does have two distinct advantages. First, he is able to spread the inducement to settle a particular case by reason of an adverse forum throughout his insurance business. Secondly, the insurance market for particular traffic routes tends to concentrate in commercial*

[1604] SPARKA, F., 2010, supra note 927, p. 192.

[1605] ibid., pp. 192–193. According to Article 21(4)(a):

> *"Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted."*

[1606] ibid., p. 193. The author notes that a similar situation in the CMR Convention remains unsettled, although the *pro litis pendens* view seems to be dominant.

> *centres such that the plaintiff's and defendant's choice of venue are likely to coincide."*[1607]

If we take into consideration that forum selection clauses have, at their core, predictability as one of their main objectives, some might argue that the Hamburg Rules, at least when it comes to jurisdiction, do not seem to get in the way of achieving it. After all, by establishing from the very beginning a set of acceptable forums, the Rules allow the carrier to take such issue into consideration at the time of setting his prices. According to SMART, for example:

> *"The retention of the place designated in the contract of carriage as one of the places where an action can be instituted still provides the carrier with an escape channel which he can use to his advantage. However, with the introduction of a wide variety of jurisdictions which are convenient for the cargo owner and which are now expressly laid down, it is hoped that in the event of a prior agreement with respect to jurisdiction the shipper should be able to negotiate favourably with the carrier. For practical purposes, the cargo owner is usually the plaintiff and the wide range of jurisdictions proffered by the Hamburg Convention now affords him the opportunity to choose a suitable place convenient for him which at the same time is fair to the carrier. Such a place can be the port of loading or the port of discharge to which both parties have an easy access since they are related to the carriage of the goods in question. In order to safeguard against a claimant selecting a place which suits his own convenience and which is not one of the jurisdictions specified in the Convention, Article 21(3) and 22(5) enact that an action or arbitration proceedings cannot be instituted in a jurisdiction which is not covered by the Convention."*[1608]

SMART's ideas in this regard are not very convincing. If the forum selection does not have an exclusive character, then any sort of bargain that the parties make in that regard is, to say the least, pointless. In fact, there would be a clear incentive for the shippers to negotiate a forum selection clause that benefits the carrier, in order to obtain a deduction in freight, safe in the knowledge that he would not be forced to actually start proceedings there.

Something similar happens when it comes to the issue of predictability. Although in theory a carrier might be able to take into account the costs associated with litigating in most of the possible forums, in reality such exercise would be impossible. Let us imagine, for example, a Russian carrier transporting cargo belonging to a South African shipper, from Felixtowe, England, to Laem Chabang, Thailand, under a bill of lading containing a forum selection clause designating the courts of Rotterdam, the Netherlands, as the

---

[1607] W. O'HARE, C., 'Cargo Dispute Resolution and the Hamburg Rules', 1980, 29 *International and Comparative Law Quarterly*, 2-3, p. 227.
[1608] SMART, H., 1989, supra note 1499, pp. 27–28.

competent forum, with a choice of law clause selecting English Law, with the contract having been made in Barcelona, Spain, at the carrier's agency. It would be impossible for this carrier to take into consideration the costs of litigating in *all* of the relevant forums at the time of setting his rates, as there will be extreme fluctuations between them. The costs of litigating in every one of these possible competent forums is so different, as are the associated expenses that come with it, that having a rational estimate before the bill of lading is prepared would be unthinkable.

Since the drafters of the Hamburg Rules acknowledged that the Rules seek to protect the shipper from the carrier, perhaps it is futile to come up with explanations as to how their jurisdictional rules benefit both parties equally. We should not forget that the Hamburg Rules (like the Hague (Visby) Rules before them) are, in essence, a protectionist scheme designed to restore balance. As such, the jurisdictional rules do not *need* to also benefit the carriers, as their very purpose is to offset the power that the carriers already possess.

Of course, philosophical or pragmatic justifications aside, there are plenty of detractors of the approach adopted by the Hamburg Rules towards forum selection. MUKHERJEE, for example, sees article 21 as perhaps one of the most important reasons that lead to the abject failure of the Rules.

> *"Such provisions* [on jurisdiction] *were* [...] *inconsistent with arrangements which have functioned successfully over the years whereby claimants, wherever located, normally expect to receive compensation direct from their insurers leaving any recourse action to be pursued by underwriters through a single jurisdiction, usually in a carrier's domicile. This was, perhaps, a significant reason for the failure of the Rules to gain acceptance."*[1609]

While we might disagree with MUKHERJEE's conclusions, particularly in regards to what he seems to perceive as a fair and normal state of affairs regarding jurisdiction clauses, his final observation is true. The Hamburg Rules have, indeed, failed to gain widespread acceptance and, as such, they have had a rather restricted sphere of influence.

The (Restricted) Impact of the Jurisdictional Provisions of the Hamburg Rules in the Developed World

While we certainly concede that the Hamburg Rules failed to achieve any significant degree of acceptance in terms of ratifications, this does not mean that they have not had any impact. In addition to the countries that ratified and incorporated them into their own legislation, some countries have adopted *some* (or even most) of the Hamburg Rules provisions, thus producing a *de facto* extension of their influence.[1610] And so, even though,

[1609] MUKHERJEE, P. K. et al., 2013, supra note 1179, p. 334.
[1610] TETLEY, W., 2005, supra note 1481, p. 186.

with the exception of Chile, no important trading country has ratified the Hamburg Rules, they also had an impact in the Scandinavian countries, which adapted their NMC94 to have it *"aligned with the Hamburg Rules as far as possible without having to derogate from the Hague-Visby Convention."*[1611] As a result of this, we find in Section 310 of the NMC94 a provision that incorporates the jurisdictional section of the Hamburg Rules.[1612]

It is important to note that although the jurisdiction rules of the NMC94 are similar to those of the Hamburg Rules, there are some significant differences, dealing with both the scope of application of the NMC94, as well as with the place of the Nordic countries within the European Union.

1. The NMC94 rules apply only to shipments where either the port of loading or the agreed/actual port of discharge, is located in Denmark, Finland, Norway or Sweden.[1613]
2. Its jurisdictional rules do not apply if they violate the provisions of the Brussels Convention of 1968 (which binds Denmark) or the Lugano Convention of 1988. In both of these cases, the conventions establish the domicile of the defendant as the main criterion for jurisdiction.[1614]

The Nordic Countries notwithstanding, it is undeniable that the Hamburg Rules did not succeed. Not only were they unable to replace the Hague (Visby) regime, but also did not, in any way, affect the manner in which forum selection clauses are interpreted. As ÖZDEL noted, almost in passing, the limitations that the Hamburg Rules established in this sphere *"have never become a great concern"* for those who use forum selection clauses in contracts evidenced by bills of lading.[1615]

12.4.3 The Rotterdam Rules

The Complex Road of Compromise Towards Regulation

Like the Hamburg Rules before them, the Rotterdam Rules also took on the ambitious challenge of addressing the issue of forum selection. It did so after a significant debate among the negotiating parties, who were divided between those who saw the regulation of jurisdiction as *"indispensable,"* and those who argued that the topic should not be addressed at all.[1616] It was well known that the jurisdictional provisions of the Hamburg

---

[1611] FALKANGER, T. et al., 2011, supra note 1172, p. 281.
[1612] Although the NMC94 is largely the same in Norway, Sweden, Denmark and Finland, some differences in numbering exist. For the purposes of our work, we will use the Norwegian version.
[1613] TETLEY, W., 2005, supra note 1481, p. 186.
[1614] ibid., pp. 186–187.
[1615] ÖZDEL, M., 2016, supra note 1580, pp. 164–165.
[1616] STURLEY, M. F., 2009, supra note 1194, p. 950.

Rules had contributed to their very limited ratification, and so the delegates were skeptical as to whether including this section would be a good idea.[1617] Furthermore, each nation had to promote the interests of its own industries and lobbies, leading to a clear divide being drawn between the different sectors of the trade.[1618]

> *"At one extreme, nations and industry groups sympathetic to carrier interests, along with nations commonly selected in choice-of-court and arbitration agreements, argued that the Convention should include no provision on jurisdiction or arbitration (except, perhaps, one that routinely enforced choice-of-court and arbitration agreements). Not surprisingly, the United Kingdom was a prominent member of this coalition. At the other extreme, nations and industry groups sympathetic to cargo interests, along with nations that regulate jurisdiction and arbitration domestically or as parties to the Hamburg Rules, insisted that the Convention should follow the example of the Hamburg Rules to protect a cargo claimant's ability to seek recovery in a reasonable forum of its choice (notwithstanding a choice-of-court or arbitration agreement). Between these two extremes, a number of nations sought a more balanced compromise between cargo and carrier interests. Because the United States had been forced to forge a compromise position among its domestic interests, it was a leading advocate of the compromise approach during the UNCITRAL negotiations."*[1619]

The situation was also exacerbated by the internal rules of the European Union since only the European Commission, not the individual Member States, had the competence to regulate jurisdiction. The opposite happened in the case of arbitration, where the European Commission had no competence whatsoever, so the individual Member States were free to negotiate at will. And so, on the one hand, European nations were represented in the talks about jurisdiction by an entity that was not present during the negotiations of the "substantive" parts of the convention, while the arbitration talks were attended by nations that were not present during the discussion of the jurisdiction

[1617] YIMER, G. A., 2013, supra note 1443, p. 477.
[1618] ibid., p. 478.
[1619] STURLEY, M. F., 2009, supra note 1194, pp. 950–951. It is worth noting that the compromise advocated by the United States had, as its starting point, the goal of overruling the *Sky Reefer* decision (SCHOENBAUM, T., *An Evaluation of the Rotterdam Rules*, in Basedow, J. et al. (eds.), *The Hamburg Lectures on Maritime Affairs 2011-2013*, 2015, p. 40). On *Sky Reefer*, *See* page 419 supra. Since the drafting of the Rotterdam Rules, and on light of the adoption of the Brussels I (recast) Regulation, the European Commission has questioned whether the mandatory jurisdictional regime established in the Rotterdam Rules would even be needed in regards to inter-European relationships. The fact that the Rotterdam Rules, unlike the Brussels I (recast) regulation, do not address the issue of *lis alibi pendens*, or the related matter of "torpedo" actions, further lessens the chances that the EU would become part of the Rotterdam Rules' jurisdictional regime (COLDWELL, R., 2014, supra note 1197, pp. 113–114).

provisions. This difficulty led to the Rotterdam Rules regulating arbitration and jurisdiction as two separate subjects.[1620]

Just like the Rotterdam Rules themselves, the jurisdictional provisions contained in them are very complex.[1621] This was the result of the difficulties that existed in the negotiation, and which led to a *"somewhat tortured outcome,"* made up of *"detailed and confusing"* provisions on jurisdiction and arbitration.[1622] This is not at all surprising, as little more can be expected from a compromise reached by such dissimilar partners.

One of the ways in which the Rotterdam Rules sought to ease the concerns of the nations that opposed the regulation of jurisdiction, or which thought that it would violate the freedom of contract of the parties if the use of forum clauses was restricted, was by making the sections on jurisdiction and arbitration optional for ratifying nations, who would have to expressly declare that they wished to be bound by them.[1623] This represented the *"broadest compromise possible,"* and appeared as the only solution to a situation in which it had "*proved impossible to achieve consensus on any compromise solution*."[1624] We will return to this issue later on.[1625]

Jurisdictional Provisions in the Rotterdam Rules

The Rotterdam Rules devote the entirety of Chapter 14 to the issue of jurisdiction. Article 66 establishes the courts that will have jurisdiction over the conflicts arising from bill of lading disputes, while Article 67 regulates forum selection clauses. Articles 68 to 74 deal procedural matters such as arrest, consolidation of actions, and the recognition and enforcement of judgments.

According to Article 66, *unless* the bill of lading contains an *exclusive* choice of court agreement, *or* the parties have agreed, *after the dispute has arisen,* to grant jurisdiction to a

---

[1620] STURLEY, M. F., 2009, supra note 1194, p. 951.
[1621] COLDWELL, R., 2014, supra note 1197, p. 112.
[1622] SCHOENBAUM, T., 2015, supra note 1619, p. 40.
[1623] Under Article 74, the provisions of Chapter 14 will only bind "*contracting States that declare in accordance with article 91 that they will be bound by them.*" An analogous provision in regards to Chapter 15 (on arbitration) appears in Article 78. According to Article 91, these declarations can be done *"at any time,"* and can also be revoked *"at any time*." It further establishes that if the declaration is done at the time of signature *"are subject to confirmation upon ratification, acceptance or approval."* Since no similar rule is established in regards to declaration done at any other time, it can be concluded that such confirmation is therefore not needed in those cases (YIMER, G. A., 2013, supra note 1443, p. 478).
The reason why the Rotterdam Rules adopted an *"opt-in"* procedure regarding jurisdiction, as opposed to *"opt-out,"* was that European Member States would have to obtain permission from the European Commission to ratify the Rules if they included the jurisdiction provisions by default. Conversely, this permission would not be required if the Rules were ratified *without* the jurisdictional provisions (STURLEY, M. F., 2009, supra note 1194, pp. 952–953
[1624] ibid., p. 946
[1625] *See* page 442 infra.

specific court, the claimant has the alternative to commence proceedings against the carrier in a *"competent court"* of any of the places mentioned therein. By "competent court," the Rotterdam Rules are not only referring to a court that has competence according to its local laws. Indeed, according to Article 1(30), when they speak of a "competent court," what the Rules are referring to is

> *"a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute."*

This is a very important provision, as the options that the plaintiff has in terms of jurisdiction, are limited to courts in contracting states. This represents a big difference from the similar provisions that existed in the Hamburg Rules, where Article 21 did not establish a similar requirement.[1626]

The competent courts that are listed under article 66 of the Rotterdam Rules are:

1. The domicile of the carrier;
2. The place of receipt agreed in the contract of carriage;
3. The place of delivery agreed in the contract of carriage; or
4. The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or
5. In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under the Rotterdam Rules.

To facilitate their comprehension, we will analyze these separately.

- *The Domicile of the Carrier*

Article 1(29) defines domicile as: "*(a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.*" It is worth noting that the Rotterdam Rules use *"whichever is applicable"* in the definition of the domicile of legal persons. It does so in order to accommodate the many ways in which different legal systems might determine nationality for legal persons.[1627]

[1626] TARMAN, Z. D., *Jurisdiction and Arbitration Under the Rotterdam Rules*, in Güner-Özbek, M. D. (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the "Rotterdam Rules"*, 2011, p. 272. On the Hamburg Rules' jurisdiction provisions, *See* section 12.4.2 supra.
[1627] ibid., p. 272.

- *The Place of Receipt / Delivery of the Goods Agreed in the Contract of Carriage*

Unlike the Hague (Visby) Rules and the Hamburg Rules, which covered *tackle-to-tackle* and *port-to-port* carriage, respectively, the Rotterdam Roles are a *door-to-door* convention, applying also to the non-maritime parts of the carriage. Because of this, the places of *receipt* and *delivery* of the goods *can* (although not necessarily) be different from the places of loading and discharging. If it is a carriage from a sea port to another sea port, "receipt" and "loading," on the one hand, and "delivery" and "discharge," on the other, will be the same. If, however, carriage was to commence via road, with only then being the goods loaded on the ship, carried to another port where they are discharged, loaded into trucks, and finally delivered to the consignee inland, then the places will be different.

It is worth noting that the Rotterdam Rules make a mention of the places of receipt and delivery *"agreed in the contract of carriage."* By doing so, the Rules place an emphasis in the importance of the contract, so that if the carrier was to, for example, deliver the goods in the wrong place, the claimant would still be able to pursue his liability on the courts of the place mentioned in the contract.[1628]

- *Port of Loading and Discharge*

During the discussion of the Rules, the delegates argued whether, due to the fact that this was a *door-to-door* convention, it was inappropriate to maintain the ports as basis for jurisdiction. UNCITRAL opted to, finally, maintain them in the list of competent courts, reasoning that most damages tend to occur during handling at the ports of loading or discharge. Furthermore, all related parties, witnesses and other means of evidence will, as a rule, be available at these places. Furthermore, it will usually be the only place where the plaintiff will be able to proceed against both the carrier and the maritime performing party with a single action[1629]

It is important to note that in this provision the Rotterdam Rules *only* refer to the ports where the goods are "*initially loaded*" and *"finally discharged."* What this means is that if

---

[1628] ibid., pp. 273–274.

[1629] ibid., pp. 274–275. In Article 1(6) and (7), the Rotterdam Rules refer to the issue of the "performing parties" as follows:

> *"6. (a) "Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.*
> *(b) "Performing party" does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.*
> *7. "Maritime performing party" means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area."*

there is transshipment during the voyage, the ports at which such transshipment occurs will *not* have jurisdiction on the basis of Article 66.

- *The Place Designated by the Parties in a Choice of Court Agreement*.

The issue of forum selection in the Rotterdam Rules, its rules and exceptions, is rather extensive. Because of this, we will deal with it in a separate section.

Forum Selection under the Rotterdam Rules

- *Default Forum Selection Rules for Ordinary Liner Contracts*[1630]

Seeking to protect weaker parties from oppressive forum selection clauses, the Rotterdam Rules greatly restrict the ability of the parties in liner contracts to select a forum.[1631] Just as the Hamburg Rules before them, the Rotterdam Rules treat forum selection clauses as non-exclusive by default. Only exceptionally will a forum selection clause be construed as exclusive. Furthermore, in its provisions on forum selection, the Rotterdam Rules go to great lengths to limit the leeway that the parties have in their choice.

According to article 66(b), the claimant can start proceedings against the carrier in "*a competent court or courts*" designated for that purpose in the contract. By using the term "*competent court*," the Rotterdam Rules once again seek to ensure their applicability to the conflict, by establishing that the designated court must be in a contracting state. As we have seen, one of the most serious problems associated with this type of clauses is that they can lead to the chosen forum applying a law that deviates from the mandatory liability provisions. By limiting the choice to contracting states, the Rotterdam Rules prevent such possibility.

When it comes to forum choices made a*fter* the dispute has arisen, the Rotterdam Rules show a much higher flexibility, allowing the parties to designate "*any* competent court."

[1630] Article 1(3) of the Rotterdam Rules defines *"liner transportation"* as *"a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates*." Conversely, *"non-liner transportation"* appears in Article 1(4) as a catch-all concept, being defined as *"any transportation that is not liner transportation"*. While the Rotterdam Rules will, as a rule, apply to liner contracts (except for charterparties and contracts for the use of the ship or a part thereon, in accordance to Article 6), it will generally not apply to *non-liner* transportation.
It is important to note that, for the purposes of this section, when we use the term *"ordinary liner contracts,"* we are not using it as opposed to *"non-liner"* contracts. We use it instead to refer to those contracts where the drafters considered that the contractual imbalances were such, that special care was required in their regulation in order to prevent abuses. On the opposite end of the spectrum, *"volume contracts"* (*See* section 11.3 supra) are those for which the drafters thought there was less of a need for statutory protection (YIMER, G. A., 2013, supra note 1443, p. 481).

[1631] ibid., p. 481.

Although this provision, included in Article 72, is not completely clear as to whether this choice would be exclusive, the lack of an express prohibition to that extent seems to suggest that in this case exclusivity would be allowed.[1632]

- *Special Rules for Volume Contracts*

As part of the compromise of diverse interests that finally resulted in the Rotterdam Rules, a higher degree of freedom of contract was allowed in regards to the so-called "volume contracts."[1633] This also applies in regards to forums selection, where *exclusive* choice of court agreements are allowed under Article 67(a), provided they comply with two requirements:

a. The forum selection, contained in a volume contract that clearly designates the names and addressed of the parties, must have been either:
    i. Individually negotiated; or
    ii. Contain a prominent statement that the contract contains an exclusive choice of forum, and specify the section where it is contained.
b. The forum selection must clearly designate the courts of a contracting State or one or more specific courts of a contracting State.

Even in the presence of a valid exclusive forum selection clause in a volume contract, the Rotterdam Rules have moderated their effects by limiting the choice. Indeed, once again we see that the drafters have only allowed the choice to be made to courts located in countries that are parties to the Rotterdam Rules.

When it comes to third parties, the Rules have also moderated the effects of the exclusive forum selection clauses present in volume contracts. In these cases (v.gr. those relating parties to whom the bill of lading is transferred, insurers subrogating the insured in his rights, etc.), the third party will only be bound if the forum selection complies with the requirements of Article 67(2). These are:

a. That the court is in one of the places mentioned under Article 66(a).[1634]
b. That the forum clause is contained in the transport document or electronic transport record itself.
c. That the third party to the contract is given *"timely and adequate notice"* of the choice court, and of the fact that this choice is exclusive.

[1632] ibid., p. 482. *See* also CACHARD, O., 'Jurisdictional Issues in the Rotterdam Rules: Balance of Interests or Legal Paternalism?', 2010, 2 *European Journal of Commercial Contract Law*, no. 1, p. 2 (stating that in these cases the exclusive forum clause is given "*full effect*" since, at that time "*the so-called weak party is deemed to have the opportunity to consider the effects of the clause*." As a consequence of his new situation, "*he no longer deserves protection*").

[1633] *See* section 11.3 supra.

[1634] *See* page 438 supra.

d. That the law of the chosen court recognizes the enforceability of exclusive forum choices.

Since it is understood that the third party may not be in the same situation as the party that concluded the volume contract, it is understandable that some moderation is exercised when it comes to them being bound by them. In this case, the Rules maintain some of the protection established in favor of the cargo interests, only allowing the enforcement of the exclusive forum selection clauses if they designate one of the forums that the Rotterdam Rules already consider adequate.

It is interesting to note that mere *"notice"* to the third party is required in regards to the exclusive forum selection, and not *"consent,"* as it is required in Article 80 regarding the effect of the volume contracts on third parties. The record on this issue seems to show that the view was that since forum selection was *"a procedural matter"* (unlike the substantive terms that the parties can deviate from in a volume contract), a mere notice should be enough.[1635]

The Optional Character of Chapter 14

The problems with Chapter 14 are further complicated by the decision taken by the drafters to make its application optional. The drafters hoped that by doing this they would encourage more nations to ratify the Rotterdam Rules, *"and to do so quickly."*[1636] In hindsight, considering that after 7 years only 3 nations have ratified the convention, the rationale for this opt-in procedure seems flimsy at best. Furthermore, this procedure seems to go against one of the main objectives of the Rotterdam Rules, which was to achieve uniformity in the regulation of maritime carriage. By making the jurisdictional provisions optional, the drafters of the Rotterdam Rules seem to have almost accepted the fact that such uniformity would not be achieved. What is more, they seem to have enacted a convention that, by design, even if it was to be adopted by 100% of the existing Nation states, would still allow for significant divergence in application and interpretation, as well as in regards to liability, due to fact that the existence of parallel jurisdictional rules would be par for the course.

The logic behind the inclusion of Chapters 14 and 15 (which is also optional) is hard to understand. In fact, the only reason why it was possible to include them in the final text of the convention was the opt-in provisions included in articles 74 and 78.[1637] This fact

[1635] TARMAN, Z. D., 2011, supra note 1626, p. 278. On the inconvenience of seeing forum selection as "merely" procedural, *See*, generally, section 12.3.3. On the futility of "notices", *See*, v.gr. section 2.7 above.
[1636] BAATZ, Y., 'Jurisdiction and Arbitration in Multimodal Transport', 2012, 36 *Tulane Maritime Law Journal*, no. 2, p. 654.
[1637] BERLINGIERI, F., 'Revisiting the Rotterdam rules', 2010 *Lloyd's Maritime and Commercial Law Quarterly*, no. 4, p. 639.

alone speaks volumes as to the likelihood of these provisions ever being adopted by a significant number of countries, and thus raises the question as to why did the drafters even bother including them.

At best, it can be said that the optional character of Chapters 14 and 15 shows that the goal of harmonization does not extend to jurisdictional issues.[1638] At worst, it shows a lack of foresight on the part of the drafters who were willing to compromise on such an important part of the convention, despite there being no real benefits to it, as the convention continues to be far from being anywhere close entering into force. Being a system that seeks uniformity, yet seems to be built to create divergence, it is not surprising that *"few states"* are expected to opt-in to these sections of the Rules.[1639]

Analyzing the Jurisdictional Provisions of the Rotterdam Rules

As reasonable as compromises might be, in the case of the Rotterdam Rules it was the zeal demonstrated in achieving this compromise that was as one of their biggest flaws. The reason for this being that, in their attempt to please everyone, the Rotterdam Rules might have, in effect, gone against those who they wanted to protect.

While the jurisdictional provisions contained in Article 66 do represent a significant protection for the cargo interests, this is severely undermined by the exception created by volume contracts. As we have already seen, the lack of precision with which volume contracts were regulated, has opened a door that is wide enough to allow *"approximately 90 per cent of the liner trade"* to be labeled as the product of "volume contracts."[1640] If that is the case, then the effect of Chapter 14 of the Rotterdam Rules will be to legitimize *"disadvantageous jurisdiction provisions"* that will, in the end, simply make legal action more expensive.[1641]

Considering that the current situation is also one in which weak parties are often victimized by onerous choice of court clauses, one could argue that adopting the Rotterdam Rules would not actually make things worse. What is more, one might even argue that the Rotterdam Rules might make things better, assuming the abuse of the volume contract provisions do not materialize. This train of thought, however, is not satisfactory. Why should any country with significant cargo interests adopt a system that, in the best-case scenario, and assuming its flaws are not exploited, *might* render a benefit?

It is worth noting that, despite the many criticisms that have been raised by cargo interests, criticism has also come from the other side. Some authors, for example, have

[1638] ALCÁNTARA GONZÁLEZ, J. M., 2010, supra note 1461, p. 40.
[1639] MUKHERJEE, P. K. et al., 2013, supra note 1179, p. 336.
[1640] MUKHERJEE, P. K. & BAL, A. B., 2009, supra note 1420, p. 601
[1641] ibid., p. 601.

argued that the very strict limits that are placed on the parties' ability to select a forum in ordinary liner contracts represent an irrational and unjustified restriction that, in effect, *"limits the shipping market from functioning by itself."*[1642] Following this line of thought, CACHARD has argued that these limits simply adopt an unjustifiably pro-cargo position, without there being any legal basis to do so.

> *"*[I]t *is crystal clear that the drafters of the Rotterdam Rules contemplated a category of contracts defined by the disparity of economic power between the parties more than by a legal classification. Recital 6 of the Resolution adopted by the General Assembly clearly supports this view: 'Noting that shippers and carriers do not have the benefit of binding and balanced universal regime …'. The question is then how the balance of interests can be reached in liner trade contracts as regards jurisdiction. In jurisdiction matters, the balance of interests means that the substance and effectiveness of the parties' rights should not depend on only one of them. How is the balance between the carrier, usually in the position of defendant, and the cargo interests, usually in the position of plaintiff to be shifted? If we move from a situation extremely favourable to the carrier to the opposite situation extremely favourable to the cargo interests, a balance has not been reached. A legal bias has then been substituted for an economic bias. This would be an example of what economists call 'perfectionism' or 'legal paternalism'."*[1643]

It is worth noting that here we find ourselves, once again, dealing with the philosophical question of whether legal paternalism is always bad. If we assume that maritime contracts are balanced and the product of a normal, free bargain, then, certainly, paternalism would be wrong. If, on the other hand, we look at contracts of carriage as imbalanced agreements in which the will of the carrier can be imposed on the cargo interests, then "paternalism" or "protectionism" would be warranted.

Considering that, as we have seen, forum selection clauses in maritime contracts are common enough to be endemic, and that the majority of liner contracts are between small shippers and large carriers, protection is necessary. One cannot be blind to the fact that some of the imbalanced system that made regulation of maritime trade necessary continues to exist. This imbalance sometimes manifests itself, as we have already seen, in the inclusion of forum selection clauses that, in enforced, can hurt the ability of the cargo interests to obtain redress.

There is no question that the limits established by the Rotterdam Rules in regards to jurisdiction are a step in the right direction. The problem is that, as good as that single step might have been, the door that was left open for abuse, and the optional character of the jurisdictional rules, represent, at the very least, two steps back.

[1642] YIMER, G. A., 2013, supra note 1443, p. 482.
[1643] CACHARD, O., 2010, supra note 1632, p. 2.

Conclusion
Where do we go from here?

"There may be said to be two classes of people in the world; those who constantly divide the people of the world into two classes and those who do not."

Robert Benchley.[1644]

"The truth is, that the law is always approach, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent when it ceases to grow.

Oliver Wendell Holmes[1645]

12.5 Freedom of Contract and Commercial Parties

If our analysis has made something clear, it is that assumptions as to bargaining power have been the cause of many bad regulations. It seems to be that many look at the marketplace with a certain optimism that leads them to see equality where only disparities exist.

The analysis that we have put forward makes it clear that it is a mistake to look at the market as if it was made up of consumers and commercial parties, with the former being seen as eternally weak, while the latter are perceived as inherently powerful. What this shortsighted view produces is a legal system where those parties that do not fit the mold will find themselves victimized not only by their contracting parties, but by an oversimplified regulatory system that does not take their needs into account.[1646]

[1644] Cited in GARVIN, L. T., 2005, supra note 594, p. 295.
[1645] HOLMES, O. W., 2009, supra note 91, p. 39.
[1646] GILIKER, P., 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law', 2005, 13 *European Review of Private Law*, no. 5, p. 633.

In a recent report calling for the reform of the Australian Unfair Contract Terms Act, the Queensland Law Society stated:

> *"It is self-evident that the majority of small businesses do not have the same level of bargaining power as larger businesses … extending the unfair contract terms protections to small businesses merely improves access to justice for another group that has been identified as being at risk, or alternatively marginalised as a result of diminished access to justice."*[1647]

Indeed, since the traditional dichotomy that the law uses in its analysis, between consumers and businesses, does not account for small commercial parties, they end up falling awkwardly somewhere in-between. They are not as weak as a consumer, but they are absolutely not powerful enough to compete in the big leagues. What is more, as a result of being treated as "businesses," these small firms will be expected to engage in the type of behaviors that would be unthinkable for a small commercial entity.

> *"Ordinarily, contract law deems large and small businesses as one and the same thus relegating the smallest of businesses to the 'arms-length' category of commercial transactions. Such a distinction disregards the business's size or the education and experience of the proprietors" and assumes that all businesses are better resourced and informed than consumers. Thus, businesses are presumed to bargain on an equal footing with each other; businesses do not need the protection of consumer-style laws because businesspeople can protect their own interests."*[1648]

Certainly, we can agree on the fact that courts should not help parties, commercial or otherwise, to escape from bad bargains they made themselves. The problem lies on the those situations in which one of the parties was taken advantage of by the other. As much as we would like to think otherwise, this is something that also happens between companies. Because of this, instead of establishing strict categories in which to divide contractual parties, or to simply dismiss commercial parties as unworthy of protection, a more casuistic approach would be better.

Be it a large commercial enterprise or a small business, in the end decisions will often be made by an individual, a single, human person, susceptible of suffering the same biases and affected by the same shortcomings that affect any consumer. The problem is that while a large corporation might be able to set up a number of checks to prevent these problems from manifesting themselves, for example by relying on expert financial and legal advise, such an expense would be unthinkable for many smaller companies. Indeed,

---

[1647] Cited in CASSON, J., 'Small Business and Unfair Contract Terms: Changes on the Horizon', 2016, 3 *LSJ: Law Society of NSW Journal*, no. 2, p. 76.
[1648] FREILICH, A. & WEBB, E., 2013, supra note 399, pp. 137–138.

"*many small businesses simply cannot afford the accounting, financial and legal advice*" that larger corporations might take for granted.[1649]

A meaningful treatment of this problem in the legal system will require the kind of flexibility that, so far, has been lacking. This is, after all, a situation that arises not out of the categories in which a given party is placed, but instead out of the bargaining power the she possesses.

Placing the emphasis on bargaining power when it comes to cases of, for example, unconscionability or undue influence, will allow the courts to address some of the many problems that a strict approach has created. At the same time, it will also allow the courts to ensure that, in those cases where regulation exists, the spirit of these regulations is respected.

12.6 Freedom of Contract, Maritime Parties & the Forum

In our analysis we have placed our attention on maritime carriage under bills of lading. This is a market where, for over a century, regulation has attempted to address the problems created by the bargaining power disparities that affect it. There is a consensus on the fact that, although outliers might exist, by and large the cargo interests will have less bargaining power than the carriers and shipowners.

Our research shows that even though there is this historical awareness of the fact that cargo interests are at a disadvantage, courts have often proven to be less than sympathetic to their plight. We can find a good example of this in the way in which courts in both the United States and England deal with forum selection clauses.

Despite the awareness of *why* the Hague (Visby) Rules were enacted, courts on both sides of the Atlantic seem to look at forum clauses in bills of lading as merely one more bargained term in a commercial contract. There is a certain tone-deafness in this approach, as they fail to realize that by allowing such terms to be included, they effectively legitimize what can easily be a way in which the carrier seeks to avoid any liability. This is a situation that also presents itself in other areas of the law, where forum selection is perceived as merely procedural, despite the well-known substantive consequences that it can have.

In a 2015 article, Professor MULLENIX lamented the current state of American law when it came to choices of forum in consumer contracts. She argued that the system seemed too eager to enforce *all* private agreements, no matter the consequences.

[1649] ibid., pp. 138–139.

> *"The reality is that scarcely any plaintiff in the post-Zapata era who has sought to invalidate a forum-selection, choice-of-law, or arbitration clause has been able to successfully prevail on a contract unreasonableness defense.* […] *The imbalance of equities in forum-selection clause jurisprudence should be remedied by changing the narrative that gives primacy to contract law and returning the conversation to that of jurisdictional ouster, litigation gamesmanship, and public policy concerns."*[1650]

The same can be said, *mutatis mutandis*, about our topic. The case law on forum selection is so far made up of two competing narratives. One of them, the one favored by the courts, sees all the parties to a contract of carriage under a bill of lading as standing on the same level. The other, and which is responsible for the regulations that govern the trade, takes the relative bargaining power of the parties into account, and sees the possible abuses that can arise out of forum selection. It is time for the courts to shift their approach.

[1650] MULLENIX, L. S., 2015, supra note 997, pp. 759–760.

Summary

This research seeks to answer two questions:

1. Should commercial parties, such as cargo interests in maritime contracts, benefit from a legal protectionism established in their favor?
2. Should this legal protectionism extend to forum selection clauses?

In order to answer these questions, an eclectic research method has been adopted, reviewing some essential concepts of contract law, and building from that analysis towards maritime contracts and forum selection. This analysis is conducted by reviewing, mostly, the law of the United States and England, although also reviewing, for comparative reasons, the law of certain Civil Law jurisdictions. Additionally, in order to further the understanding of the problem, some of the historical and sociological issues surrounding this topic are also analyzed and commented on.

Chapter 1 The Inviolability of Contracts

While it might appear counterintuitive, the idea of *pacta sunt servanda,* that agreements are to be kept, is not found in Roman law. Indeed, even though this mandatory character of contracts is at the core of our free market system, it is actually a rather new part of our legal understanding. Its origins can be traced back to the canonists who, on the basis of biblical rules in regards to keeping promises, elaborated a doctrine under which a moral imperative was linked to the fulfillment of contracts. It was on the basis of their work that such a concept became a part (although in different measures) of Western legal systems, having been incorporated into, for example, the Civil Codes of France, the Netherlands, Germany and Spain, as well as the Common Law.

Chapter 2 Freedom of Contract and Bargaining Power

Associated to the concept of *pacta sunt servanda* is that of *freedom of contract*, the ability of the parties to determine the content of their agreements without the State interfering with their desires. This principle, and which is also an essential element of our capitalist societies, has not remained static through the ages.

A product of the Age of Enlightenment, this principle appears as a direct response to the deeds of the overbearing feudal State. It places the emphasis in private autonomy, in the fundamental rigs of individuals, seeing them as the best arbiters to determine what is best for them. This *laissez-faire* understanding of contracts became inadequate to deal with some of the new challenges that came as a result of a more complex market. Chief among these new challenges were: a) The concentration of bargaining power in a decreasing amount of market participants, and b) The appearance of contracts of adhesion.

Since the adhering parties to a contract of adhesion are unable to modify the terms of their agreements, and these terms are often the same all across the market, it quickly

became obvious that for them, "freedom" of contract was only theoretical. Although different measures have been adopted to attempt to combat this problem, such as increasing the information that must be provided to adhering parties, the results have not been satisfactory.

Chapter 3 Repairing Contractual Imbalances

Since bargaining power disparities often result in unfair contractual terms, some have suggested that the existence of these disparities should be enough to warrant contractual review. The problem about this approach, however, is that, in general, it is impossible to create a flawless method through which to measure bargaining power so as to identify "powerful" parties. As a result, protections have often been placed on "categories" of parties, such as workers and consumers, establishing certain requirements that must be fulfilled by their contract. Alternatively, doctrines centered around "fairness," such as the doctrine of unconscionability in the Common Law, and good faith in the Civil Law, have been used to tackle unfair (or unconscionable) contracts.

Chapter 4 Unconscionability in the Common Law

Despite being of English origin, the doctrine of unconscionability has been virtually abandoned in England. It has, however, seen a resurgence in the United States, as well as in other Common Law countries. Through its use (v.gr. thanks to its inclusion in UCC section 2-302) victims of contractual unfairness have been able to obtain judicial relief from their contracts. In order to obtain such relief, however, the courts have established a rather strict approach to unconscionability, requiring evidence of both procedural unconscionability (i.e. that unfairness existed in *concluding* the contract) and substantive unconscionability (i.e. that the terms themselves are unfair).

One of the shortcomings of unconscionability is that its use has often been limited to consumer contracts, leaving commercial parties out of its reach. This does not seem to be justified, as commercial parties can also be victims of the kind of unfair bargains that can affect any other market participant.

Chapter 5 Unconscionable Contracts in the Civil Law

One of the safety valves through which Civil Law jurisdictions have been able to tackle unfairness, lacking the flexibility of the Common Law, is by resorting to good faith. Often this enforcement of the good faith obligation is seen as an extension of the right to human dignity that the parties, as individuals, possess. As such, they are to be protected from abusive clauses that are inserted into contracts, and which represent, in and of themselves, a violation of the good faith duty.

Some countries, like Germany, have gone further in the extension that they give to this obligation, linking it directly to the human rights of the parties, and their horizontal application in contractual matters. Although we contest that this approach can even be extended to commercial parties, it does not seem to be an adequate control mechanism.

On the contrary, it creates the kind of uncertainties that make it a fairly dangerous tool to have in private law.

Chapter 6 Choice of Court Agreements

The parties to a contract, particularly those with an international element, will often go to great lengths to limit the uncertainty and minimize their costs. One of the tools that they employ to achieve this result is the insertion of forum selection clauses in their contracts, limiting the forums where it will be possible to start proceedings if a dispute arises.

Although nowadays their use is accepted virtually all across the board, for a long time they were seen as going against public policy, by ousting courts of their jurisdiction. Although this debate, by and large, has been left behind, there are still concerns surrounding the use of these clauses. Chief among them is the possibility that they might deprive one of the parties of their day in court, by severely increasing their procedural costs. While admitting their usefulness and the benefits that they can create for the parties, the way in which different legal systems have attempted to prevent the most negative consequences of their use, varies from State to State.

Chapter 7 Forum Selection in the United States

For a long time the United States adopted what is now known as the "ouster doctrine," and under which all forum selection clauses were deemed unenforceable by reasons of public policy. This placed the United States in a fairly difficult situation in the international stage, as it found itself following an antiquated approach compared to other developed nations. This changed with *The Bremen*, a 1972 Supreme Court decision that recognized the validity of forum selection clauses. In this case, two large international enterprises had agreed on a forum selection clause, and the Supreme Court did not see any reason why their bargain should not be respected.

While the ruling in *The Bremen* seemed to limit the effects of the decision to a rather unique subset of contracts (i.e. thoroughly negotiated, international contracts between large commercial parties) the courts soon extended its application well beyond those confines. This expansion reached its apex with the 1991 Supreme Court decision in *Carnival Cruise* where the enforceability of a forum selection clause between a cruise company and an individual consumer was deemed fully enforceable.

It is our contention that the expansion of *The Bremen* is bad law. It has overlooked the real problems associated with bargaining power disparities and, in effect, has allowed for "weak" parties to find themselves deprived of judicial relief. While this has affected consumers, its effects can also be felt in commercial contracts, where small businesses will also be unable to escape from an adhesive forum selection clause, regardless of the fact that there was no real negotiation (or even a possibility of one) about its inclusion.

Chapter 8 Forum Selection in England

Unlike the United States, England has traditionally shown a much more tolerant view of forum selection clauses. Indeed, English courts will enforce these clauses almost automatically, only refusing to do so in very exceptional cases. In general, the burden laid on the party resisting the enforcement is quite high, requiring special proof of issues such as the unfairness of the selected forum, or the difficulties associated with reaching it. As a general rule, matters like distance and costs, for example, have not been been well received by the courts in this regard.

Chapter 9 Contracts in Maritime Law

A part of private law (unlike the "law of the sea") maritime law is one of the most harmonized segments of international law. This due to the fact that, since it affects commerce, there is a clear interest on the part of the international community to ensure that the markets operate properly.

In the carriage of goods by sea, the exploitation of a vessel is, by and large, made through two types of contracts. Charterparties, contracts for the use of a ship, or part of it; and contracts of affreightment evidenced in bills of lading.

Bills of lading serve three distinct purposes; first, they are a receipt for the goods that are being shipped aboard a vessel; second, they are the best evidence of the terms of the contract (without, at the same time, being *the* contract); and, third, they are a document of title, allowing the bearer to transfer them while they are still in transit by transferring the bill of lading via its endorsement. As bills of lading represent the most common form of contracts of carriage of goods by sea, they have been the subject of several regulatory efforts.

Chapter 10 The International Regulatory Framework of Contracts of Affreightment

Starting in the late 19th Century, there has been a move to regulate contracts of affreightment, so as to tackle the bargaining disparities that exist between shipowners on the one hand, and cargo owners on the other. Due to the practice of the carriers to exclude any and all liabilities, a series of international regulatory bodies have been enacted; the Hague Rules (1918), the Visby Amendments to the Hague Rules (1979), the Hamburg Rules (1978), and the Rotterdam Rules (2009). Right now, the Hague-Visby Rules are the most often-encountered regulation, with the Hamburg Rules having been adopted by only a handful of minor nations, and the Rotterdam Rules still lacking the necessary ratifications to come into force. What these rules have sought to create is, to a larger or lesser extent depending on the specific body, a regulatory system on liability rules.

Even among countries that have adopted the same rules, the problem is that they are often applied in different ways. What is more, it is often the case that a given set of rules

are slightly modified when adapted into a given legal system, further eroding the goals of harmonization and uniformity that the international community desires.

Chapter 11 Party Autonomy in Contracts of Affreightment

Maritime carriage is characterized by a significant absence of freedom of contract. Although the parties are, of course, able to make decisions on many aspects of the contract, they are not allowed to depart from certain minimum liability standards imposed by the governing rules. The idea has been that the bargaining power possessed by the carriers is such, that allowing them to depart from these minimum standards, would result in them disclaiming all liability, transferring the costs to the cargo interests and their insurers.

Due to the criticisms that have been leveled by some against the perceived "paternalism" demonstrated by the previous maritime rules, the Rotterdam Rules have created an alternative system. Here, parties to a "volume contract" (essentially a contract for a series of shipments) will be allowed to do away with these limitations. It is our position that the way in which the volume contracts exception was established in the Rotterdam Rules was inconvenient, as it is so vague that it allows virtually all contracts to fall under the "volume contract" exception, provided the amount of shipments is equal to, or larger than, two. What we contest, and the majority of commentators seems to agree, is that the Rotterdam Rules, in their hopes of satisfying the demands of the vessel owners, have created a loophole that will leave shippers unprotected and which, in our view, might actually prevent these rules from being adopted altogether.

Chapter 12 Forum Selection Clauses in Bills of Lading

The importance of forum selection cannot be overstated. Its relevance is such, that disputes as to the forum will often serve as proxies to debates over the substantive issue. Evidence shows that losing a dispute over the forum will often result in a party abandoning a claim altogether, or settling in a less favorable way.

Since the Hague-Visby Rules do not address the issue of jurisdiction, it has been left up to the courts to decide whether a forum selection clause should be allowed. In general, courts in England and the United States have enforced these clauses, although occasionally relief has been granted to parties that manage to meet the very high burden of proof required to demonstrate that the costs of litigating in the selected forum actually represents a lowering of the liability of the carrier beyond the limits established in the Rules.

Both the Hamburg Rules and the Rotterdam Rules establish rules that limit the use of exclusive forum selection clauses. What this means is that even in the face of such a clause, the claimant will still have the option to commence proceedings in other competent courts. This is further restricted in the case of the Rotterdam Rules, where the only courts that can be legitimately designated in the forum selection clause are those located in States that are party to the Rotterdam Rules. It should be noted, however, that

the jurisdictional provisions of the Rotterdam Rules are optional, with ratifying States needing to expressly accept them,

Within the volume contract exception, the Rotterdam Rules seem to erode the protections of the cargo interests, by establishing that in those cases the forum selection clauses will be fully valid and exclusive. This erosion, however, is limited by the fact that only forums located in contracting States will be considered as valid.

Conclusion

Although contractual protections against bargaining power disparities have been traditionally established in favor of "weak" contractual parties like consumers and workers, they should be extended to commercial parties. The evidence presented in this work shows that small businesses are often left at the mercy of larger enterprises, suffering with the same kind of abusive contractual terms that might affect an unprotected consumer.

Related to the idea of protecting small businesses, the traditional approach towards forum selection in commercial contracts, particularly maritime contracts of carriage, should be re-examined. The idea that these clauses are only procedural in nature is unrealistic, as the evidence demonstrates that they have a significant impact on the substantive rights of the parties. What is more, the costs in which a party might have to incur in order to comply with the terms of such a clause, might result in the proceedings becoming so expensive as to, in effect, lower the liability of the carrier, by forcing the claimant to make the kind of disbursements that would make it more fiscally efficient to simply not claim at all.

The approach that has been taken so far in the international stage in regards to maritime contracts leaves much to be desired. The first problem is that simply flooding the landscape with more possible regulations will only increase uncertainty, as more possible standards will be available to be adopted, adapted, and transformed, by individual nations. Secondly, and as the Rotterdam Rules make clear, there seems to be a desire to loosen some of the protections established in favor of cargo interests, by allowing for more freedom of contract. While in principle this might be a good idea, and a serious debate should be had on this matter, the way in which such changes have been framed is far from adequate. What is more, such changes are justified by appealing to the existence of outlier cargo interests that possess equal or larger bargaining power than the shipowners, apparently not realizing that regulations should be done based on the average subjects, not the statistical anomalies.

Samenvating

Dit onderzoek beoogt twee vragen te beantwoorden:

1. Dienen commerciële partijen, bijvoorbeeld partijen met belangen in de lading in maritieme contracten, juridische bescherming te genieten?
2. Dient deze juridische bescherming betrekking te hebben op forumkeuzebedingen?

Om deze vragen te beantwoorden is gebruik gemaakt van een eclectische onderzoeksmethode waarbij een aantal essentiële concepten van het contractenrecht worden geanalyseerd, waarna een analyse van maritieme contracten en de forumkeuze plaatsvindt. Deze analyse betreft voornamelijk een analyse van het recht van de Verenigde Staten en Engeland, hoewel daarnaast, voor rechtsvergelijkende redenen, het recht van een aantal Civil Law landen wordt besproken. Daarnaast worden, om het begrip van het probleem te bevorderen, een aantal historische en sociologische kwesties rond dit thema geanalyseerd en becommentarieerd.

Hoofdstuk 1 De onaantastbaarheid van contracten

Het lijkt wellicht contra-intuïtief, maar het idee van *pacta sunt servanda,* dat overeenkomsten dienen te worden nagekomen, stamt niet uit het Romeinse recht. Sterker nog, hoewel het dwingende karakter van overeenkomsten de kern vormt van ons vrije markten-systeem, behelst het eigenlijk een vrij nieuw onderdeel van ons juridisch begrip. De oorsprong van het begrip dateert uit de tijd van de canonisten die, op basis van Bijbelse regels met betrekking tot het nakomen van beloften, een doctrine ontwikkelden op grond waarvan een morele verplichting werd gekoppeld aan de vervulling van overeenkomsten. Het was op basis van hun werk dat het begrip deel uit ging maken (hoewel in verschillende hoedanigheden) van de Westerse rechtssystemen, door te worden opgenomen in bijvoorbeeld het burgerlijk wetboek van Frankrijk, Nederland, Duitsland en Spanje, alsmede in de Common Law.

Hoofdstuk 2 Contractsvrijheid en onderhandelingspositie

Gerelateerd aan het begrip *pacta sunt servanda* is de *contractsvrijheid*: de mogelijkheid voor partijen om de inhoud van hun overeenkomsten vast te stellen zonder dat de Staat zich inmengt in hun verlangens. Dit principe, en dat is ook een essentieel onderdeel van onze kapitalistische maatschappij, is door de eeuwen heen niet statisch gebleven. Dit begrip lijkt, als een product van de Verlichting, een reactie te zijn op de overheersende inmenging van de feodale staat. Dit *laissez-faire* begrip van contracten was onvoldoende in staat om te gaan met de nieuwe uitdagingen van een meer complexe markt. De belangrijkste uitdagingen waren: a) de concentratie van de onderhandelingspositie en een afnemende hoeveelheid van marktdeelnemers en b) het ontstaan van adhesie-contracten.

Aangezien de zwakkere partij bij een adhesie-contract niet in staat is de contractvoorwaarden aan te passen, en dezelfde voorwaarden vaak in de gehele markt worden gebruikt, werd het snel duidelijk dat de term contractsvrijheid slechts theoretisch was. Hoewel verschillende maatregelen zijn gebruikt om dit probleem op te lossen, zoals het verhogen van de informatie aan deelnemende partijen, zijn de resultaten daarvan niet bevredigend.

Hoofdstuk 3 Herstel van contractevenwicht

Aangezien verschillen in onderhandelingspositie vaak resulteren in oneerlijke contractvoorwaarden, hebben sommigen voorgesteld dat het bestaan van dergelijke geschillen voldoende zou moeten zijn om een contractuele beoordeling daarvan te rechtvaardigen. Het probleem van deze benadering was echter dat het over het algemeen onmogelijk is om een vlekkeloze methode te ontwikkelen om de onderhandelingspositie vast te stellen en zodoende 'machtige' partijen te identificeren. Als gevolg daarvan wordt vaak bescherming geboden aan bepaalde categorieën van partijen zoals werknemers en consumenten, waarbij bepaalde voorwaarden worden gesteld aan (de kwalificatie van) dergelijke contracten. Als alternatief zijn er doctrines ontwikkeld rondom 'billijkheid', zoals de onredelijkheids- of *unconscionability*-leer in de Common Law en de goede trouw in de Civil Law, om oneerlijke (of onredelijke) contracten aan te pakken.

Hoofdstuk 4 Unconscionability (onredelijkheid) in de Common Law

Hoewel van Engelse origine, wordt de leer van *unconscionability* in Engeland nauwelijks meer toegepast. Het is echter nieuw leven ingeblazen in de Verenigde Staten en andere Common Law landen. Door gebruik te maken van deze leer (met dank aan de opname in sectie 2-302 UCC) zijn slachtoffers van contractuele onredelijkheid in staat om gerechtelijke hulp te verkrijgen bij dergelijke contracten. Om in aanmerking te komen voor dergelijk herstel is in de rechtspraak een vrij strikte benadering van onredelijkheid ontwikkeld, welke bewijs van zowel procedurele als materiële onredelijkheid vereist (d.w.z. dat de bepalingen zelf onredelijk zijn). Een van de tekortkomingen van de onredelijkheidsleer is dat zijn toepassing vaak beperkt wordt tot consumentenovereenkomsten, waardoor commerciële partijen buiten het bereik van deze leer vallen. Dit lijkt ongerechtvaardigd, commerciële partijen kunnen immers evengoed slachtoffer zijn van oneerlijke onderhandelingen die betrekking kunnen hebben op elke andere marktdeelnemer.

Hoofdstuk 5 Onredelijke contracten in de Civil Law

Een van de redenen waardoor civielrechtelijke jurisdicties in staat zijn om oneerlijkheid aan te pakken, zonder de flexibiliteit die geboden wordt door de Common Law, is door toevlucht te nemen tot de goede trouw. De handhaving van de goed trouw wordt vaak gezien als een verlenging van het recht op menselijke waardigheid dat de partijen, als individuen, bezitten. Zij dienen daarom te worden beschermd tegen oneerlijke bedingen

die deel uitmaken van een overeenkomst en die, *per se,* een schending van de goede trouw inhouden. Sommige landen, zoals Duitsland, hanteren een uitgebreidere goede trouw verplichting, door de goede trouw rechtstreeks te koppelen aan de mensenrechten van partijen en de horizontale toepassing daarvan in contractuele zaken toe te staan. Hoewel ik mij afvraag of deze benadering kan worden uitgebreid naar commerciële partijen lijkt het geen adequaat controlesysteem. In tegendeel, het zorgt voor bepaalde onzekerheden die het tot een gevaarlijk instrument maken in het privaatrecht.

Hoofdstuk 6 Forumkeuzebedingen

De contractspartijen, in het bijzonder waar het een contract met een internationaal element betreft, gaan vaak tot het uiterste om onzekerheden te beperken en kosten te minimaliseren. Een van de instrumenten die gebruikt worden om dit resultaat te bereiken is de toevoeging van een forumkeuzebeding aan hun contracten, waardoor het aantal fora waar het mogelijk is om een procedure te starten wordt ingeperkt. Hoewel het gebruik van een forumkeuzebeding tegenwoordig alom wordt toegestaan, werden deze bepalingen lange tijd strijdig met de openbare orde geacht doordat zij de bevoegdheid aan de rechter ontnamen. Hoewel dit debat over het algemeen niet langer gevoerd wordt zijn er nog altijd bezwaren rond het gebruik van deze bepalingen. Hierbij is het belangrijkste bezwaar de mogelijkheid dat de forumkeuze een van partijen mogelijk zijn toegang tot de rechter ontzegt, door de proceskosten aanzienlijk te verhogen. Hoewel het nut van een forumkeuzebeding en de voordelen die een dergelijk beding voor partijen creëert worden erkent, verschilt de manier waarop men de negatieve consequenties van een dergelijk beding probeert tegen te gaan van staat tot staat.

Hoofdstuk 7 Forumkeuze in de Verenigde Staten

Lange tijd werd in de Verenigde Staten gebruik gemaakt van wat nu bekend staat als de 'ouster doctrine' , op basis waarvan iedere forumkeuze onuitvoerbaar werd geacht wegens strijd met de openbare orde. Dit gebruik plaatste de Verenigde Staten in een vrij moeilijke positie op het internationale speelveld, aangezien gebruik gemaakt werd van een verouderde aanpak in vergelijking met andere ontwikkelde landen. Dit wijzigde met *The Bremen*, een beslissing van de Supreme Court uit 1972, waarin de geldigheid van forumkeuzebedingen werd vastgesteld. In deze zaak waren twee grote internationale ondernemingen een forumkeuze overeengekomen en zag de Supreme Court geen reden om deze keuze niet te respecteren.

Hoewel de gevolgen van de uitspraak in *The Bremen* beperkt leken tot een vrij unieke subset van overeenkomsten (dat wil zeggen internationale contracten tussen grote commerciële partijen waarin grondig onderhandeld was) breidden rechterlijke instanties de toepassing van deze zaak snel uit buiten deze grenzen. Deze uitbreiding bereikte zijn hoogtepunt met de uitspraak van de Supreme Court in de zaak *Carnival Cruise* in 1991 waarin de geldigheid van een forumkeuzebeding tussen een cruise bedrijf een individuele consument volledig geldig werd geacht.

Naar mijn mening is een dergelijke uitbreiding van de uitspraak in *The Bremen* ongewenst. Daarbij worden de werkelijke problemen met betrekking tot verschillen in onderhandelingspositie over het hoofd gezien hetgeen ervoor heeft gezorgd dat voor 'zwakke' partijen de toegang tot de rechter aanzienlijk wordt bemoeilijkt. Hoewel dit primair consumenten heeft getroffen, heeft de genoemde uitbreiding ook gevolgen voor commerciële partijen, doordat kleine partijen niet in staat zijn om te ontkomen aan een forumkeuzebeding in een adhesie-contract, ongeacht het feit dat er geen werkelijke onderhandeling (of zelfs de mogelijkheid van een dergelijke onderhandeling) over de invoeging van een forumkeuzebeding heeft plaatsgevonden.

Hoofdstuk 8 Forumkeuze in Engeland

In tegenstelling tot de Verenigde Staten heeft Engeland traditioneel veel meel tolerantie getoond ten aanzien van forumkeuzebedingen. Engelse rechtbanken zullen deze bedingen vrijwel direct handhaven; handhavingsweigeringen komen slechts voor in zeer uitzonderlijke gevallen voor. Over het algemeen is de bewijslast die rust op de partij die zich verzet tegen de toepassing van een forumkeuzebeding vrij hoog, waarbij in het bijzonder bewijs van zaken als de onredelijkheid van het geselecteerde forum of de moeilijkheden ten aanzien van het bereiken van het forum gevraagd wordt. Over het algemeen worden zaken zoals bijvoorbeeld afstand en kosten in dit kader niet goed ontvangen door de rechter.

Hoofdstuk 9 Contracten in het maritieme recht

Als onderdeel van het privaatrecht (anders dan het zeerecht) is het maritieme recht een van de meest geharmoniseerde segmenten van internationaal recht. Dit is te wijten aan het feit dat, aangezien het betrekking heeft op handel, de internationale gemeenschap een duidelijk belang heeft in de goede werking van markten.

Met betrekking tot goederenvervoer over zee, vindt de exploitatie van een schip grotendeels plaats op basis van twee soorten contracten: charterparties, contracten voor het gebruik van een schip, of een deel daarvan; en bevrachtingscontracten blijkend uit een cognossement. Het doel van een cognossement is drieledig: allereerst geldt het als ontvangstbewijs voor de goederen die per schip worden vervoerd; ten tweede vormt het beste bewijs van de contractvoorwaarden (zonder, tegelijkertijd, het contract te zijn); en, ten derde, vormt het een titel die de drager, door overdracht van het cognossement, het recht geeft de goederen over te dragen terwijl deze nog op doorreis zijn. Aangezien het cognossement de meest gangbare vorm van contracten met betrekking tot goederenvervoer over zee vertegenwoordigt is deze het onderwerp geweest van verschillende regulerende inspanningen.

Hoofdstuk 10 Het internationaal regelgevende kader van bevrachtingscontracten

Vanaf de late 19e eeuw is er gepoogd bevrachtingscontracten te reguleren om tegemoet te komen aan de verschillen in onderhandelingspositie die bestaan tussen de scheepseigenaren aan de ene hand en de vrachteigenaren aan de andere. Om tegenwicht te bieden aan het gebruik onder vervoerders om alle aansprakelijkheid uit te sluiten, zijn een aantal internationale regelingen in het leven geroepen: de *Hague Rules* (1918), de *Visby Amendments to the Hague Rules* (1979), de *Hamburg Rules* (1978) en de *Rotterdam Rules* (2009). Tegenwoordig vertegenwoordigen de *Hague-Visby Rules* de meest gebruikte regeling; de *Hamburg Rules* zijn slechts door een handvol kleine staten aangenomen en bij de *Rotterdam Rules* ontbreken de ratificaties die vereist zijn voor inwerkingtreding. Wat deze regelingen beoogden te creëren is, in meer of mindere mate, afhankelijk van de specifieke regeling, regelgeving met betrekking tot aansprakelijkheid.

Zelfs tussen landen die dezelfde regels toepassen bestaat het probleem dat deze regelgeving vaak op verschillende wijze(n) wordt toegepast. Bovendien komt het vaak voor dat een bepaalde regeling binnen een bepaald rechtssysteem, enigszins is aangepast hetgeen verder afbreuk doet aan de doelstelling van harmonisatie en uniformiteit die gewenst wordt door de internationale gemeenschap.

Hoofdstuk 11 Partijautonomie binnen bevrachtingscontracten

Het rechtsgebied van zeevervoer wordt gekarakteriseerd door een significante afwezigheid van contractsvrijheid. Hoewel de partijen, natuurlijk, in staat zijn om beslissingen te maken over vele aspecten van hun contract, is het hen niet toegestaan om af te wijken van bepaalde normen betreffende minimumaansprakelijkheid in de geldende regels. Het idee is dat de onderhandelingspositie van de vervoerder zo sterk is, dat het toestaan van een afwijking van deze minimumnormen zou resulteren in een algehele uitsluiting van aansprakelijkheid, waarbij de kosten worden overgedragen aan diegenen met belangen in de lading en hun verzekeraars.

Door de kritiek die door sommigen wordt geuit tegen het vermeende 'paternalisme' van de vorige maritieme regelingen, is door de *Rotterdam Rules* een alternatief systeem gecreëerd. Onder de *Rotterdam Rules* is het partijen bij een 'volume contact' (feitelijk een contract voor een reeks van zendingen) toegestaan om af te wijken van deze beperkingen. Ik ben van mening dat de manier waarop de exceptie voor volume contracten in de *Rotterdam Rules* is opgesteld bezwaarlijk is; het is dermate onbestemd dat vrijwel alle contracten onder de 'volume contract'-exceptie vallen, zolang het aantal zendingen groter dan of gelijk is aan twee. Wat ik stel, en waar de meerderheid van commentatoren mee in lijkt te stemmen, is dat de *Rotterdam Rules,* door te voldoen aan de eisen van de scheepseigenaren een lacune hebben gecreëerd die de bevrachters onbeschermd zal laten en die, naar mijn mening, wellicht voorkomt dat deze regeling in werking treedt.

Hoofdstuk 12 Forumkeuzebeding in een cognossement

Het belang van een forumkeuze kan niet worden overschat. De relevantie daarvan is zodanig dat geschillen betreffende het forum vaak een graadmeter vormen voor het verloop van het materiële geschil. Het blijkt dat het verlies van een geschil over het forum er vaak voor zal zorgen dat een partij afstand doet van zijn vordering of dat het geschil op een minder gunstige manier wordt beslecht.

Aangezien de *Hague-Visby Rules* de kwestie van internationale bevoegdheid niet behandelen is het aan de rechter om te bepalen of een forumkeuzebeding wordt toegestaan. In het algemeen kunnen dergelijke bedingen in Engeland en de Verenigde Staten worden afgedwongen, hoewel het partijen in sommige gevallen gelukt is aan de zware bewijslast te voldoen en aan te tonen dat de kosten van het procederen in de geselecteerde forum feitelijk resulteren in een verlaging van de aansprakelijkheid van de vervoerder buiten de limieten die gesteld worden in de *Rules*.

Zowel de *Hamburg Rules* als de *Rotterdam Rules* bevatten regels die het gebruik van exclusieve forumkeuzebedingen inperken. Dit betekent dat de eiser ondanks het bestaan van een forumkeuze de optie heeft om een procedure voor een andere bevoegde rechter te starten. Dit wordt verder aan banden gelegd door de *Rotterdam Rules*, waar alleen een forumkeuze kan worden uitgebracht voor een staat die partij is bij de Rotterdam Rules. Daarbij dient evenwel te worden opgemerkt dat de bevoegdheidsbepalingen uit de *Rotterdam Rules* van optionele aard zijn; ratificerende staten dienen deze bepalingen uitdrukkelijk te aanvaarden.

Waar het de uitzondering voor volume contracten betreft lijken de *Rotterdam Rules* de bescherming van partijen met een belang in de lading aan te tasten, door vast te stellen dat forumkeuzebedingen in dergelijke contracten volledig geldig en exclusief zijn. Deze aantasten wordt echter beperkt doordat alleen een keuze voor de rechter van een verdragsluitende staat als geldig zal worden ervaren.

Conclusie

Hoewel contractuele bescherming tegen verschillen in onderhandelingspositie traditioneel worden opgesteld ten behoeve van 'zwakke' contractspartijen zoals consumenten en werknemers, dient deze bescherming uitgebreid te worden tot commerciële partijen. Dit werk levert bewijs voor de stelling dat kleine ondernemingen vaak worden overgelaten aan de genade van grotere ondernemingen, waarbij zij met dezelfde onredelijke contractvoorwaarden te kampen hebben als de onbeschermde consument.

In het licht van het idee van de bescherming van kleine ondernemingen dient de traditionele benadering van de forumkeuze in commerciële contracten, in het bijzonder contracten betreffende goederenvervoer over zee, te worden herzien. Het idee dat deze bepalingen slechts van procedurele aard zijn is onrealistisch, aangezien er duidelijk bewijs is dat deze bepalingen een significante impact hebben op de materiële rechten van partijen. Bovendien zijn de kosten die een partij zou moeten maken om tegemoet te

komen aan de voorwaarden van een dergelijk beding zodanig zijn dat de procedure vaak zo duur wordt dat deze in feite resulteert in een verlaging van de aansprakelijkheid van de vervoerder door de eiser te dwingen zodanige uitgaven te doen dat het financieel efficiënter is om geen vordering in te dienen.

De aanpak die tot dusver op het internationale toneel is genomen met betrekking tot maritieme contracten laat veel te wensen over. Het eerste probleem is dat het creëren van meer en alternatieve regelingen enkel aanleiding zal geven tot meer onzekerheid, naarmate er meer normen beschikbaar zijn om te worden aangenomen, aangepast en getransformeerd door individuele landen. Ten tweede, hetgeen blijkt uit de *Rotterdam Rules,* bestaat de wens om de bescherming van de partijen met een belang in de lading te bepreken door een grotere contractsvrijheid toe te staan. Hoewel dit in principe een goed idee zou kunnen zijn dient hierover een serieus debat plaats te vinden, de manier waarop de wijzigingen tot dusver zijn vormgegeven is verre van voldoende. Dergelijke wijzigingen worden gerechtvaardigd door een beroep te doen op het bestaan van (een uitzonderlijke groep) partijen met een belang in de lading die een gelijke of betere onderhandelingspositie hebben dan de scheepseigenaren, waarbij men zich blijkbaar niet heeft gerealiseerd dat regelingen dienen te worden gebaseerd op de gemiddelde partijen en niet op statistische afwijkingen.

Bibliography

Books

AIKENS, R. & LORD, R. et al., *Bills of Lading*, 2016, 2nd ed., Taylor & Francis.

AKSOY, H. C., *Impossibility in Modern Private Law: A Comparative Study of German, Swiss and Turkish Laws and the Unification Instruments of Private Law*, 2014, Springer International Publishing.

ARROYO, I. (ed.), *Yearbook Maritime Law 1984*, 1986, Springer Science + Business Media.

BAATZ, Y. (ed.), *Maritime Law*, 2014, Third Edition, Taylor and Francis, Hoboken.

BAR, C. von & CLIVE, E. et al., *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Outline Edition*, 2009, Sellier. European Law Publishers.

BASEDOW, J., et al. (eds.), *The Hamburg Lectures on Maritime Affairs 2011-2013*, 2015, Springer Berlin Heidelberg.

BAUGHEN, S., *Shipping Law*, 2015, 6th ed., Taylor and Francis, Hoboken.

BELL, A. S., *Forum Shopping and Venue in Transnational Litigation*, 2003, Oxford University Press.

BEN-SHAHAR, O. & SCHNEIDER, C. E., *More Than You Wanted to Know: The Failure of Mandated Disclosure*, 2014, Princeton University Press.

BERGER, K. P. (ed.), *European Private Law, Lex Mercatoria and Globalisation*, 2011.

BERLINGIERI, F., *International Maritime Conventions Volume I: The Carriage of Goods And Passengers by Sea*, 2014, Informa Law from Routledge, Great Britain.

BERLINGIERI, F., *International Maritime Conventions: Navigation, Securities, Limitation of Liability and Jurisdiction*, 2015, Informa Law from Routledge, Great Britain.

BOONE, I., et al. (eds.), *Liber Amicorum Hubert Bocken*, 2009, Die Keure, Brugge.

BOSCHIERO, N., et al. (eds.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, 2013, T. M. C. Asser Press, The Hague, The Netherlands.

BOYD, S. C. & BURROWS, A. S. et al., *Scrutton on Charterparties and Bills of Lading*, 1996, 20º Edition, London: Sweet & Maxwell.

BRIGGS, A., *Agreements on Jurisdiction and Choice of Law*, 2008, Oxford University Press.

BRIGGS, A., *The Conflict of Laws*, 2013, Third edition, Oxford University Press, Oxford, United Kingdom.

CARR, I. & STONE, P., *International Trade Law*, 2014, 5th ed., Routledge-Cavendish.

Centre for Studies and Research in International Law and International Relations (ed.), *Le Droit International des Transports Maritimes 1999*,

CHEREDNYCHENKO, O. O., *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions*, 2007, Sellier. European Law Publishers, München, Germany.

CLAUSEWITZ, C. v., *On War*, 2007, Oxford University Press.

COLLIER, J. G., *Conflict of Laws*, 2004, Third Edition, Cambridge University Press, Cambridge, UK.

COLTON, C. C., *Lacon: Or, Many Things in Few Words: Addressed to Those who Think*, 1820, 5th, Longman, Hurst, Rees, Orme, and Brown.

CONTRERAS STRAUCH, O., *Derecho Marítimo*, 2000, Editorial Jurídica ConoSur Ltda., Santiago de Chile.

CORDERO-MOSS, G. (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, 2011, Cambridge University Press.

D'AGOSTINO, E., *Contracts of Adhesion Between Law and Economics: Rethinking the Unconscionability Doctrine*, 2014, Springer.

DAMAR, D., *Wilful Misconduct in International Transport Law*, 2011, Springer, Heidelberg.

DAVIES, M. (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, 2005, Kluwer Law International, The Hague, Netherlands.

DECOCK, W., *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)*, 2012, M. Nijhoff Publishers.

DOCKRAY, M. & THOMAS, K. R., *Cases and Materials on the Carriage of Goods by Sea*, 2004, Cavendish.

DUNLOP, J., *History of Roman Literature During the Augustan Age*, 1828, Longmans, Rees, Orme, Brown and Green, London.

ESPIAU ESPIAU, S. & VAQUER I ALOY, A. (eds.), *Bases de un Derecho Contractual Europeo*, 2002, Tirant lo Blanch.

FALKANGER, T. & BULL, H. J. et al., *Scandinavian Maritime Law: The Norwegian Perspective*, 2011, 3º Edition, Universitetsforlaget.

FARINA, M. & MALTESE, D., *Abuse of Rights and Freedom of Contract in Comparative Perspective: A Legal and Economic Analysis*, 2012, 2012/08/07.

FONTANA, Biancamaría (ed.), *Constant: Political Writings*, 1988, Cambridge University Press

FORCE, R., *Admiralty and Maritime Law*, 2004, Federal Judicial Center.

GARNER, B. A., *Black's Law Dictionary, 9th*, 2009, 9th edition, West Pub. Co., St. Paul, Minn.

GEORGE, R., *Ninety Percent of Everything: Inside Shipping, the Invisible Industry That Puts Clothes on Your Back, Gas in Your Car, and Food on Your Plate*, 2013, Henry Holt and Company.

GIRVIN, S., *Carriage of Goods by Sea*, 2011, 2º Edition, Oxford University Press, Oxford, United Kingdom.

GÜNER-ÖZBEK, M. D. (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the "Rotterdam Rules"*, 2011, Springer, Berlin, New York.

HARTKAMP, A. S. & BAR, C. von, *Towards a European Civil Code*, 2011, Kluwer Law International.

HARTKAMP, A. S., et al. (eds.), *Towards a European Civil Code*, 2011, 4, Kluwer Law International.

HARTLEY, T. C., *Choice-of-Court Agreements Under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, 2013, Oxford University Press, Oxford, United Kingdom.

HOBBES, T., *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil*, 1839, John Bohn, London.

HOGG, M., *Promises and Contract Law: Comparative Perspectives,* Cambridge University Press.

HOLMES, O. W., *The Common Law*, 2009, Harvard University Press.

HUGHES PARRY, D., *The Sanctity of Contracts in English Law*, 1959, Stevens & Sons Limited, London.

HUTSON, C., *Who is a Fundamentalist?*, 1982, Sword of the Lord.

JEFFERSON, T. & APPLEBY, J. et al., *Jefferson: Political Writings*, 1999, Cambridge University Press.

KENNY, M., et al. (eds.), *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable*, 2010, Cambridge University Press

KRANICH, S., et al. (eds.), *Multilingual Discourse Production*, 2011, John Benjamins Publishing Company, Amsterdam.

LETELIER, F. O., *El Movimiento Obrero en Chile, 1891-1919*, 2005, LOM Ediciones.

LINDSKOUG, P., et al. (eds.), *Essays in honour of Michael Bogdan*, 2013, Juristförlaget i Lund, Lund.

M. L. Hendrikse, et al. (eds.), *Aspects of Maritime Law: Claims Under Bills of Lading*, 2008, Kluwer Law International.

MAK, C., *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, 2008, Kluwer Law International.

MALKASIAN, C., *A History of Modern Wars of Attrition*, 2002, Praeger.

MANKABADY, S. (ed.), *The Hamburg Rules On The Carriage Of Goods By Sea*, 1978, A. W. Stijthoff, London.

MARGETSON, N. J., *The System of Liability of Articles III and IV of the Hague (Visby) Rules*, 2008, Paris Legal Publishers, Zutphen, the Netherlands.

MARKESINIS, B. S. & UNBERATH, H. et al., *The German Law of Contract: A Comparative Treatise*, 2006, 2, Hart Publishing.

MARTEN, B., *Port State Jurisdiction and the Regulation of International Merchant Shipping*, 2014, Springer International Publishing, Cham.

MERRYMAN, J. H. & PÉREZ-PERDOMO, R., *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 2007, Stanford University Press.

MILL, J. S., *On Liberty*, 1869, Longmans, Green, Reader, and Dyer.

MIRANDA, S. G. & M, G. et al., *Hombres y Mujeres de la Pampa: Tarapacá en el Ciclo del Salitre*, 2002, LOM Ediciones.

MITCHELHILL, A., *Bills of Lading: Law and Practice*, 1990, Second Edition, Springer-Science+Business Media, B.V.

MUKHERJEE, P. K. & BROWNRIGG, M. et al., *Farthing on International Shipping*, 2013, 4th ed., Springer, Berlin.

Office of the High Commissioner for Human Rights, *Selected Decisions of the Human Rights Committee under the Optional Protocol (Volume 8): Seventy-Fifth to Eighty-Fourth Sessions (July 2002 – July 2005)*, 2007, United Nations, New York, NY.

O'MAHONY, L. F., *Home Equity and Ageing Owners: Between Risk and Regulation*, 2012, Bloomsbury Publishing.

ORWELL, G., *Nineteen Eighty-Four*, 1983, Penguin Books, New York, NY.

PANIZZON, M., *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement*, 2006, Bloomsbury Publishing, Portland, OR.

PARAMESWARAN, B., *The Liberalization of Maritime Transport Services: With special reference to the WTO/GATS framework*, 2004, Springer, Berlin, New York.

PING-FAT, S., *Carrier's Liability Under the Hague, Hague-Visby and Hamburg Rules*, 2002, Kluwer Law International, The Hague, The Netherlands.

PRATCHETT, T., *Feet of Clay*, 2007, HarperCollins e-books.

PURNHAGEN, K. & ROTT, P. (eds.), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz*, 2014, Springer International Publishing, Cham.

RAND, A. (ed.), *Capitalism: The Unknown Ideal*, 1986, Penguin.

ROCKWELL JR., L. H., *Speaking of Liberty*, 2003, Ludwig von Mises Institute, Auburn, Alabama.

RUBINO-SAMMARTANO, M., *International Arbitration Law and Practice*, 2001, Kluwer Law International.

SCHINAS, O., et al. (eds.), *HSBA handbook on ship finance*, 2015, Springer, Berlin.

SCHLOSSER, E., *Fast Food Nation: The Dark Side of the All-American Meal*, 2012, Mariner Books/Houghton Mifflin Harcourt.

SCHULZE, R. & STUYCK, J. (eds.), *Towards a European Contract Law*, 2011, Sellier. European Law Publishers.

SLAWSON, W. David, *Binding Promises: The Late 20th-Century Reformation of Contract Law*, 1996, Princeton University Press, Princeton.

SMART, H., *United Nations Convention on the Carriage of Goods by Sea: 1978 (Hamburg Rules): Explanatory Documentation*, 1989, Commonwealth Secretariat.

SMITH, S. A. & ATIYAH, P. S., *Atiyah's Introduction to the Law of Contract*, 2006, OUP Oxford.

SOLA, P. R., *Fundamenta Iuris: Terminología, Principios e Interpretatio*, 2012, Editorial de la Universidad de Almería.

SPARKA, F., *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis*, 2010, Springer Science & Business Media.

GRUNDMANN, KERBER, et. al. (eds.) *Party Autonomy and the Role of Information in the Internal Market*, 2001, Walter de Gruyter, Berlin.

STONE, P., *EU Private International Law*, 2010, 2nd ed., Edward Elgar, Cheltenham, UK, Northampton, MA.

STURLEY, M. F. & FUJITA, T. et al., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly Or Partly by Sea*, 2010, Sweet & Maxwell.

TANG, Z. S., *Jurisdiction and Arbitration Agreements in International Commercial Law*, 2014, Routledge.

TEPPER, P., *The Law of Contracts and the Uniform Commercial Code*, 2012, Second Edition, Cengage Learning, New York.

THAMPAPILLAI, D. & TAN, V. et al., *Australian Commercial Law*, 2015, Cambridge University Press, Melbourne, Australia.

THOMAS, D. R. (ed.), *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2009, Lawtext Publishing Limited, Devon.

THOMAS, D. R. (ed.), *The Carriage of Goods by Sea Under the Rotterdam Rules*, 2010, Lloyd's List, London.

TODD, P., *Principles of Carriage of Goods by Sea*, 2016, Routledge, Abingdon.

TREITEL, G. H. & REYNOLDS, F. et al., *Carver on Bills of Lading*, 2011, Third Edition, Sweet & Maxwell.

VAN DE BUNT, H. G. (ed.), *International Law and the Fight Against Corruption*, 2012, T.M.C. Asser Press, Den Haag.

VAN DEN BERGH, R.J., *Regulation and Economics*, 2012, Edward Elgar Publishing Limited.

WADDAMS, S., *Principle and Policy in Contract Law: Competing or Complementary Concepts?*, 2011, Cambridge University Press.

WILLISTON, S. & LORD, R., *Williston on Contracts*, 2002, West Group, Minnesota.

WILSON, J. F., *Carriage of Goods by Sea*, 2010, 7th ed., Pearson/Longman, Harlow.

XU, J. (ed.), *Contemporary Marine and Maritime Policy*, 2014, Nova Science Publishers Incorporated, New York.

ZARTMAN, I. W. & TOUVAL, S., *International Cooperation: The Extents and Limits of Multilateralism*, 2010, Cambridge University Press.

ZIMMERMANN, R. & WHITTAKER, S. (eds.), *Good Faith in European Contract Law*, 2000, Cambridge University Press.

Conference Proceedings

AIDONIS, D., et al. (eds.), *Proceedings of the 1st Olympus International Conference on Supply Chains (Olympus ICSC 2010)*, 2010, Katerini, Greece.

BAIRD, M., et al. (eds.), *Reworking Work: AIRAANZ 05: Proceedings of the 19th Conference of the Association of Industrial Relations Academics of Australia and New Zealand*, 2005, Association of Industrial Relations Academics of Australia and New Zealand, Sydney, Australia.

LARIONOVA, J., et al. (eds.), *The Interaction of National Legal Systems: Convergence or Divergence?*, 2013, Vilnius, Latvia.

LIU, J. J., et al. (eds.), *Proceedings of the International Forum on Shipping, Ports and Airports (IFSPA) 2010: Integrated Transportation Logistics: From Low Cost to High Responsibility*.

Contributions in Edited Books

ALBA, M., *Déjá Vu? Maybe, Maybe Not: The Rotterdam Rules, Maritime Policy and Contract Law*, in Xu, J. (ed.), *Contemporary Marine and Maritime Policy*, 2014.

ARROYO, I., *Maritime Law: An Approach to the Concept*, in Arroyo, I. (ed.), *Yearbook Maritime Law 1984*, 1986.

BAATZ, Y., *Jurisdiction and Arbritration*, in Thomas, D. R. (ed.), *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2009.

BASEDOW, J., *Exclusive Choice-of-Court Agreements as a Derogation from Imperative Norms*, in Lindskoug, P. et al. (eds.), *Essays in honour of Michael Bogdan*, 2013.

BERLINGIERI, F., *The History of the Rotterdam Rules*, in Güner-Özbek, M. D. (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the "Rotterdam Rules"*, 2011.

BRAND, R. A., *Consent, Validity and Choice of Forum Agreements in International Contracts*, in Boone, I. et al. (eds.), *Liber Amicorum Hubert Bocken*, 2009.

CAPPER, D., *Protection of the Vulnerable in Financial Transactions: What the Common Law Vitiating Factors Can Do For You*, in Kenny, M. et al. (eds.), *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable*.

CARBONE, S. M. & LA MATTINA, A., *Uniform International Law on the Carriage of Goods by Sea: Recent Trends Toward a Multimodal Perspective*, in Boschiero, N. et al. (eds.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, 2013.

CONSTANT, B., *On Uniformity*, in Biancamaria Fontana (ed.), *Constant: Political Writings*, 1988.

DAVIES, M. & FORCE, R., *Forum Selection Clauses in International Maritime Contracts*, in Davies, M. (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, 2005.

DYRDA, Ł., *Jurisdiction in Civil and Commercial Matters under the Regulation No 1215/2012 – Between Common Grounds of Jurisdiction and Divergent National Rules*, in Larionova, J. et al. (eds.), *The Interaction of National Legal Systems: Convergence or Divergence?*, 2013.

GILLAN, M. & CASPERSZ, D., *The Introduction of Good Faith Bargaining in Western Australia: Policy Origins and Implications for Collective Bargaining*, in Baird, M. et al. (eds.), *Reworking Work: AIRAANZ 05: Proceedings of the 19th Conference of the Association of Industrial Relations Academics of Australia and New Zealand*, 2005.

GÜNER-ÖZBEK, M. D., *Extended Scope of the Rotterdam Rules: Maritime Plus and Conflict of the Extension with the Extensions of Other Transport Law Conventions*, in Güner-Özbek, M. D. (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the "Rotterdam Rules"*, 2011.

HARE, J., *Shopping for the Best Admiralty Bargain: Competing Jurisdictions in Admiralty Claims with Particular Emphasis on Forum Shopping Motivated by Domestic and International Differences in Regimes for the Limitation of Liability*, in Davies, M. (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, 2005.

HERMAN, S., *"Pacta sunt servanda" Meets the Market: Enforcing Promises in Spanish and United States Law*, in Espiau Espiau, S. & Vaquer i Aloy, A. (eds.), *Bases de un Derecho Contractual Europeo*, 2002.

HESSELINK, M. W., *The Concept of Good Faith*, in Hartkamp, A. S. et al. (eds.), *Towards a European Civil Code*, 2011.

HESSELINK, M. W., *Unfair Terms in Contracts Between Businesses*, in Schulze, R. & Stuyck, J. (eds.), *Towards a European Contract Law*, 2011.

HONKA, H., *Jurisdiction and EC Law : Loss of or Damage to Goods*, in Davies, M. (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, 2005.

KENNY, M. & DEVENNEY, J. et al., *Conceptualising Unconscionability in Europe: In the Kaleidoscope of Private and Public Law*, in Kenny, M. et al. (eds.), *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable*.

KERBER, W. & VANBERG, V., *Constitutional Aspects of Party Autonomy and Its Limits: The Perspective of Constitutional Economics*, in Stefan Grundmann, Wolfgang Kerber, Stephen Weatherill (ed.), *Party Autonomy and the Role of Information in the Internal Market*, 2001.

KRAMER, X. E., *Private International Law Responses to Corruption: Approaches to Jurisdiction and Foreign Judgments and the International Fight Against Corruption*, in Van de Bunt, H. G. (ed.), *International Law and the Fight Against Corruption*, 2012.

KRANICH, S. & BECHER, V. et al., *A Tentative Typology of Translation-Induced Language Change*, in Kranich, S. et al. (eds.), *Multilingual Discourse Production*, 2011.

LIANG, C., *Rise and Fall of Freedom of Contract under Bills of Lading – with Special Reference to the Development of the International Legislation and to a Special Issue under the Chinese Law*, in Liu, J. J. et al. (eds.), *Proceedings of the International Forum on Shipping, Ports and Airports (IFSPA) 2010: Integrated Transportation Logistics: From Low Cost to High Responsibility*.

MANKABADY, S., *Comments on the Hamburg Rules*, in Mankabady, S. (ed.), *The Hamburg Rules On The Carriage Of Goods By Sea*, 1978.

MARGETSON, S. W., *The History of the Hague (Visby) Rules*, in M. L. Hendrikse et al. (eds.), *Aspects of Maritime Law: Claims Under Bills of Lading*, 2008.

PEJOVIĆ, č., *Article 47(2) of the Rotterdam Rules: The Solution of Old Problems or a New Confusion?*, in Basedow, J. et al. (eds.), *The Hamburg Lectures on Maritime Affairs 2011-2013*, 2015.

RAND, A., *What is Capitalism?*, in Rand, A. (ed.), *Capitalism: The Unknown Ideal*, 1986.

RECALDE CASTELLS, A., *Reflections on Spain's Decision to Ratify the Rotterdam Rules*, in Basedow, J. et al. (eds.), *The Hamburg Lectures on Maritime Affairs 2011-2013*, 2015.

SAMARAS, I. & PAPADOPOULOU, E. M., *The Global Financial Crisis–the Effects on the Liner Shipping Industry and the Newly Adopted Leading Practices*, in Aidonis, D. et al. (eds.), *Proceedings of the 1st Olympus International Conference on Supply Chains (Olympus ICSC 2010)*, 2010.

SCHOENBAUM, T., *An Evaluation of the Rotterdam Rules*, in Basedow, J. et al. (eds.), *The Hamburg Lectures on Maritime Affairs 2011-2013*, 2015.

STURLEY, M. F., *General Principles of Transport Law and the Rotterdam Rules*, in Güner-Özbek, M. D. (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the "Rotterdam Rules"*, 2011.

STUYCK, J., *Do We Need 'Consumer Protection' for Small Businesses at the EU Level?*, in Purnhagen, K. & Rott, P. (eds.), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz*, 2014.

TARMAN, Z. D., *Jurisdiction and Arbitration Under the Rotterdam Rules*, in Güner-Özbek, M. D. (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the "Rotterdam Rules"*, 2011.

TETLEY, W., *Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea*, in Davies, M. (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, 2005.

TETTENBORN, A., *Freedom of Contract and the Rotterdam Rules: Framework for Negotiation or One-Size-Fits-All?*, in Thomas, D. R. (ed.), *The Carriage of Goods by Sea Under the Rotterdam Rules*, 2010.

ÜLGENER, M. F., *Obligations and Liabilities of the Carrier*, in Güner-Özbek, M. D. (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the "Rotterdam Rules"*, 2011.

ÜNAN, S., *The Scope of Application of the Rotterdam Rules and Freedom of Contract*, in Güner-Özbek, M. D. (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the "Rotterdam Rules"*, 2011.

WADDAMS, S., *Protection of weaker parties in English law*, in Kenny, M. et al. (eds.), *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable*.

WHITTAKER, S. & ZIMMERMANN, R., *Good Faith in European Contract Law: Surveying the Legal Landscape*, in Zimmermann, R. & Whittaker, S. (eds.), *Good Faith in European Contract Law*, 2000.

WILHELMSSON, T., *Standard Form Conditions*, in Hartkamp, A. S. et al. (eds.), *Towards a European Civil Code*, 2011.

ZIEGLER, A. V., *Jurisdiction and Forum Selection Clauses in a Modern Law on Carriage of Goods by Sea*, in Davies, M. (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, 2005.

ZIEGLER, A. V., *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research*, in Centre for Studies and Research in International Law and International Relations (ed.), *Le Droit International des Transports Maritimes 1999*.

Journal Articles

'"We See by the Papers"', 1949, 44 *The Classical Journal*, no. 4, 263–268.

ABALLI, A. J., JR., 'Comparative Developments in the Law of Choice of Forum', 1968, 1 *New York University Journal of International Law and Politics*, no. 2, 178–207.

ABAUNZA, D. R., 'A Brief Overview of the Enforceability of Forum Selection, Choice of Law, and Arbitration Clauses and the Doctrine of Forum Non Conveniens under the Admiralty Law of the United States', 2001, 24 *Dalhousie Law Journal*, no. 1, 361–376.

ABELL, M. & HOBBS, V., 'The Duty of Good Faith in Franchise Agreements – A Comparative Study of the Civil and Common Law Approaches in the EU', 2013, 11 *International Journal of Franchising Law*, X, 1–16.

ACEVEDO, C. B., 'El Problema del Órgano Jurisdiccional Competente en las Normas del Libro III del Código de Comercio Chileno y en las Reglas de Hamburgo: Hacia Donde Navegamos', 1998, 25 *Revista Chilena de Derecho*, no. 2, 273–293.

ACKERMANN, T., 'Public Supply of Optional Standardized Consumer Contracts: A Rationale for the Common European Sales Law?', 2013, 50 *Common Market Law Review*, no. 1, 11–27.

ADAMS, C., 'Reframing the Obesity Debate: McDonald's Role May Surprise You', 2007, 35 *The Journal of Law, Medicine & Ethics*, 154–157.

AGUILAR GUTIÉRREZ, A., 'La Evolución del Contrato', 1955, 22 *Boletín del Instituto de Derecho Comparado*, no. 22, 27–49.

ALBORNOZ, M. M., 'Choice of Law in International Contracts in Latin American Legal Systems', 2010, 6 *Journal of Private International Law*, no. 1, 23–58.

ALCÁNTARA GONZÁLEZ, J. M. et al., 'Particular Concerns with Regard to the Rotterdam Rules', 2010, 2 *Cuadernos de Derecho Transnacional*, no. 2, 5–15.

ALCÁNTARA GONZÁLEZ, J. M., 'The Rotterdam rules. Prelude or premonition?', 2010, 2 *Cuadernos de Derecho Transnacional*, no. 1, 25–43.

ALDERMAN, R. M., 'Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform', 2001, 38 *Houston Law Review*, no. 4, 1237–1268.

ALIAS, S. A. et al., 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts', 2012, 6 *Australian Journal of Basic and Applied Sciences*, no. 11, 331–341.

ALLEN, F. A., 'Griffin v. Illinois: Antecedents and Aftermath', 1957, 25 *The University of Chicago Law Review*, no. 1, 151–161.

ALLISON, S., 'Choice of Law and Forum Clauses in Shipping Documents — Revising Section 11 of the Carriage of Goods by Sea Act 1991 (CTH)', 2014, 40 *Monash University Law Review*, no. 3, 639–672.

ALLSOP, J., 'Maritime Law - The Nature and Importance of Its International Character', 2009, 34 *Tulane Maritime Law Journal*, no. 2, 555–590.

ANCEL, M., 'From the Unification of Law to Its Harmonization', 1976, 51 *Tulane Law Review*, no. 1, 108–117.

ANDERSON, J. & COULSON, N. J., 'The Moslem Ruler and Contractual Obligations', 1958, 33 *New York University Law Review*, no. 7, 917–933.

ANDERSON, V., 'A Critical Assessment of the Rotterdam Rules' Potential to be Ratified, in Light of the Proposed Multimodal Transportation System and the Proposed Changes to the Obligations and Liability of the Carrier', 2015, 5 *Southampton Student Law Review*, no. 1, 19–32.

ANGELO, A. & ELLINGER, E. P., 'Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States', 1992, 14 *Loyola of Los Angeles International and Comparative Law Review*, no. 3, 455–506.

ARMSTRONG, W. P., 'Point: In Defense of Legalese', 1992, 3 *The Scribes Journal of Legal Writing*, 33–36.

ASARIOTIS, R., 'Contracts for the Carriage of Goods by Sea and Conflict of Laws: Some Questions regarding the Contracts (Applicable Law) Act 1990', 1995, 26 *Journal of Maritime Law and Commerce*, 293–314.

ASHTON, R., 'A Comparison of the Legal Regulation of Carriage of Goods by Sea under Bills of Lading in Australia and Germany', 1999, 14 *Australian and New Zealand Maritime Law Journal*, no. 2, 24–64.

ATIYAH, P. S., 'Contract and Fair Exchange', 1985, 35 *University of Toronto Law Journal*, no. 1, 1–24.

AUCHMUTY, R., 'Men Behaving Badly: An Analysis of English Undue Influence Cases', 2002, 11 *Social & Legal Studies*, no. 2, 257–282.

AYRES, I. & SCHWARTZ, A., 'The No-Reading Problem in Consumer Contract Law', 2014, 66 *Stanford Law Review*, no. 3, 545–610.

BAATZ, Y., 'A Jurisdiction Race in the Dark: The Wadi Sudr', 2010 *Lloyd's Maritime and Commercial Law Quarterly*, no. 3, 364–375.

BAATZ, Y., 'An English Jurisdiction Clause does Battle with Canadian Legislation Similar to the Hamburg Rules', 2006 *Lloyd's Maritime and Commercial Law Quarterly*, no. 2, 143–154.

BAATZ, Y., 'Enforcing English Jurisdiction Clauses in Bills of Lading', 2006, 18 *Singapore Academy of Law Journal*, no. 3, 727–770.

BAATZ, Y., 'Forum Selection in Contracts for the Carriage of Goods by Sea: The European dimension', 2011 *Lloyd's Maritime and Commercial Law Quarterly*, no. 2, 208–226.

BAATZ, Y., 'Jurisdiction and Arbitration in Multimodal Transport', 2012, 36 *Tulane Maritime Law Journal*, no. 2, 643–658.

BAATZ, Y., 'The Effectiveness of Settlement Agreements and English Jurisdiction Agreements: The Alexandros T', 2014 *Lloyd's Maritime and Commercial Law Quarterly*, 159–173.

BAIRD, D. G., 'The Boilerplate Puzzle', 2006, 104 *Michigan Law Review*, no. 5, 933–952.

BAKOS, Y. et al., 'Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts', 2014 *New York University Law and Economics Working Papers*, 1–45.

BARAK, A., 'Constitutional Human Rights and Private Law', 1996, 3 *Review of Constitutional Studies*, no. 2, 218–281.

BARNES, W. R., 'Social Media and the Rise in Consumer Bargaining Power', 2011, 14 *University of Pennsylvania Journal of Business Law*, no. 3, 661–699.

BARNETT, R. E., 'Consenting to Form Contracts', 2002, 71 *Fordham Law Review*, no. 3, 627–645.

BARNHIZER, D. D., 'Inequality of Bargaining Power', 2005, 76 *University of Colorado Law Review*, no. 1, 139–241.

BARNHIZER, D. D., 'Power, Inequality and the Bargain: The Role of Bargaining Power in the Law of Contract-Symposium Introduction', 2006, 2006 *Michigan State Law Review*, no. 4, 841–851.

BARNHIZER, D. D., 'Propertization Metaphors for Bargaining Power and Control of the Self in the Information Age', 2006, 54 *Cleveland State Law Review*, 69–113.

BARRIE, G. N., 'The Eleftheria (1969) 2 All ER 641', 1970, 3 *Comparative and International Law Journal of Southern Africa*, no. 1, 94–98.

BASNAYAKE, S., 'Introduction: Origins of the 1978 Hamburg Rules', 1979, 27 *American Journal of Comparative Law*, no. 2, 353–356.

BASSETT, D. L., 'The Forum Game', 2005, 84 *North Carolina Law Review*, no. 2, 333–396.

BAUDOUIN, J.-L., 'Oppressive and Unequal Contracts: The Unconscionability Problem in Louisiana and Comparative Law', 1985, 60 *Tulane Law Review*, no. 6, 1119–1134.

BEALE, H., 'Inequality of Bargaining Power', 1986, 6 *Oxford Journal of Legal Studies*, no. 1, 123–136.

BECHER, S. I., 'Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met', 2008, 45 *American Business Law Journal*, no. 4, 723–774.

BECHER, S. I., 'Behavioral Science and Consumer Standard Form Contracts', 2007, 68 *Louisiana Law Review*, 117–180.

BECKER, J. D., 'Choice-of-Law and Choice-of-Forum Clauses in New York', 1989, 38 *International and Comparative Law Quarterly*, no. 1, 167–175.

BECKER, S. M., 'Improve Your Written Communication Skills: Eliminate Legalese', 1992, 7 *Commercial Law Bulletin*, no. 4, 15–16.

BEN-SHAHAR, O. & SCHNEIDER, C. E., 'The Failure of Mandated Disclosure', 2010, 159 *University of Pennsylvania Law Review*, no. 3, 647–749.

BEN-SHAHAR, O., 'Fixing Unfair Contracts', 2011, 63 *Stanford Law Review*, no. 4, 869–906.

BEN-SHAHAR, O., 'Regulation through Boilerplate: An Apologia', 2014, 112 *Michigan Law Review*, no. 6, 883–904.

BEN-SHAHAR, O., 'The Myth of the 'Opportunity to Read' in Contract Law', 2009, 5 *European Review of Contract Law*, no. 1, 1–28.

BENSON, R. W., 'The End of Legalese: The Game is Over', 1984, 13 *New York University Review of Law & Social Change*, no. 3, 519–574.

BERGMAN, G. M., 'Contractual Restrictions on the Forum', 1960, 48 *California Law Review*, no. 3, 438–447.

BERLINGIERI, F., 'An Analysis of Two Recent Commentaries on the Rotterdam rules', 2012, 114 *Diritto Marittimo*, no. 1, 3–119.

BERLINGIERI, F., 'Freedom of Contract Under the Rotterdam Rules', 2009, 14 *Uniform Law Review*, no. 4, 831–846.

BERLINGIERI, F., 'Revisiting the Rotterdam rules', 2010 *Lloyd's Maritime and Commercial Law Quarterly*, no. 4, 583–639.

BERLINGIERI, F., 'Uniformity in Maritime Law and Implementation of International Conventions', 1987, 18 *Journal of Maritime Law and Commerce*, no. 3, 317–350.

BERMAN, H. J., 'The Religious Sources of General Contract Law: An Historical Perspective', 1986, 4 *Journal of Law and Religion*, no. 1, 103–124.

BEYLEVELD, D. & BROWNSWORD, R., 'Human Dignity, Human Rights, and Human Genetics', 1998, 61 *The Modern Law Review*, no. 5, 661–680.

BIGWOOD, R., 'Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing - Kiwi-Style', 2011, 42 *Victoria University of Wellington Law Review*, no. 1, 83–116.

BISHOP, R. D. & LEE, D. B., 'Enforceability of Forum-Selection Clauses in International Commercial Contracts', 1995, 4 *Dalhousie Journal of Legal Studies*, no. 1, 20–42.

BISSETT-JOHNSON, A., 'The Efficacy of Choice of Jurisdiction Clauses in International Contracts in English and Australian Law', 1970, 19 *The International and Comparative Law Quarterly*, no. 4, 541–556.

BLACK, A. J., 'Undue Influence and Unconscionability in Contracts and the Equitable Remedy of Rescission in Canada', 2011, 17 *New England Journal of International and Comparative Law*, no. 1, 47–86.

BLACK, C. L., JR., 'The Bremen, COGSA and the Problem of Conflicting Interpretation', 1973, 6 *Vanderbilt Journal of Transnational Law*, no. 2, 365–373.

BLACK, V., 'Conditional Forum Non Conveniens in Canadian Courts', 2013, 39 *Queen's Law Journal*, no. 1, 41–82.

BLACKHAM, J. & PRINS, G., 'Why Things Don't Happen', 2010, 155 *The RUSI Journal*, no. 4, 14–22.

BLENKHORN, L. E., 'Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women', 2002, 76 *Southern California Law Review*, no. 1, 189–234.

BLOCK, D., 'CAVEAT Surfer: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction with Websites', 2001, 14 *Loyola Consumer Law Review*, no. 2, 227–244.

BOLGAR, V., 'Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine', 1975, 35 *Louisiana Law Review*, no. 5, 1015–1036.

BOONK, H., 'Determining Jurisdiction and Choice of Law in Contractual Disputes Coupled with Property-Related Claims', 2011 *Lloyd's Maritime and Commercial Law Quarterly*, no. 2, 227–236.

BOOYS, T. Q. de et al., 'How the CFR Can Improve the Consumer Rights Directive: A Comparison between the Model Rules in the Draft Common Frame of Reference and the European Commission's Proposal for a Consumer Rights Directive', 2009 *Centre for the Study of European Contract Law Working Paper Series*, no. 9.

BORCHERS, P. J., 'Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform', 1992, 40 *American Journal of Comparative Law*, no. 1, 121–158.

BORCHERS, P. J., 'Forum Selection Agreements in the Federal Courts after Carnival Cruise: A Proposal for Congressional Reform', 1992, 67 *Washington Law Review*, no. 1, 55–111.

BOVIO, D. M., 'Ocean Carriers' Duty of Care to Cargo in Port: The Rotterdam Rules of 2009', 2008, 32 *Fordham International Law Journal*, 1162–1209.

BOVIO, D. M., 'The First Decisions Applying the Hamburg Rules', 1997 *Lloyd's Maritime and Commercial Law Quarterly*, 351–358.

BRAFFORD, A., 'Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?', 1996, 21 *Journal of Corporation Law*, no. 2, 331–362.

BRAND, F. D. J., 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution: notes', 2009, 126 *South African Law Journal*, no. 1, 71–90.

BRAUCHER, J., 'Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission', 1988, 68 *Boston University Law Review*, no. 2, 349–430.

BRAUCHER, R., 'The Unconscionable Contract or Term', 1970, 31 *University of Pittsburgh Law Review*, no. 3, 337–347.

BRECKENRIDGE, J. E., 'Bargaining Unfairness and Agreements to Arbitrate: Judicial and Legislative Application of Contract Defenses to Arbitration Agreements', 1991, 1991 *Annual Survey of American Law*, no. 4, 925–983.

BRICE, G., 'Maritime Claims: The European Judgments Convention', 1987 *Lloyd's Maritime and Commercial Law Quarterly*, 281–304.

BRIGGS, A., 'Forum Non Conveniens - Now We Are Ten?', 1983, 3 *Legal Studies*, no. 1, 74–93.

BRIGGS, A., 'Jurisdiction Clauses and Judicial Attitudes', 1993, 109 *Law Quarterly Review*, 382–385.

BRIGGS, A., 'The Brussels I bis Regulation appears on the horizon', 2011 *Lloyd's Maritime and Commercial Law Quarterly*, no. 2, 157–166.

BRIGGS, A., 'The subtle variety of jurisdiction agreements', 2012 *Lloyd's Maritime and Commercial Law Quarterly*, no. 3, 364–381.

BRISCOE, J. P., 'The Rotterdam Rules: A Port in the Storm of Liability Limitations and the Fair Opportunity Split', 2011, 9 *Loyola Maritime Law Journal*, 75–98.

BRITO, A. G., 'La Buena Fe en el Código Civil de Chile', 2002, 29 *Revista Chilena de Derecho*, 11–24.

BRITTAIN JR., J. T., 'A Practitioner's Guide to Forum Selection Clauses in Texas', 2001, 1 *Houston Business and Tax Law Journal*, 79–118.

BRITTAIN JR., J. T., 'Foreign Forum Selection Clauses in the Federal Courts: All in the Name of International Comity', 2000, 23 *Houston Journal of International Law*, no. 2, 305–348.

BROOKS, M. & MACKEY, J., 'Will the Rotterdam Rules Be Accepted: A Liner Cargo Interest Perspective', 2012, 35 *Dalhousie Law Journal*, no. 2, 267–294.

BROWN, E. L., 'The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic', 2000, 105 *Commercial Law Journal*, no. 3, 287–308.

BROWN, L., 'The Impact of Section 51AC of the Trade Practices Act 1974(CTH) on Commercial Certainty', 2004, 28 *Melbourne University Law Review*, no. 3, 589–622.

BROWNE, M. N. & BIKSACKY, L., 'Unconscionability and the Contingent Assumptions of Contract Theory', 2013, 2013 *Michigan State Law Review*, no. 1, 211–256.

BRUCH, J. H., 'Forum Selection Clauses in Consumer Contracts: An Unconscionable Thing Happened on the Way to the Forum', 1991, 23 *Loyola University of Chicago Law Journal*, no. 2, 329–354.

BUHLER, P. A., 'Forum Selection and Choice of Law Clauses in International Contracts: A United States Viewpoint with Particular Reference to Maritime Contracts and Bills of Lading', 1995, 27 *The University of Miami Inter-American Law Review*, no. 1, 1–44.

BURKE, J. J. A., 'Contract as Commodity: A Nonfiction Approach', 1999, 24 *Seton Hall Legislative Journal*, no. 2, 285.

BURTON, S. J., 'The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate', 2006, 2006 *Journal of Dispute Resolution*, no. 2, 469–500.

BUXBAUM, H. L., 'Forum Selection in International Contract Litigation: The Role of Judicial Discretion', 2004, 12 *Willamette Journal of International Law and Dispute Resolution*, no. 2, 185–210.

BYERS, M., 'Abuse of Rights: An Old Principle, A New Age', 2001, 47 *McGill Law Journal*, no. 2, 389–431.

CACHARD, O., 'Jurisdictional Issues in the Rotterdam Rules: Balance of Interests or Legal Paternalism?', 2010, 2 *European Journal of Commercial Contract Law*, no. 1, 1–8.

CAJARVILLE, J. C., 'La Buena Fe y su Aplicación en el Derecho Argentino', 2012, 74 *Prudentia Iuris*, 249–260.

CALAMARI, J. A., 'Container Revolution and the $500 Package Limitation - Conflicting Approaches and Unrealistic Solutions: A Proposed Alternative', 1977, 51 *St. John's Law Review*, no. 4, 687–716.

CALAMARI, J. D., 'Duty to Read--A Changing Concept', 1974, 43 *Fordham Law Review*, no. 3, 341–362.

CAMERER, C. et al., 'Regulation for Conservatives:: Behavioral Economics and the Case for "Asymmetric Paternalism"', 2003, 151 *University of Pennsylvania Law Review*, no. 3, 1211–1254.

CANIS, E., 'One Like Away: Mandatory Arbitration for Consumers', 2015, 26 *George Mason University Civil Rights Law Journal*, no. 1, 127–156.

CARBONNEAU, T. E., 'The Revolution in Law through Arbitration', 2008, 56 *Cleveland State Law Review*, no. 2, 233–269.

CARCAMO-HUECHANTE, L. E., 'Milton Friedman: Knowledge, Public Culture, and Market Economy in the Chile of Pinochet', 2006, 18 *Public Culture*, no. 2, 413–435.

CARLSON, M. H., 'U.S. Participation in Private International Law Negotiations: Why the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea Is Important to the United States', 2008, 44 *Texas International Law Journal*, no. 3, 269–278.

CARLSON, M. H., 'U.S. Participation in the International Unification of Private Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention', 2006, 31 *Tulane Maritime Law Journal*, no. 2, 615–637.

CARR, C., 'Inequality of Bargaining Power', 1975, 38 *The Modern Law Review*, no. 4, 463–466.

CARTER, A. M., 'The Reader's Limited Capacity: A Working-Memory Theory for Legal Writers', 2014, 11 *Legal Communications and Rhetoric: JALWD*, no. 1, 31–50.

CASSON, J., 'Small Business and Unfair Contract Terms: Changes on the Horizon', 2016, 3 *LSJ: Law Society of NSW Journal*, no. 2, 76.

Chafee, Zechariah, Jr., 'The Disorderly Conduct of Words', 1941, 41 *Columbia Law Review*, no. 3, 381–404.

CHAMI, D. E., 'Rotterdam Rules from an Argentinean Perspective, The', 2009, 14 *Uniform Law Review*, no. 4, 847–856.

CHANDA, S., 'Comparison of Rights and Liabilities under a Charter Party and a Bill of Lading, A', 2011, 24 *University of San Francisco Maritime Law Journal*, no. 1, 65–82.

CHANDLER [III], G. F., 'A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules', 1984, 15 *Journal of Maritime Law and Commerce*, no. 2, 233–292.

CHANDLER [III], G. F., 'After Reaching a Century of the Harter Act: Where Should We Go from Here?', 1993, 24 *Journal of Maritime Law and Commerce*, no. 1, 43–52.

CHANDLER [III], G. F., 'The Measure of Liability for Cargo Damage under Charter Parties', 1989, 20 *Journal of Maritime Law and Commerce*, no. 3, 395–402.

CHEN, X., 'Chinese Law on Carriage of Goods by Sea under Bills of Lading', 1999, 8 *Currents: International Trade Law Journal*, no. 2, 89–100.

CHEREDNYCHENKO, O., 'Fundamental Rights and Contract Law', 2006, 2 *European Review of Contract Law*, no. 4, 489–505.

CHEW, C., 'Common Law and Equitable Aspects of Unjust Banking Contracts: A Legal Analysis', 2014, 29 *Journal of International Banking Law and Regulation*, no. 4, 248–253.

CHHINA, R., '"Unconscionability" as an Exception to the Autonomy Principle: How Well is it Entrenched in Singaporean Jurisprudence?', 2016 *Lloyd's Maritime and Commercial Law Quarterly*, no. 3, 412–435.

CHING, K. K., 'What We Consent to When We Consent to Form Contracts: Market Price', 2015, 84 *University of Missouri-Kansas City Law Review*, no. 1, 1–26.

CHOI, A. & TRIANTIS, G., 'The Effect of Bargaining Power on Contract Design', 2012, 98 *Virginia Law Review*, no. 8, 1665–1743.

CHONG, D. G. S., 'Hague-Visby Revisited, The', 1994, 6 *Singapore Academy of Law Journal*, no. 1, 25–46.

CHRISTENSEN, K. J., 'Of Comity: Aerospatiale as Lex Maritima', 2003, 2 *Loyola Maritime Law Journal*, 1–43.

CIACCHI, A. C., 'Party Autonomy as a Fundamental Right in the European Union', 2010, 6 *European Review of Contract Law*, no. 3, 303–318.

CICORIA, C., 'The Protection of the Weak Contractual Party in Italy vs. United States Doctrine of Unconscionability. A Comparative Analysis', 2003, 3 *Global Jurist Advances*, no. 3, 1–35.

COCO, L., 'Debtor's Prison in the Neoliberal State: Debtfare and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005', 2012, 49 *California Western Law Review*, no. 1, 1–49.

COHEN, M. R., 'The Basis of Contract', 1933, 46 *Harvard Law Review*, no. 4, 553–592.

COLBY, E., 'What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?', 2001, 34 *Connecticut Law Review*, no. 2, 625–660.

COLDWELL, R., 'Jurisdiction and the UN Convention on Contracts for the International Carriage of Goods: Where the Freedom of Contract Prevails', 2014, 17 *International Trade and Business Law Review*, no. 1, 108–125.

COLLINET, P., 'The Evolution of Contract as Illustrating the General Evolution of Roman Law', 1932, 48 *The Law Quarterly Review*, no. 4, 488–494.

COLLINS, H., 'Good Faith in European Contract Law', 1994, 14 *Oxford Journal of Legal Studies*, no. 2, 229–254.

COLLINS, H., 'The European Economic Constitution and the Constitutional Dimension of Private Law', 2009, 5 *European Review of Contract Law*, no. 2, 71–94.

COLLINS, L., 'Arbitration Clauses and Forum Selecting Clauses in the Conflict of Laws: Some Recent Developments in England', 1971, 2 *Journal of Maritime Law and Commerce*, no. 2, 363–382.

COLLINS, L., 'Choice of Forum and the Exercise of Judicial Discretion: The Resolution of an Anglo-American Conflict', 1973, 22 *International and Comparative Law Quarterly*, no. 2, 332–343.

COLLINS, L., 'Forum Selection and an Anglo-American Conflict: The Sad Case of the Chaparral', 1971, 20 *The International and Comparative Law Quarterly*, no. 3, 550–557.

Conway, R. Seymour, 'The Origin of the Latin Gerund and Gerundive', 1891, 5 *The Classical Review*, no. 7, 296–301.

CORDERO ÁLVARO, C. I., 'La Cláusula Atributiva de Jurisdicción en el Conocimiento de Embarque', 2008, 41 *Anuario Jurídico y Económico Escurialense*, 194–232.

CORNEJO FULLER, E., 'El Contrato de Transporte Bajo Conocimiento de Embarque: Norma sobre Contenedores y Transporte Multimodal', 1988, 12 *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, 277–296.

COSTELLO, F. W., 'The Enforcement of Forum Selection Provisions in International Commercial Agreements: : M/S Bremen v. Zapata Off-Shore., (U.S. Sup Ct. 1972)', 1972, 11 *Columbia Journal of Transnational Law*, no. 2, 449–489.

COVEY, A. E. & MORRIS, M. S., 'The Enforceability of Agreements Providing for Forum and Choice of Law Selection', 1983, 61 *Denver Law Journal*, no. 4, 837–860.

COWEN, Z. & DA COSTA, D. M., 'The Contractual Forum: Situation in England and the British Commonwealth', 1964, 13 *The American Journal of Comparative Law*, 179–186.

CRASWELL, R., 'Property Rules and Liability Rules in Unconscionability and Related Doctrines', 1993, 60 *The University of Chicago Law Review*, no. 1, 1–65.

CROWLEY, M. E., 'Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem, The', 2004, 79 *Tulane Law Review*, no. 5, 1461–1504.

CRUTCHER, M. B., 'Ocean Bill of Lading--A Study in Fossilization', 1970, 45 *Tulane Law Review*, no. 4, 697–732.

CRUZ, R. T. & HINCK, J. J., 'Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information', 1995, 47 *Hastings Law Journal*, no. 3, 635.

CUTLER, M. R., 'Comparative Conflicts of Law: Effectiveness of Contractual Choice of Forum', 1985, 20 *Texas International Law Journal*, no. 1, 97–132.

DARR, F. P., 'Unconscionability and Price Fairness', 1994, 30 *Houston Law Review*, no. 5, 1819–1862.

DAS, K. M., 'Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the Reasonably Communicated Test', 2002, 77 *Washington Law Review*, no. 2, 481–510.

DAVID, R., 'Frustration of Contract in French Law', 1946, 28 *Journal of Comparative Legislation and International Law*, no. 1, 11–14.

DAVIES, M., 'Forum Selection Clauses in Maritime Cases', 2002, 27 *Tulane Maritime Law Journal*, no. 2, 367–388.

DAVIES, M., 'Forum Selection, Choice of Law and Mandatory Rules', 2011 *Lloyd's Maritime and Commercial Law Quarterly*, no. 2, 237–248.

DAVIS, C. M., 'Sky Reefer: Foreign Arbitration & Litigation under COGSA', 1995, 8 *University of San Francisco Maritime Law Journal*, no. 1, 73–90.

DAVIS, J., 'Forbidding Dwarf Tossing: Defending Dignity or Discrimination Based on Size?', 2006, 9 *Yearbook of New Zealand Jurisprudence*, 238–256.

DAVIS, N. J., 'Presumed Assent: The Judicial Acceptance of Clickwrap', 2007, 22 *Berkeley Technology Law Journal*, no. 1, 577–598.

DAWSON, J. P., 'Economic Duress and the Fair Exchange in French and German Law', 1937, 11 *Tulane Law Review*, no. 3, 345–376.

DAWSON, J. P., 'Economic Duress and the Fair Exchange in French and German Law (Part II)', 1937, 12 *Tulane Law Review*, no. 1, 42–73.

DE LA MAZA GAZMURI, Iñigo, 'Contratos por Adhesión y Cláusulas Abusivas: ¿Por qué el Estado y no Solamente el Mercado?', 2003 *Revista Chilena de Derecho Privado*, no. 1, 109–148.

DEAN, M., 'Unfair Contract Terms: The European Approach', 1993, 56 *The Modern Law Review*, no. 4, 581–590.

DELANEY, J. & LEWIS, K., 'The Presumptive Approach to the Construction of Arbitration Agreements and Separability: English Law Post Fiona Trust and Australian Law Contrasted', 2008, 31 *University of New South Wales Law Journal*, no. 1, 341–363.

DELAUME, G. R., 'Choice of Forum Clauses and the American Forum Patriae; Something Happened on the Way to the Forum: Zapata and Silver', 1972, 4 *Journal of Maritime Law and Commerce*, no. 2, 295–308.

DELLETT, S., 'Arbitration, Forum Selection, and Choice of Law Agreements in International Securities Transactions', 1985, 42 *Washington and Lee Law Review*, no. 3, 1069–1098.

DEMARIA, A. N., 'Of Fast Food and Franchises', 2003, 41 *Journal of the American College of Cardiology*, no. 7, 1227–1228.

DEMPSEY, J., 'Forum Selection Clauses in Attorney-Client Agreements: The Exploitation of Bargaining Power', 2011, 114 *West Virginia Law Review*, no. 3, 1195–1232.

DENNING, S. M., 'Choice of Forum Clauses in Bills of Lading', 1970, 2 *Journal of Maritime Law and Commerce*, no. 1, 17–40.

DIAMOND, A. L., 'The Israeli Standard Contracts Law, 5724-1964', 1965, 14 *The International and Comparative Law Quarterly*, no. 4, 1410–1416.

DIAMOND, A., 'The Hague-Visby Rules»,(1978)', 1978, 2 *Lloyd's Maritime and Commercial Law Quarterly*, 225–266.

DIAMOND, A., 'The next sea carriage Convention?', 2008, 2 *Lloyd's Maritime and Commercial Law Quarterly*, 135.

DIAMOND, A., 'The Rotterdam Rules', 2009 *Lloyd's Maritime and Commercial Law Quarterly*, 445–536.

DICKERSON, T. A., 'The Cruise Passenger's Rights and Remedies 2014: The COSTA CONCORDIA Disaster: One Year Later, Many More Incidents Both on Board Megaships and during Risky Show Excursions', 2013, 38 *Tulane Maritime Law Journal*, no. 2, 515–582.

DICKERSON, T. A., 'Travel Abroad, Sue at Home 2012: Forum Non Conveniens & the Enforcement of Forum Selection and Mandatory Arbitration Clauses', 2012, 32 *Pace Law Review*, no. 2, 407–435.

DIMATTEO, L. A. & RICH, B. L., 'A Consent Theory of Unconscionability: An Empirical Study of Law in Action', 2005, 33 *Florida State University Law Review*, no. 4, 1067–1118.

DONOVAN, J. J., 'Origins and Development of Limitation of Shipowners' Liability', 1978, 53 *Tulane Law Review*, no. 4, 999–1045.

DONOVAN, J. J., 'The Hamburg Rules: Why a New Convention on Carriage of Goods by Sea', 1979, 4 *Maritime Lawyer*, no. 1, 1–16.

DRISCOLL, W. & LARSEN, P. B., 'Convention on International Multimodal Transport of Goods', 1982, 57 *Tulane Law Review*, no. 2, 193–281.

DROGUS, V., 'Forum Selection Clauses in Maritime Bills of Lading', 1997, 21 *Hastings International and Comparative Law Review*, no. 3, 743–763.

DUGGAN, A. J., 'The Trumping of Mateship: Unconscionability in the High Court of Australia', 2003, 39 *Canadian Business Law Journal*, no. 2, 272–284.

ECHEVERRI SALAZAR, V. M., 'El Control a las Cláusulas Abusivas en los Contratos de Adhesión con Consumidores', 2011, 10 *Opinión Jurídica*, no. 20, 125–144.

EDDY, K., 'To Every Remedy a Wrong: The Confounding of Civil Liberties through Mandatory Arbitration Clauses in Employment Contracts', 2000, 52 *Hastings Law Journal*, no. 3, 771–793.

EDELMAN, P. S., 'Forum Non Conveniens: Its Application in Admiralty Law', 1984, 15 *Journal of Maritime Law and Commerce*, no. 4, 517–538.

EDWARDS, C., 'Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues', 2008, 77 *University of Missouri-Kansas City Law Review*, no. 3, 647–696.

EDWARDS, H. T., 'Alternative Dispute Resolution: Panacea or Anathema', 1985, 99 *Harvard Law Review*, no. 3, 668–684.

EHRENZWEIG, A. A., 'Adhesion Contracts in the Conflict of Laws', 1953, 53 *Columbia Law Review*, no. 8, 1072–1090.

EIGEN, Z. J., 'When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance', 2012, 41 *The Journal of Legal Studies*, no. 1, 67–93.

EISENBERG, M. A., 'The Bargain Principle and Its Limits', 1982, 95 *Harvard Law Review*, no. 4, 741–801.

El-Hassan, 'Abd El-Wahab Ahmed, 'Freedom of Contract, the Doctrine of Frustration, and Sanctity of Contracts in Sudan Law and Islamic Law', 1985, 1 *Arab Law Quarterly*, no. 1, 51–59.

ELLINGHAUS, M. P., 'In Defense of Unconscionability', 1969, 78 *The Yale Law Journal*, no. 5, 757–815.

ENMAN, S. R., 'Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law', 1987, 16 *Anglo-American Law Review*, no. 3, 191–219.

ENRÍQUEZ, D., 'Uncitral y las Oscilaciones del Régimen Jurídico del Transporte Marítimo Internacional de Mercancías: Advertencias en Torno a la Búsqueda de una Tercera Vía', 2008, 8 *Anuario Mexicano de Derecho Internacional*, 79–142.

EPSTEIN, R. A., 'Unconscionability: A Critical Reappraisal', 1975, 18 *Journal of Law and Economics*, no. 2, 293–315.

ESPANÉS, L. M. de, 'Lesión, Elementos y Naturaleza Jurídica', 1998, 38 *THEMIS: Revista de Derecho*, 173–177.

ESTRELLA FARIA, J. A., 'Uniform Law and Functional Equivalence: Diverting Paths or Stops along the Same Road - Thoughts on a New International Regime for Transport Documents', 2011, 2 *Elon Law Review*, no. 1, 1–37.

ESTRELLA FARIA, J. A., 'Uniform Law for International Transport at UNCITRAL: New Times, News Players, and New Rules', 2009, 44 *Texas International Law Journal*, no. 3, 277–320.

EVANS, I. L., 'The Harter Act and Its Limitations', 1910, 8 *Michigan Law Review*, no. 8, 637.

EVANS, M., 'Uniform Law: A Bridge Too Far', 1995, 3 *Tulane Journal of International and Comparative Law*, 145-160

Fages Bertrand, 'Pre-contractual Duties in the Draft Common Frame of Reference – What Relevance for the Negotiation of Commercial Contracts?', 2008, 4 *European Review of Contract Law*, no. 3, 304–316.

FAGHFOURI, M., 'International Regulation of Liability for Multimodal Transport', 2006, 5 *WMU Journal of Maritime Affairs*, no. 1, 95–114.

FAHRENBACK, C. C., 'Vimar Seguros y Reaseguros v. M/V Sky Reefer: A Change in Course: COGSA Does Not Invalidate Foreign Arbitration Clauses in Maritime', 1995, 29 *Akron Law Review*, 371–396.

FAJEMIROKUN, B., 'A Nigerian Perspective on Foreign Jurisdiction Clauses in Bills of Lading', 1994, 25 *Journal of Maritime Law and Commerce*, no. 4, 581.

FALLON, R. H., JR., 'Greatness in a Lower Federal Court Judge: The Case of J. Skelly Wright', 2015, 61 *Loyola Law Review*, no. 1, 29–56.

FARLEY, M. et al., 'Prostitution and Trafficking in Nine Countries', 2004, 2 *Journal of Trauma Practice*, 3-4, 33–74.

FARNSWORTH, E. A., 'Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws', 1995, 3 *Tulane Journal of International and Comparative Law*, 47–64.

FARQUHARSON, I. M., 'Choice of Forum Clauses - A Brief Survey of Anglo-American Law', 1974, 8 *International Lawyer (ABA)*, no. 1, 83–102.

FAURE, M. G. & LUTH, H. A., 'Behavioural Economics in Unfair Contract Terms: Cautions and Considerations', 2011, 34 *Journal of Consumer Policy*, no. 3, 337–358.

FAWCETT, J. J., 'Forum Shopping - Some Questions Answered', 1984, 35 *Northern Ireland Legal Quarterly*, no. 2, 141–152.

FAWCETT, J. J., 'Trial in England or Abroad: The Underlying Policy Considerations', 1989, 9 *Oxford Journal of Legal Studies*, no. 2, 205–229.

FERNÁNDEZ, A. M., 'La Autonomía de la Voluntad en las Reglas de Rotterdam', 2012 *Revista de Derecho del Transporte: Terrestre, Marítimo, Aéreo y Multimodal*, no. 9, 11–35.

FILION, L. J., 'Free trade: The Need for a Definition of Small Business', 1990, 7 *Journal of Small Business & Entrepreneurship*, no. 2, 33–46.

FISHER, G., 'Anti-suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement', 2010, 22 *Bond Law Review*, 1, Article 1, 1–25.

FITZGERALD, G. F., 'Proposed Convention on International Multimodal Transport of Goods: A Progress Report, The', 1979, 17 *Canadian Yearbook of International Law*, 247–279.

FLEMING, A., 'The Rise and Fall of Unconscionability as the Law of the Poor', 2013, 102 *Georgetown Law Journal*, no. 5, 1383–1442.

FORCE, R., 'Choice of Law in Admiralty Cases: National Interests and the Admiralty Clause', 2000, 75 *Tulane Law Review*, 5-6, 1421–1488.

FORCE, R., 'Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)', 1995, 70 *Tulane Law Review*, 6 Part A, 2051–2090.

FORCE, R., 'Regal-Beloit Decision: What, if Anything, Would Happen to the Legal Regime for Multimodal Transport in the United States if it Adopted the Rotterdam Rules, The', 2011, 36 *Tulane Maritime Law Journal*, 685.

FORCE, R., 'The position in the United States on foreign forum selection and arbitration clauses', 2011 *Lloyd's Maritime and Commercial Law Quarterly*, no. 2, 249–261.

FORCE, R., 'The Position in the United States on Foreign Forum Selection and Arbitration Clauses, Forum Non Conveniens, and Antisuit Injunctions', 2010, 35 *Tulane Maritime Law Journal*, no. 2, 401–466.

FORREST, C., 'Hague Convention on Choice of Court Agreements: The Maritime Exceptions', 2009, 5 *Journal of Private International Law*, no. 3, 491–516.

FORT, J. C., 'Understanding Unconscionability: Defining the Principle', 1977, 9 *Loyola University of Chicago Law Journal*, no. 4, 765–822.

FORTES, P. R. B., 'The Future of Contract Law in Latin America', 2016, 24 *European Review of Private Law*, no. 2, 287–296.

FORTICH, S., 'Solus Consensus Obligat: Principio General Para el Derecho Privado de los Contratos', 2012, 23 *Revista de Derecho Privado*, 179–198.

FOX, J. M., 'The Importance of Maritime Law in Wisconsin', 1919, 3 *Marquette Law Review*, no. 2, 95–102.

FRANCK, L., 'A New Law for the Seas - An Instance of International Legislation', 1926, 42 *Law Quarterly Review*, no. 1, 25–36.

FRAZER, W., 'Milton Friedman and Thatcher's Monetarist Experience', 1982, 16 *Journal of Economic Issues*, no. 2, 525–533.

FREDERICK, D. C., 'Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules', 1991, 22 *Journal of Maritime Law and Commerce*, no. 1, 81–118.

FREILICH, A. & WEBB, E., 'Small Business - Forgotten and in Need of Protection from Unfairness', 2013, 37 *University of Western Australia Law Review*, no. 1, 134–155.

FRESNEDO DE AGUIRRE, Cecilia, 'The Rotterdam Rules from the Perspective of a Country that is a Consumer of Shipping Services', 2009, 14 *Uniform Law Review*, no. 4, 869–884.

FRIDMAN, G. H. L., 'Freedom of Contract', 1967, 2 *Ottawa Law Review*, no. 1, 1–22.

FRIEDMAN, S., 'Arbitration Provisions: Little Darlings and Little Monsters', 2010, 79 *Fordham Law Review*, no. 5, 2035–2067.

FRIEDMANN, D., 'The Efficient Breach Fallacy', 1989, 18 *The Journal of Legal Studies*, no. 1, 1–24.

GANTER, R. A., 'Contracts - Forum Selection - Absent Bad Faith, Fraud, or Overreaching, a Reasonable Forum Selection Clause in a Commercial Cruise from Contract is Enforceable', 1991, 22 *Seton Hall Law Review*, no. 2, 505–539.

GARCIA, M., 'Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum', 2013, 36 *Campbell Law Review*, no. 1, 31–74.

GARNETT, R., 'The Enforcement of Jurisdiction Clauses in Australia', 1998, 21 *University of New South Wales Law Journal*, no. 1, 1–26.

GARVIN, L. T., 'Small Business and the False Dichotomies of Contract Law', 2005, 40 *Wake Forest Law Review*, no. 1, 295–388.

GASKELL, N., 'Australian Recognition and Enforcement of Foreign Charterparty Arbitration Clauses: Norden v. Gladstone', 2014 *Lloyd's Maritime and Commercial Law Quarterly*, 174–182.

GAUFFREAU, S. C., 'Foreign Arbitration Clauses in Maritime Bills of Lading: The Supreme Court's Decision in Vimar Seguros Y Reaseguros v. M/V Sky Reefer', 1995, 21 *NCJ Int'l L. & Com. Reg.*, no. 2, 395–420.

GAVIT, B. C., 'Where Do We Go from Here in Legal Education', 1950, 23 *Rocky Mountain Law Review*, no. 1, 24–33.

Gebhardt, J. H., 'Pacta Sunt Servanda', 1947, 10 *The Modern Law Review*, no. 2, 159–170.

GEHRINGER, A., 'After Carnival Cruise and Sky Reefer: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions', 2000, 66 *Journal of Air Law and Commerce*, no. 2, 633–688.

GEORGE, G., 'The Principle of Contractual Freedom', 2010 *AGORA International Journal of Juridical Sciences*, no. 2, cclxvi–cclxxvii.

GERSHENSON, D. E., 'Conflict of Laws - Choice of Forum Clause - Invalidity of a Clause in an Ocean Bill of Lading Restricting Litigation to a Foreign Forum', 1967, 14 *Wayne Law Review*, no. 2, 609–616.

GIBERSON, M., 'The Problem with Price Gouging Laws', 2011, 34 *Regulation*, no. 1, 48–53.

GIBSON, J., 'Vertical Boilerplate', 2013, 70 *Washington and Lee Law Review*, no. 1, 161–235.

GILBERT, E. P., 'We're All in the Same Boat: Carnival Cruise Lines, Inc. v. Shute', 1992, 18 *Brooklyn Journal of International Law*, no. 2, 597–633.

GILBERT, J. T., 'Choice of Forum Clauses in International and Interstate Contracts', 1976, 65 *Kentucky Law Journal*, no. 1, 1–71.

GILBERT, K. D., 'Conflicts of Law - Validating Foreign Arbitration Clause in Maritime Bill of Lading', 1995, 29 *Suffolk University Law Review*, no. 1, 265–275.

GILIKER, P., 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law', 2005, 13 *European Review of Private Law*, no. 5, 621–640.

GILO, D. & PORAT, A., 'Viewing Unconscionability through a Market Lens', 2010, 52 *William and Mary Law Review*, no. 1, 133–196.

GIMÉNEZ CANDELA, T., 'La Modificación de las Condiciones del Contrato: La Cláusula "Rebus Sic Stantibus"', 2009, 1 *Revista Juris da Faculdade de Direito, São Paulo*, 47–53.

GLOVER, J. M., 'Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements', 2006, 59 *Vanderbilt Law Review*, no. 5, 1735–1770.

GOKSOR, R., 'Jurisprudence on Protection of Weaker Parties in European Contracts Law from a Swedish and Nordic Perspective', 2006, 6 *Chicago-Kent Journal of International and Comparative Law*, 184–250.

GOLDBERG, S., 'Unconscionability in a Commercial Setting: The Assessment of Risk in a Contract to Build Nuclear Reactors', 1982, 58 *Washington Law Review*, no. 5, 343–356.

GOLDIE, C. W. H., 'Effect of the Hamburg Rules on Shipowners' Liability Insurance', 1993, 24 *Journal of Maritime Law and Commerce*, no. 1, 111–118.

GOLDMAN, L., 'My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts', 1991, 86 *Northwestern University Law Review*, no. 3, 700–741.

GONZÁLEZ, F. F. V., 'La Obligación de Negociar con Buena Fe una Convención Colectiva de Trabajo en el Régimen Laboral Quebequense', 2014, 64 *THEMIS: Revista de Derecho*, 281–295.

GOODMAN, B., 'Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract', 1999, 21 *Cardozo Law Review*, no. 1, 319–360.

GORMLEY, W. P., 'Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith', 1969-1970, 14 *Saint Louis University Law Journal*, 367–428.

GORMLEY, W. P., 'The Development of the Rhodian-Roman Maritime Law to 1681, with Special Emphasis on the Problem of Collision', 1961, 3 *Inter-American Law Review*, no. 2, 317–346.

GOULD, M., 'The Conflict Between Forum-Selection Clauses and State Consumer Protection Laws: Why Illinois Got It Right in Jane Doe v. Match.com', 2015, 90 *Chicago-Kent Law Review*, no. 2, 671–702.

GRAMMOND, S., 'The Regulation of Abusive or Unconscionable Clauses from a Comparative Law Perspective', 2010, 49 *Canadian Business Law Journal*, no. 3, 345–377.

GRANGER, C., 'The Conflict of Laws and Forum Shopping: Some Recent Decisions on Jurisdiction and Free Enterprise in Litigation', 1973, 6 *Ottawa L. Rev.*, no. 2, 416–437.

GRAUPNER, R., 'Contractual Stipulations Conferring Exclusive Jurisdiction upon Foreign Courts in the Law of England and Scotland', 1943, 59 *Law Quarterly Review*, no. 3, 227–243.

GREEN, M. Z., 'Preempting Justice through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer', 1992, 5 *Loyola Consumer Law Reporter*, no. 4, 112–123.

GREENFIELD, S. & OSBORN, G., 'Unconscionability and Contract: The Creeping Shoots of Bundy', 1992, 7 *Denning Law Journal*, 65–75.

GRETHER, D. M. et al., 'The Irrelevance of Information Overload: An Analysis of Search and Disclosure', 1985, 59 *Southern California Law Review*, no. 2, 277–304.

GRIGGS, P. J. S., 'Obstacles to Uniformity of Maritime Law the Nicholas J. Healy Lecture', 2003, 34 *Journal of Maritime Law and Commerce*, no. 2, 191–208.

GROBARČÍKOVÁ, A. & SOSEDOVÁ, J., 'Carrier's liability under the international conventions for the carriage of goods by sea', 2014, 9 *Transport Problems*, no. 3, 75–82.

GRUNDMANN, S., 'The Structure of the DCFR – Which Approach for Today's Contract Law?', 2008, 4 *European Review of Contract Law*, no. 3, 225–247.

GRUSON, M., 'Forum-Selection Clauses in International and Interstate Commercial Agreements', 1982 *University of Illinois Law Review*, no. 1, 133–206.

GUARRERA, J., 'Mandatory Arbitration: Inherently Unconscionable, but Immune from Unconscionability', 2012, 40 *Western State University Law Review*, no. 1, 89–104.

GUTOFF, J. M., 'An Examination and Consideration of: Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force', 2007, 38 *Journal of Maritime Law and Commerce*, no. 4, 583–602.

GUZMÁN, J. V. & PINO, M. M., 'El Contrato de Fletamento y sus Principales Diferencias con el Contrato de Transporte Bajo el Conocimiento de Embarque', 2011, 10 *Revista E-mercatoria*, no. 1, 1–54.

HABACHY, S., 'Property, Right, and Contract in Muslim Law', 1962, 62 *Columbia Law Review*, no. 3, 450–473.

HAHLO, H. R., 'Unfair Contract Terms in Civil-Law Systems', 1981, 98 *South African Law Journal*, no. 1, 70–80.

HAIGHT, C. S., JR., 'Babel Afloat: Some Reflections on Uniformity in Maritime Law', 1997, 28 *Journal of Maritime Law and Commerce*, no. 2, 189–206.

HAINES, A. D., 'Choice of Court Agreements in International Litigation:: Their Use and Legal Problems to Which they Give Rise in the Context of the Interim Text', 2002, 18 *Hague Conference on Private International Law, Preliminary Documents*, 1-17

HALL, E. et al., 'The Consumer Rights Directive – An Assessment of its Contribution to the Development of European Consumer Contract Law', 2012, 8 *European Review of Contract Law*, no. 2, 139–166.

HAMMOND, C., 'Can a Company be the 'Victim' of Undue Influence and Unconscionability?', 2001, 19 *Company and Securities Law Journal*, 74.

HARDING, M. M., 'The Redefinition of Arbitration by Those with Superior Bargaining Power', 1999, 1999 *Utah Law Review*, no. 4, 857–956.

HARLEY, J. A., 'Economic Duress and Unconscionability: How Fair Must the Government Be', 1988, 18 *Public Contract Law Journal*, no. 1, 76–187.

HARRINGTON, J., 'To Litigate or Arbitrate-No Matter-The Credit Card Industry Is Deciding for You', 2001, 2001 *Journal of Dispute Resolution*, no. 1, 101–118.

HARRIS, J. G., 'The "Latin Gerundive" as Autobiographical Imperative: A Reading of Mandel'shtam's Journey to Armenia', 1986, 45 *Slavic Review*, no. 1, 1–19.

HARRIS, J., 'Contractual Freedom in the Conflict of Laws', 2000, 20 *Oxford Journal of Legal Studies*, no. 2, 247–269.

HARRISON, J. L., 'Class, Personality, Contract, and Unconscionability', 1993, 35 *William and Mary Law Review*, no. 2, 445–501.

HARTKAMP, A. S., 'Judicial Discretion under the New Civil Code of the Netherlands', 1992, 40 *The American Journal of Comparative Law*, no. 3, 551–571.

HARTKAMP, A., 'The Concept of Good Faith in the UNIDROIT Principles for International Commercial Contracts', 1995, 3 *Tulane Journal of International and Comparative Law*, 65–72.

HASHMI, S., 'The Rotterdam Rules: A Blessing?', 2011, 10 *Loyola Maritime Law Journal*, no. 2, 227–268.

HELLAWELL, R., 'Allocation of Risk between Cargo Owner and Carrier', 1979, 27 *The American Journal of Comparative Law*, 2/3, 357–367.

HELVESTON, M. N. & JACOBS, M. S., 'The Incoherent Role of Bargaining Power in Contract Law', 2014, 49 *Wake Forest Law Review*, no. 4, 1017–1058.

HERNANDEZ-GUTIERREZ, M. I., 'Forum-Selection and Arbitration Clauses in International Commercial Contracts: Does the New York Convention Call for a Heightened Enforceability Standard?', 2009, 18 *Dalhousie Journal of Legal Studies*, no. 1, 55–66.

HERRMANN, G., 'The UNCITRAL Model Law – its background, salient features and purposes', 1985, 1 *Arbitration International*, no. 1, 6–39.

HESKETH, D., 'Weaknesses in the Supply Chain: Who Packed the Box?', 2010, 4 *World Customs Journal*, no. 2, 3–20.

HETHERINGTON, S., 'CMI and the Panacea of Uniformity - An Elusive Dream, The', 2014, 39 *Tulane Maritime Law Journal*, no. 1, 159–182.

HICKS, J. K., 'What Should We Do with the Fire Defense, Late in the Evening', 2004, 83 *Texas Law Review*, no. 4, 1225–1264.

HILL, J. et al., 'Comparative Law, Law Reform and Legal Theory', 1989, 9 *Oxford Journal of Legal Studies*, no. 1, 101–115.

HILLMAN, R. A., 'Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302', 1981, 67 *Cornell Law Review*, 1.

HILLMAN, R. A., 'Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?', 2006, 104 *Michigan Law Review*, no. 5, 837–856.

HIMEL, S., 'Contracts - Jurisdiction - Absent a Strong Showing of Unreasonableness or Undue Influence, Parties' Contractual Selection of Forum in International Transactions Will Be Valid and Enforceable', 1973, 3 *Georgia Journal of International and Comparative Law*, no. 1, 201–206.

HOFER, A., 'Legalese to the Detriment of Small Business: Midwest Family Mutual Insurance Co. v. Wolters', 2015, 41 *William Mitchell Law Review*, no. 4, 1528–1555.

HOLMES, O. W., 'The Path of the Law', 1997, 110 *Harvard Law Review*, no. 5, 991–1009.

HOLT, R. T., 'A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts', 2009, 62 *Vanderbilt Law Review*, no. 6, 1913–1952.

HON, T. S., 'A New-Found Significance for Non-Exclusive Jurisdiction Agreements', 2000 *Singapore Journal of Legal Studies*, no. 1, 298–326.

HONDIUS, E. H., 'Unfair Contract Terms: New Control Systems', 1978, 26 *The American Journal of Comparative Law*, no. 4, 525–549.

HONNOLD, J. O., 'Ocean Carriers and Cargo; Clarity and Fairness - Hague or Hamburg', 1993, 24 *Journal of Maritime Law and Commerce*, 75.

HOOPER, C. D., 'Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or the Definition of Fora Conveniens Set Forth in the Rotterdam Rules', 2008, 44 *Texas International Law Journal*, no. 3, 417–426.

HOSTETLER, J. A., 'The Amish and the Law: A Religious Minority and its Legal Encounters', 1984, 41 *Washington and Lee Law Review*, no. 1, 33.

HUEBNER, C. A., 'Compulsory Arbitration of Labor Disputes', 1946, 30 *Journal of the American Judicature Society*, no. 4, 123–129.

HYLAND, R., 'Pacta Sunt Servanda: A Meditation', 1994, 34 *Virginia Journal of International Law*, no. 2, 405–433.

JACKSON, D. C., 'Current English Admiralty Jurisdiction and Practice', 1982, 1982 *Acta Juridica*, 5–16.

JACKSON, D. C., 'The Hague-Visby Rules and Forum, Arbitration and Choice of Law Clauses', 1980 *Lloyd's Maritime and Commercial Law Quarterly*, 159–167.

JACKSON, E., 'Civil Procedure - The Enforceability of Forum Selection Clauses under M/S Bremen v. Zapata off-Shore Co.', 2001, 25 *American Journal of Trial Advocacy*, no. 2, 377–382.

JARVIS, R. M. & STRAUBEL, M. S., 'Litigation with a Foreign Flavor: A Comparison of the Warsaw Convention and the Hamburg Rules', 1993, 59 *Journal of Air Law and Commerce*, no. 4, 907–944.

JARVIS, R. M., 'Sending Disputes Overseas: Does a Foreign-Forum Arbitration Clause Violate the Carriage of Good by Sea Act?', 1995 *Preview of United States Supreme Court Cases*, no. 6, 268–270.

JEFFREYS, S., 'Keeping Women Down and Out: The Strip Club Boom and the Reinforcement of Male Dominance', 2008, 34 *Signs: Journal of Women in Culture and Society*, no. 1, 151–173.

JHA, V. & CHUGH, K. S., 'The Case Against a Regulated System of Living Kidney Sales', 2006, 2 *Nature Clinical Practice Nephrology*, no. 9, 466–467.

JIANG, P., 'Drafting the Uniform Contract Law in China', 1996, 10 *Columbia Journal of Asian Law*, no. 1, 245–258.

JIN LEE, S. S., 'Is Sky Reefer in Jeopardy: The MLA's Proposed Changes to Maritime Foreign Arbitration Clauses', 1997, 72 *Washington Law Review*, no. 2, 625–654.

JINGJIAN, W. & YING, Y., 'Attempts of Returning to Freedom of Contract in the Public Transport Field: Comment on Regulation on Maritime Service Contract by the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly][By Sea]', 2007 *China Oceans Law Review*, no. 1, 373–394.

JOHANSON, S. M., 'Counterpoint: In Defense of Plain Language', 1992, 3 *Scribes Journal of Legal Writing*, 37.

JOHNSTON, A., 'Contractual Forum Selection in Florida: Toward a New Policy', 1986, 38 *University of Florida Law Review*, no. 1, 141–178.

JOHNSTON, J. S., 'Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers, The', 2005, 104 *Michigan Law Review*, 857.

JORDAN, E. R., 'Unconscionability at the Gas Station', 1977, 62 *Minnesota Law Review*, 813.

Jr. Ronald J. Scalise, 'Why No "Efficient Breach" in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract', 2007, 55 *The American Journal of Comparative Law*, no. 4, 721–766.

JUENGER, F. K., 'Supreme Court Validation of Forum-Selection Clauses', 1972, 19 *Wayne Law Review*, no. 1, 49–60.

JUENGER, F. K., 'Trends in European Conflicts Law', 1974, 60 *Cornell Law Review*, 969.

JUSTRIBÓ, V., 'Las Reglas de Rotterdam y el Seguro Marítimo de Mercancías. Su Influencia en el Proyecto de Ley General de Navegación Marítima', 2012, 4 *Cuadernos de Derecho Transnacional*, no. 2, 384–397.

KADIDAL, S., 'Obscenity in the Age of Mechanical Reproduction', 1996, 44 *The American Journal of Comparative Law*, no. 2, 353–385.

KAHN-FREUND, O., 'Jurisdiction Agreements: Some Reflections', 1977, 26 *The International and Comparative Law Quarterly*, no. 4, 825–856.

KAHN-FREUND, O., 'Pacta Sunt Servanda - A Principle and Its Limits: Some Thoughts Prompted by Comparative Labour Law', 1973-1974, 48 *Tulane Law Review*, no. 4, 894–906.

KARAN, H., 'Any Need for a New International Instrument on the Carriage of Goods by Sea: The Rotterdam Rules', 2011, 42 *Journal of Maritime Law and Commerce*, no. 3, 441–452.

KARAN, H., 'The Carrier's Liability for Breach of the Contract of Carriage of Goods by Sea under Turkish Law', 2002, 33 *Journal of Maritime Law and Commerce*, no. 1, 91–110.

KARAYANNI, M. M., 'Public Policy Exception to the Enforcement of Forum Selection Clauses, The', 1995, 34 *Duquesne Law Review*, no. 4, 1009–1055.

KARAYANNI, M. M., 'The Myth and Reality of a Controversy: "Public Factors" and the Forum Non Conveniens Doctrine', 2003, 21 *Wisconsin International Law Journal*, no. 2, 327–382.

KENNEDY, D., 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power', 1981, 41 *Maryland Law Review*, no. 4, 563.

KEREN, H., 'Guilt-Free Markets? Unconscionability, Conscience, and Emotions', 2015 *SSRN Electronic Journal*, 1–63.

KESSLER, F. & FINE, E., 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study', 1964, 77 *Harvard Law Review*, no. 3, 401–449.

KESSLER, F., 'Contracts of Adhesion--Some Thoughts about Freedom of Contract', 1943, 43 *Columbia Law Review*, no. 5, 629–642.

KEYES, M., 'Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice', 2009, 5 *Journal of Private International Law*, no. 2, 181–211.

KEYS, J. R., 'New Freedom in the Negotiation of International Contracts: The Supreme Court Upholds Forum Selection Clauses - M/S Bremen v. Zapata Off-Shore Co. (U.S. 1972)', 1973, 5 *Law and Policy in International Business*, no. 2, 688–718.

KHALID, N. & SUPPIAH, R., 'The Rotterdam Rules: Catalyst for trade or cumbersome convention?', 2010, 37 *Maritime Policy & Management*, no. 4, 447–450.

KHOURY, A. H., 'Of Trucks, Trains & Ships: Relative Liability in Multimodal Shipping', 2015, 14 *Richmond Journal of Global Law and Business*, no. 1, 45–62.

KIM, H., 'Shipowners' Limitation of Liability: Comparative Utility and Growth in the United States, Japan, and South Korea', 1993, 6 *University of San Francisco Maritime Law Journal*, no. 2, 357–387.

KIM, I. H., 'Introduction to Korean Law Governing Carriage of Goods by Sea, An', 2005, 36 *Journal of Maritime Law and Commerce*, no. 4, 447–476.

KIMBALL, S. L. & PFENNIGSTORF, W., 'Administrative Control of the Terms of Insurance Contracts: A Comparative Study', 1965, 40 *Indiana Law Journal*, no. 2, 143–232.

KIMBLE, J. & Prokop Jr, Joseph A, 'Strike Three for Legalese', 1990, 69 *Michigan Bar Journal*, 418–421.

KIMBLE, J., 'The Great Myth That Plain Language Is Not Precise', 1998, 7 *Scribes Journal of Legal Writing*, 109–118.

KING, D. B., 'Standard Form Contracts: A Call for Reality', 2000, 44 *Saint Louis University Law Journal*, no. 3, 909–918.

KIRBY, J. M., 'Consumer's Right to Sue at Home Jeopardized through Forum Selection Clause in Carnival Cruise Lines v. Shute', 1991, 70 *North Carolina Law Review*, no. 3, 888–915.

KLEMM, K. M., 'Forum Selection in Maritime Bills of Lading under COGSA', 1988, 12 *Fordham International Law Journal*, no. 3, 459–493.

KLOCK, M., 'Unconscionability and Price Discrimination', 2001, 69 *Tennessee Law Review*, no. 2, 317–384.

KNAPP, C. L., 'Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device', 2009, 46 *San Diego Law Review*, 609.

KNAPP, C. L., 'Contract Law Walks the Plank: Carnival Cruise Lines, Inc. v. Shute', 2011, 12 *Nevada Law Journal*, no. 3, 553–562.

KNAPP, C. L., 'Taking Contracts Private: The Quiet Revolution in Contract Law', 2002, 71 *Fordham Law Review*, 761.

KNAPP, C. L., 'Unconscionability in American Contract Law: A Twenty-First Century Survey', 2013 *SSRN Electronic Journal*, 1-29

KNIGHT, S. M., 'Avoidance of Foreign Jurisdiction Clauses in International Contracts', 1977, 26 *The International and Comparative Law Quarterly*, no. 3, 664–674.

KOENIG, T. H. & RUSTAD, M. L., 'Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses', 2014, 65 *Case Western Reserve Law Review*, no. 2, 341–411.

KORNHAUSER, L. A., 'Unconscionability in Standard Forms', 1976, 64 *California Law Review*, no. 5, 1151–1183.

KOROBKIN, R. B., 'A 'Traditional' and 'Behavioral' Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company', 2004, 26 *University of Hawaii Law Review*, 441–468.

KOZOLCHYK, B., 'Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective', 1992, 23 *Journal of Maritime Law and Commerce*, no. 3, 161–246.

KRONMAN, A. T., 'Mistake, Disclosure, Information, and the Law of Contracts', 1978, 7 *The Journal of Legal Studies*, no. 1, 1–34.

KRONMAN, A. T., 'Paternalism and the Law of Contracts', 1982, 92 *Yale Law Journal*, 763.

KUMM, M., 'Who's Afraid of the Total Constitution - Constitutional Rights as Principles and the Constitutionalization of Private Law', 2006, 7 *German Law Journal*, 341–370.

LACOUR, C. L., 'The Enforceability of Foreign Arbitration Clauses under the Carriage of Goods by Sea Act after Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer', 1996, 4 *Tulsa Journal of Comparative & International Law*, no. 1, 127–142.

LAGERMAN, L. O., 'Choice of Forum Clauses in International Contracts: What Is Unjust and Unreasonable?', 1978, 12 *The International Lawyer*, no. 4, 779–794.

LAGUADO GIRALDO, C. A., 'Condiciones Generales, Cláusulas Abusivas y el Principio de Buena Fe en el Contrato de Seguro', 2003, 105 *Universitas*, 231–251.

LAMONT-BLACK, S., 'Transporting goods in the EU: an interplay of international, European and national law', 2010, 11 *ERA Forum*, no. 1, 93–110.

LANDO, H. & ROSE, C., 'On the Enforcement of Specific Performance in Civil Law Countries', 2004, 24 *International Review of Law and Economics*, no. 4, 473–487.

LANDO, O., 'Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law?', 2007, 15 *European Review of Private Law*, no. 6, 841–853.

LANDRUM, S., 'Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements', 2014, 97 *Marquette Law Review*, no. 3, 751–812.

LANE, J., 'Should Australian Courts Accept or Refuse the Aid of Private International Law When Considering to Enforce Foreign Maritime Liens', 2009, 16 *eLaw Journal*, no. 1, 32–52.

LANNAN, K., 'Behind the Numbers: The Limitation on Carrier Liability in the Rotterdam Rules', 2009, 14 *Uniform Law Review*, no. 4, 901–930.

LANNAN, K., 'The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea–A General Overview', 2009, 14 *Uniform Law Review*, no. 4, 290–323.

LAPIEDRA ALCAMÍ, R., 'El Arbitraje Marítimo Internacional en las Reglas de Rotterdam', 2016 *Iuris Tantum Revista Boliviana de Derecho*, no. 22, 144–173.

LARYEA, E., 'Why Ghana Should Implement Certain International Legal Instruments Relating to international Sale of Goods Transactions', 2011, 19 *African Journal of International and Comparative Law*, no. 1, 1–37.

LAURENT, D. A., 'Foreign Jurisdiction and Arbitration Clauses in the New Zealand Maritime Context', 2007, 21 *Australian and New Zealand Maritime Law Journal*, 121–170.

LEARY, M., 'Say What You Mean and Mean What You Say: Edging Towards a Workable Container Solution', 2003, 28 *Tulane Maritime Law Journal*, no. 1, 191–208.

LEBOVITS, G., 'Free at Last from Obscurity: Achieving Clarity', 2015, 16 *Scribes Journal of Legal Writing*, 127–131.

LEDERMAN, L., 'Viva Zapata: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases', 1991, 66 *New York University Law Review*, no. 2, 422–467.

LEE, E. S., 'The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules', 2002, 15 *Transnational Lawyer*, no. 2, 241–256.

LEE, Y., 'Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts', 1997, 35 *Columbia Journal of Transnational Law*, no. 3, 663–696.

LEFF, A. A., 'Unconscionability and the Code. The Emperor's New Clause', 1967, 115 *University of Pennsylvania Law Review*, no. 4, 485–559.

LEFLAR, R. A., 'The Bremen and the Model Choice of Forum Act', 1972, 6 *Vanderbilt Journal of Transnational Law*, no. 2, 375–386.

LEGET, C. et al., ''Nobody Tosses a Dwarf!' The Relation Between the Empirical and the Normative Reexamined', 2009, 23 *Bioethics*, no. 4, 226–235.

LEGROS, C., 'Relations between the Rotterdam Rules and the Convention on the Carriage of Goods by Road', 2011, 36 *Tulane Maritime Law Journal*, 725–740.

LEMPRIERE, P., 'Developments in the Law of Common Carriage in Foreign Trade: Where Have All the Cases Gone', 2014, 27 *University of San Francisco Maritime Law Journal*, no. 2, 197–240.

LENHOFF, A., 'Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law', 1961, 36 *Tulane Law Review*, no. 4, 481–494.

LENHOFF, A., 'The Parties' Choice of a Forum: Prorogation Agreements', 1960, 15 *Rutgers Law Review*, no. 3, 414–490.

LEOW, V., 'Exclusively Here to Stay: The Applicable Principles to Granting a Stay on the Basis of an Exclusive Jurisdiction Clause - Golden Shore Transportation Ptd. Ltd. v. UCO Bank', 2004, 2004 *Singapore Journal of Legal Studies*, no. 2, 569–583.

LI, L., 'Binding Effect of Arbitration Clauses on Holders of Bills of Lading as Nonoriginal Parties and a Potential Uniform Approach through Comparative Analysis', 2012, 37 *Tulane Maritime Law Journal*, no. 1, 107–126.

LIANG, C., 'Bills of Lading's Freedom of Contract: With Special Reference to the Development of the International Legislation and to a Special Issue under the Chinese Law', 2013 *China Oceans Law Review*, no. 18, 225–234.

LIEBMAN, J. R. & WERLIN, L. M., 'Forum Selection Covenants in American Practice: Bremen in Perspective', 1979, 11 *Case Western Reserve Journal of International Law*, no. 3, 559–574.

LIENTZ, G. D., 'Lessor Evils: Implementing Additional Safeguards for New Entrants to Commercial Markets', 2015, 18 *Journal of Gender, Race, and Justice*, 267.

LIESEMER, J. A., 'Carnival's Got the Fun and the Forum: A New Look at Choice-of-Forum Clauses and the Unconscionability Doctrine after Carnival Cruise Lines, Inc. v. Shute', 1991, 53 *University of Pittsburgh Law Review*, no. 4, 1025–1060.

LITTLE, C. E., 'The Authenticity and Form of Cato's Saying "Carthago Delenda Est"', 1934, 29 *The Classical Journal*, no. 6, 429–435.

LITTLEWOOD, M., 'Freedom From Contract: Economic Duress and Unconscionability', 1984, 5 *Auckland University Law Review*, 164–179.

LIYING, Z., 'Rotterdam Rules Effect on Chinese Cargo Owners, The', 2013, 21 *Asia Pacific Law Review*, no. 1, 27–54.

LLORENTE GÓMEZ DE SEGURA, Carlos, 'Las Reglas de Rotterdam (I)', 2010, 2 *Cuadernos de Derecho Transnacional*, no. 1, 165–185.

LLORENTE GÓMEZ DE SEGURA, Carlos, 'Las Reglas de Rotterdam (II)', 2010, 2 *Cuadernos de Derecho Transnacional*, no. 2, 104–125.

LONDOÑO, A. Z., 'Las Cláusulas de Selección de Foro y Selección de Ley en la Contratación Internacional: Una Visión Desde el Derecho Internacional Privado Colombiano', 2010, 44 *Revista de Derecho Privado*, 1–35.

LONEGRASS, M., 'Finding Room for Fairness in Formalism--The Sliding Scale Approach to Unconscionability', 2012, 44 *Loyola University of Chicago Law Journal*, 1-64

LOURENS, M., 'Overview of the Regimes Governing the Carriage of Goods by Sea, An', 1999, 10 *Stellenbosch Law Review*, no. 2, 244–250.

LYNN, K., 'Browse the Web, Enter a Contract… Arbitrate? The Enforceability of Mandatory Binding Arbitration Provisions in Consumer Browsewrap Contracts', 2015, 6 *JCCC Honors Journal*, no. 1, 1-16

LYON, V. F. & ACKERMAN, D. W., 'Controlling Disputes by Controlling the Forum: Forum Selection Clauses in Construction Contracts', 2002, 22 *Construction Lawyer*, no. 4, 15–23.

LYONS, S. L., 'Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability', 2004, 52 *Buffalo Law Review*, no. 1, 185–223.

MACAULAY, S., 'Non-Contractual Relations in Business: A Preliminary Study', 1963, 28 *American Sociological Review*, no. 1, 55–67.

MACHEN, N. A., 'Balancing Bargaining Power: The Eleventh Circuit Overreaches to Destroy the Public Policy Defense at the Initial Enforcement Stage of Arbitration in Lindo v. NCL (Bahamas), Ltd.', 2011, 36 *Tulane Maritime Law Journal*, no. 2, 839–851.

MACLEAN, R. G., 'Judicial Discretion in the Civil Law', 1982, 43 *Louisiana Law Review*, 45.

MAGASHI, A. I. & HARUNA, A. L., 'Revisiting Freedom of Contract in the Contract of Carriage of Goods by Sea under the Rotterdam Rules: Service Contracts in Disguise?', 2016, 24 *IIUM Law Journal*, no. 1, 233–256.

MAGASHI, A. I. & HARUNA, A. L., 'Revisiting Freedom of Contract in the Contract of Carriage of Goods by Sea under the Rotterdam Rules: Service Contracts in Disguise?', 2016, 24 *IIUM Law Journal*, no. 1, 233–256.

MAGOJA, E. E., 'La Teoría de la Imprevisión: El Gobierno de la Equidad en la Ejecución de los Contratos', 2012 *Prudentia Iuris*, no. 74, 233–248.

MAIER, H. G., 'The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law', 1972, 6 *Vanderbilt Journal of Transnational Law*, no. 2, 387–398.

MAINSBRIDGE, A., 'Discretion to Stay Proceedings-The Impact of the Abidin Daver on Judicial Chauvinism', 1986, 11 *Sydney L. Rev.*, 151.

MAIR, S. E., 'Unconscionability and the Enforcement of Standardized Contracts in Commercial Transactions', 1984, 16 *Pac. LJ*, 247.

MAK, C., 'Fundamental Rights in the DCFR' *Centre for the Study of European Contract Law Working Paper Series*, 2009/1, 1–25.

MAK, C., 'The Constitutional Momentum of European Contract Law On the Interpretation of the DCFR in Light of Fundamental Rights', 2009, 17 *European Review of Private Law*, no. 4, 513–529.

MAK, C., 'The One and the Many: Translating Insights from Constitutional Pluralism to European Contract Law Theory', 2013, 21 *European Review of Private Law*, no. 5, 1189–1210.

MAKINS, B., 'Uniformity of the Law of the Carriage of Goods by Sea in the 1990s: The Hamburg Rules - A Casualty', 1991, 8 *Australian and New Zealand Maritime Law Journal*, no. 1, 34–48.

MALHOTRA, N. K., 'Reflections on the Information Overload Paradigm in Consumer Decision Making', 1984, 10 *Journal of Consumer Research*, 436–440.

MALLOR, J. P., 'Unconscionability in Contracts Between Merchants', 1986, 40 *Southwestern Law Journal*, no. 4, 1065–1088.

MANDELBAUM, S. R., 'Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods under the Hague, COGSA, Visby and Hamburg Conventions', 1995, 23 *Transportation Law Journal*, no. 3, 471–502.

MANDELBAUM, S. R., 'International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules', 1995, 5 *Journal of Transnational Law & Policy*, no. 1, 1–40.

MANKOWSKI, P., 'The Rotterdam Rules–Scope of Application and Freedom of Contract', 2010, 2 *European Journal of Commercial Contract Law*, 1-2, 9–21.

MANN, R. J., '"Contracting" for Credit', 2006, 104 *Michigan Law Review*, no. 5, 899–932.

MANTA, I. D. & OLSON, D. S., 'Hello Barbie: First They Will Monitor You, Then They Will Discriminate against You. Perfectly.', 2015, 67 *Alabama Law Review*, no. 1, 135–188.

MARCUS, D., 'The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts', 2007, 82 *Tulane Law Review*, no. 3, 973–1048.

MARELLA, M. R., 'The Old and the New Limits to Freedom of Contract in Europe', 2006, 2 *European Review of Contract Law*, no. 2, 256–274.

MARGOLIS, R., 'Combined Transport Bills and a New Limitation to the Hague-Visby Rules - Horst Karcher v. Piff Shipping Ltd.', 1991, 21 *Hong Kong Law Journal*, no. 1, 116–122.

MARGOLIS, R., 'Delayed Applications for Stay of Proceedings in Shipping Cases', 1992, 13 *Singapore Law Review*, 163.

MARGOLIS, R., 'Exclusive Jurisdiction Clauses and Multiple Plaintiffs', 1991, 21 *Hong Kong Law Journal*, no. 2, 240–247.

MARINELLI, A. J., 'Evolving Concept of Unconscionability in Modern Contract Law', 1998, 5 *Journal of Law & Business*, 15.

MARNEFFE, P. de, 'Avoiding Paternalism', 2006, 34 *Philosophy & Public Affairs*, no. 1, 68–94.

MAROTTA-WURGLER, F., 'Does Contract Disclosure Matter?', 2012, 168 *Journal of Institutional and Theoretical Economics JITE*, no. 1, 94–119.

MAROTTA-WURGLER, F., 'Even More than You Wanted to Know About the Failures of Disclosure', 2015, 11 *Jerusalem Review of Legal Studies*, no. 1, 63–74.

MAROTTA-WURGLER, F., 'Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's" Principles of the Law of Software Contracts"', 2011 *The University of Chicago Law Review*, 165–186.

MARROW, P. B., 'Policing Contracts for Unconscionability: Guidelines for International Arbitrators Subject to the Scrutiny of US Courts', 2007, 37 *Arbitration*, no. 4, 382–393.

MARTEN, B., 'Multimodal Transport Reform and the European Union: A Treaty Change Approach', 2011, 36 *Tulane Maritime Law Journal*, 741.

MARTÍNEZ, A. L.-T., 'La Regulación de los Contratos Internacionales en la Unión Europea', 2015, 22 *Agenda Internacional*, no. 33, 167–189.

MASON, A., 'Harmonization of Maritime Laws and the Impact of International Law on Australasian Maritime Law', 1999, 14 *Australian and New Zealand Maritime Law Journal*, no. 1, 2–21.

MATTEUCCI, M., 'The History of Unidroit and the Methods of Unification', 1973, 66 *Law Library Journal*, no. 3, 286–289.

MAXEINER, J. R., 'Standard-Terms Contracting in the Global Electronic Age: European Alternatives', 2003, 28 *Yale Journal of International Law*, 109.

MCCLAFFERTY, A., 'Effective Protection for the E-Consumer in Light of the Consumer Rights Directive', 2012, 11 *Hibernian Law Journal*, 85.

MCCORMACK, H. M., 'Uniformity of Maritime Law, History, and Perspective from the U.S. Point of View', 1998, 73 *Tulane Law Review*, no. 5, 1481–1551.

MCCULLOUGH, C., 'Unconscionability as a Coherent Legal Concept', 2015, 164 *University of Pennsylvania Law Review*, 779.

MCGEE, R. W., 'If Dwarf Tossing Is Outlawed, Only Outlaws Will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?', 1993, 38 *American Journal of Jurisprudence*, 335–358.

MCLAUGHLIN, C. B., JR., 'The Evolution of the Ocean Bill of Lading', 1925, 35 *Yale Law Journal*, no. 5, 548–570.

MCLAUGHLIN, G. T., 'Unconscionability and Impracticability: Reflections on Two U.C.C. Indeterminacy Principles', 1992, 14 *Loyola of Los Angeles International and Comparative Law Journal*, no. 3, 439–454.

MCLEMORE, R. K., 'Forum-Selection Clauses and Seaman Personal Injury: A Modern Analytical Framework with International Emphasis', 2000, 25 *Tulane Maritime Law Journal*, no. 1, 327–354.

MCMAHON, J. P., 'Hague Rules and Incorporation of Charter Party Arbitration Clauses into Bills of Lading, The', 1970, 2 *Journal of Maritime Law and Commerce*, no. 1, 1–16.

MCMEEL, G., 'Interpretation and Mistake in Contract Law: "The Fox Knows Many Things..."', 2006, 1 *Lloyd's Maritime and Commercial Law Quarterly*, 49–81.

MCMURTRY, J., 'The Contradictions of Free Market Doctrine: Is There a Solution?', 16 *Journal of Business Ethics*, no. 7, 645–662.

MEADOWS, R. L., 'Unconscionability as a Contract Policing Device for the Elder Client: How Useful Is It?', 2005, 38 *Akron Law Review*, no. 4, 741–758.

MEHLER, I. M., 'Language Mastery and Legal Training', 1961, 6 *Villanova Law Review*, 201–217.

MELLINKOFF, D., 'The Myth of Precision and the Law Dictionary', 1983, 31 *UCLA Law Review*, 423.

MENDELSOHN, A. I., 'Liberalism, Choice of Forum Clauses and the Hague Rules', 1970, 2 *Journal of Maritime Law and Commerce*, 661.

MENDELSOHN, A. I., 'Why the U.S. Did Not Ratify the Visby Amendments', 1992, 23 *Journal of Maritime Law and Commerce*, no. 1, 29–53.

MENG, T. L., 'The Carriage of Goods by Sea Act 1972 and the Hamburg Rules', 1980, 22 *Malaya L. Rev.*, no. 2, 199–211.

MENG, V. Y. O., 'Stay of Actions: Wherefore the Law', 1985, 6 *Singapore Law Review*, 201–218.

MENSCH, B., 'Freedom of Contract as Ideology', 1980, 33 *Stanford Law Review*, no. 4, 753–772.

MERRETT, L., 'Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?', 2009, 58 *International and Comparative Law Quarterly*, no. 3, 545–564.

MICHELL, M. P., 'Forum Selection Clauses and Fundamental Breach: Z. I. Pompey Industrie v. Ecu-Line N. V., The Canmar Fortune', 2002, 36 *Canadian Business Law Journal*, no. 3, 453–478.

MILADINOVIĆ, Z. & MIĆOVIĆ, A., 'Assessment of Unfair Terms in Timeshare Contract', 2015, 39 *TEME: Casopis za Društvene Nauke*, no. 1, 100.

MILHORN, B. L., 'Vimar Seguros y Reaseguros v. M/V Sky Reefer: Arbitration Clauses in Bills of Lading under the Carriage of Good by Sea Act', 1997, 30 *Cornell International Law Journal*, no. 1, 173–202.

MILLNS, S., 'Dwarf-Throwing and Human Dignity: A French Perspective', 1996, 18 *Journal of Social Welfare and Family Law*, no. 3, 375–391.

MILLS HOLMES, E. & THÜRMANN, D., 'A New and Old Theory for Adjudicating Standardized Contracts', 2015, 17 *Georgia Journal of International & Comparative Law*, no. 3, 323–429.

MIROW, M., 'Borrowing Private Law in Latin America: Andres Bello's Use of the Code Napoleon in Drafting the Chilean Civil Code', 2001, 61 *Louisiana Law Review*, no. 2, 10.

MOBERLY, M. D. & BURR, C. F., 'Enforcing Forum Selection Clauses in State Court', 2009, 39 *Southwestern Law Review*, no. 2, 265–324.

MOBERLY, M. D. & BURR, C. F., 'Enforcing Forum Selection Clauses in State Court', 2009, 39 *Southwestern Law Review*, no. 2, 265–324.

MOMBERG URIBE, R., 'El Control de las Cláusulas Abusivas como Instrumento de Intervención Judicial en el Contrato', 2013, 26 *Revista de Derecho (Valdivia)*, no. 1, 9–27.

MOMBERG URIBE, R., 'La Revisión del Contrato por las Partes: El Deber de Renegociación como Efecto de la Excesiva Onerosidad Sobreviniente', 2010, 37 *Revista Chilena de Derecho*, no. 1, 43–72.

MOORE, J. C., 'The Hamburg Rules', 1978, 10 *Journal of Maritime Law and Commerce*, no. 1, 1–12.

MOORE, S. K., 'Is the Maritime Domain a Security Vulnerability To Be Exploited During London 2012 and Beyond?', 2011, 11 *Defence Studies*, no. 4, 698–733.

MORALES ARAGÓN, J. A., 'La Carga Dinámica de la Prueba dentro del Proceso Contractual de Transporte Marítimo bajo Conocimiento de Embarque', 2013, 10 *Revista Ciencias Humanas*, no. 1, 53–68.

MORANT, B. D., 'The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses', 2003, 7 *Journal of Small and Emerging Business Law*, no. 2, 234–282.

MORANT, B. D., 'The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context', 2006, 2006 *Michigan State Law Review*, no. 4, 925–962.

MORGAN, P., 'Conflicts Between Jurisdiction and Procedure: Pre-Action Civil Procedure and Jurisdiction - A Poor Fit', 2011 *Lloyd's Maritime and Commercial Law Quarterly*, no. 2, 275–292.

MORINGIELLO, J. M., 'Signals, Assent and Internet Contracting', 2004, 57 *Rutgers Law Review*, no. 4, 1307–1350.

MORRISSEY, J. F., 'Lochner, Lawrence, and Liberty', 2010, 27 *Georgia State University Law Review*, no. 3, 609–672.

MORSE, C. G. J., 'Forum-Selection Clauses - EEC Style', 1989, 1 *African Journal of International and Comparative Law*, no. 4, 551–583.

MUKHERJEE, P. K. & BAL, A. B., 'A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective', 2009, 40 *Journal of Maritime Law and Commerce*, no. 4, 579–607.

MULLENIX, L. S., 'Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court', 1988, 57 *Fordham Law Review*, no. 3, 291–374.

MULLENIX, L. S., 'Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction', 1992, 27 *Texas International Law Journal*, no. 2, 323–370.

MULLENIX, L. S., 'Carnival Cruise Lines, Inc. v. Shute: The Titanic of Worst Decisions', 2011, 12 *Nevada Law Journal*, no. 3, 549–552.

MULLENIX, L. S., 'Gaming the System: Protecting Consumers from Unconscionable Contractual Forum Selection and Arbitration Clauses', 2015, 66 *Hastings Law Journal*, no. 3, 719–760.

MULLENIX, L. S., 'Supreme Court Review: Analysis: Forum-Shoppers Should Discover a Wider Market', 1991, 13 *The National Law Journal*, 1-6

MURPHY, J. D., 'Judicial Chauvinism - The Hague-Visby Rules, Choice of Law Clauses in Bills of Lading, and the Andhika Samyra', 1990, 20 *Hong Kong Law Journal*, no. 1, 86–99.

MURRAY, D. E., 'The Hamburg Rules: A Comparative Analysis', 1980, 12 *Lawyer of the Americas*, no. 1, 59–92.

MYBURGH, P., 'Uniformity or Unilateralism in the Law of Carriage of Goods by Sea', 2000, 31 *Victoria University of Wellington Law Review*, no. 2, 353–382.

NADELMANN, K. H., 'Choice-of-Court Clauses in the United States: The Road to Zapata', 1973, 21 *The American Journal of Comparative Law*, no. 1, 124–135.

NADLER, J., 'Unconscionability, Freedom, and the Portrait of a Lady', 2015, 27 *Yale Journal of Law & the Humanities*, no. 2, 213–249.

NAIR, A., 'Note on Norden: Voyage Charterparties, the Hague/Visby Rules and Enforcing Foreign Arbitration Awards, A', 2013, 27 *Australian and New Zealand Maritime Law Journal*, no. 2, 90–99.

NALIN, P., 'Good Faith: Contemporary Contextualization and Functions', 2013, 52 *Revista da Faculdade de Direito UFPR*, no. 0, 67–79.

NASCHITZ, P. G., 'Choice of Forum Clauses in Israel Maritime Cases', 1971, 3 *Journal of Maritime Law and Commerce*, no. 4, 775–782.

NASCHITZ, P. G., 'Forum Non Conveniens in Israel, England, and the United States: A Comparative Note', 1988, 19 *Journal of Maritime Law and Commerce*, no. 4, 551–564.

NATION [III], G. A., 'Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured', 2005, 94 *Kentucky Law Journal*, 101–137.

NAUDE, T., 'Unfair Contract Terms Legislation: The Implications of Why We Need it For Its Formulation and Application', 2006, 17 *Stellenbosch Law Review*, no. 3, 361–385.

NAUDE, T., 'Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective, The', 2007, 124 *South African Law Journal*, no. 1, 128–164.

NEDZEL, N. E., 'A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability', 1997, 12 *Tulane European & Civil Law Forum*, 97–158.

NEUBORNE, B., 'Ending Lochner Lite', 2015, 50 *Harvard Civil Rights-Civil Liberties Law Review*, no. 1, 183–214.

NICHOLS, C. L., 'Misrepresentation: Can A Vendee Rely on a Vendor's Representations?', 1979, 9 *Stetson Law Review*, 501–512.

NICOLL, C. C., 'Do the Hamburg Rules Suit a Shipper-Dominated Economy', 1993, 24 *Journal of Maritime Law and Commerce*, no. 1, 151–180.

NIEDERMAIER, T., 'Arbitration Agreements between Parties of Unequal Bargaining Power - Balancing Exercises on Either Side of the Atlantic', 2014, 39 *ZDAR: Zeitschrift fur Deutsches und Amerikanisches Recht*, no. 1, 12–21.

NIKAKI, T. & SOYER, B., 'New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive and Efficient, or Just Another One for the Shelves', 2012, 30 *Berkeley Journal of International Law*, no. 2, 303–348.

NIKAKI, T., 'Bringing Multimodal Transport Law into the New Century: Is the Uniform Liability System the Way Forward', 2013, 78 *Journal of Air Law and Commerce*, 69.

NIKAKI, T., 'The Carrier's Duties under the Rotterdam Rules: Better the Devil You Know', 2010, 35 *Tulane Maritime Law Journal*, no. 1, 1–44.

NISWANGER, R. F., 'An Unconscionability Formula for Louisiana Civilians', 2006, 81 *Tulane Law Review*, 509–535.

NOLES, C., 'Enforcement of Forum Selection Agreements in Contracts between Unequal Parties', 1981, 11 *Georgia Journal of International and Comparative Law*, 693–708.

NORDENMAN, M., 'Europe and Its Seas in the Twenty-First Century', 2016, 27 *Mediterranean Quarterly*, no. 1, 22–29.

Note, 'Australian Comments on the Uncitral Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea', 2008, 22 *Australian and New Zealand Maritime Law Journal*, no. 1, 123–130.

Note, 'Enforcement and Effect of the Jurisdiction Clause in Admiralty', 1959, 34 *St. John*, no. 1, 72–96.

Note, 'Jurisdiction and Applicable Law in the Carriage of Goods by Sea: Hi-Fert v. United Shipping (Australia)', 2000, 5 *Uniform Law Review*, no. 2, 348–353.

Note, 'Unconscionable Business Contracts: A Doctrine Gone Awry', 1961, 70 *The Yale Law Journal*, no. 3, 453–460.

NOTTAGE, L. R., 'Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Developments in the Law of Unfair Contracts', 1996, 26 *Victoria University of Wellington Law Review*, 247–292.

OAKLEY, R. L., 'Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts', 2005, 42 *Houston Law Review*, 1041.

OANA, A., 'Implications of the Bill of Lading Usage in the Process of Goods Transportation by Sea', 2013, 20 *Constanta Maritime University Annals*, no. 2, 183–186.

O'CONNELL, T. J., 'Arbitration and Forum Selection Clauses in International Business: The Supreme Court Takes an Internationalist View', 1974, 43 *Fordham Law Review*, no. 3, 424–440.

O'HARA, E. A., 'The Jurisprudence and Politics of Forum-Selection Clauses', 2002, 3 *Chicago Journal of International Law*, no. 2, 301–316.

OLAWOYIN, A. A., 'Admiralty Jurisdiction in the Federal Courts of Nigeria: Innovation or Incongruity under the Admiralty Jurisdiction Act 1991', 2004, 35 *Journal of Maritime Law and Commerce*, no. 1, 79–98.

OLAWOYIN, A. A., 'Forum Selection Disputes under Bills of Lading in Nigeria: A Historical and Contemporary Perspective', 2004, 29 *Tulane Maritime Law Journal*, no. 2, 255–286.

OLIVER, G. D., 'Future Interpretations of Article 17 of the Convention of Jurisdiction and the Enforcement of Judgements in the European Communities', 1984, 70 *Cornell Law Review*, no. 2, 289–315.

ONUFRIO, M. V., 'The Constitutionalization of Contract Law in the Irish, the German and the Italian Systems: Is Horizontal Indirect Effect Like Direct Effect?: A Comment on Professor Kumm's View', 2007 *Indret: Revista para el Análisis del Derecho*, no. 4, 1–13.

ORTIZ, R. I., 'What Changes in International Transport Law after the Rotterdam Rules', 2009, 14 *Uniform Law Review*, no. 4, 893–901.

O'TOOLE, E. M., 'The Sinking of the Eleftheria', 2003, 12 *Dalhousie Journal of Legal Studies*, 245–266.

ÖZDEL, M., 'Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?', 2016, 33 *Journal of International Arbitration*, no. 2, 151–169.

PALLARES, L. S., 'Brief Approach to the Rotterdam Rules: Between Hope and Disappointment, A', 2011, 42 *Journal of Maritime Law and Commerce*, no. 3, 453–463.

PALLARÉS, L. S., 'The Rotterdam Rules: Between Hope and Disappointment', 2010, 2 *Mexican Law Review*, no. 2, 125–139.

PARK, W. W., 'Illusion and Reality in International Forum Selection', 1995, 30 *Texas International Law Journal*, no. 1, 135–204.

PARRISH, M. E., 'Justice Douglas and the Rosenberg Case: A Rejoinder', 1984, 70 *Cornell Law Review*, no. 6, 1048–1058.

PAULSEN, G. W., 'Historical Overview of the Development of Uniformity in International Maritime Law', 1982, 57 *Tulane Law Review*, no. 5, 1065–1091.

PAWLOWSKI, M., 'Unconscionability as a Unifying Concept in Equity', 2001, 16 *Denning Law Journal*, 79–97.

PEACOCK, J. H., III, 'Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts', 1989, 68 *Texas Law Review*, no. 5, 977–1002.

PECEROS, G. E. Y., 'Contratación Electrónica en el Comercio Internacional de Mercaderías', 2003, 5 *Docentia et Investigatio*, no. 8, 197–203.

PECK, D. S., 'Economic Analysis of the Allocation of Liability for Cargo Damage: The Case for the Carrier, or Is It', 1998, 26 *Transportation Law Journal*, no. 1, 73–106.

PEEL, E., 'Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws', 1998 *Lloyd's Maritime and Commercial Law Quarterly*, 182–227.

PERROT, R., 'Judge: The Extent and Limit of His Role in Civil Matters', 1975, 50 *Tulane Law Review*, 495.

PETERS, M., 'Jurisdiction and Multimodal Transportation: Bringing Uniformity of Carriage of Goods by Sea to the Shores of the United States', 2008-2009, 17 *Michigan State University College of Law Journal of International Law*, no. 3, 761–788.

PETERS, M., 'Jurisdiction and Multimodal Transportation: Bringing Uniformity of Carriage of Goods by Sea to the Shores of the United States', 2008-2009, 17 *Michigan State University College of Law Journal of International Law*, no. 3, 761–788.

PETERSON, C. H., 'Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases', 1999, 60 *Louisiana Law Review*, no. 4, 1259–1280.

PFUND, P. H., 'United States Participation in International Unification of Private Law', 1985, 19 *International Lawyer (ABA)*, no. 2, 505–520.

PHILLIPS, J., 'Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine', 2010, 45 *Wake Forest Law Review*, no. 3, 837–861.

PIERS, M., 'Good Faith in English Law - Could a Rule Become a Principle', 2011, 26 *Tulane European and Civil Law Forum*, 123–170.

PINKER, S., 'The Stupidity of Dignity: Conservative Bioethics' Latest, Most Dangerous Ploy', 2008, 238 *The New Republic*, no. 9, 28–31.

PIZARRO WILSON, C., 'La Eficacia del Control de las Cláusulas Abusivas en el Derecho Chileno', 2004, 6 *Revista Estudios Socio-Jurídicos*, no. 2, 117–141.

PLAUT, V. & BARTLETT [III], R. P., 'Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements', 2012, 36 *Law and Human Behavior*, no. 4, 1–23.

POOR, W., 'New Code for the Carriage of Goods by Sea', 1923, 33 *Yale Law Journal*, no. 2, 133–140.

PORCELLI, S. & ZHAI, Y., 'The Challenge for the Harmonization of Law', 2010, 17 *Transition Studies Review*, no. 2, 430–455.

POSNER, E. A., 'Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract', 1995, 24 *Journal of Legal Studies*, no. 2, 283–320.

POSNER, E. A., 'Economic Analysis of Contract Law after Three Decades: Success or Failure', 2002, 112 *Yale Law Journal*, no. 4, 829–880.

POUND, R., 'Liberty of Contract', 1909, 18 *The Yale Law Journal*, no. 7, 454–487.

POWERS, P. J., 'Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods', 1998, 18 *Journal of Law and Commerce*, no. 2, 333–354.

PRESTON, C. B., 'Please Note: You Have Waived Everything: Can Notice Redeem Online Contracts', 2014, 64 *American University Law Review*, no. 3, 535–590.

PRETORIUS, C.-J., 'The Basis of Contractual Liability in Dutch Law', 2004, 37 *Comparative and International Law Journal of Southern Africa*, no. 3, 377–403.

PRINCE, H. G., 'Unconscionability in California: A Need for Restraint and Consistency', 1994, 46 *Hastings Law Journal*, 459–554.

PRYLES, M., 'Comparative Aspects of Prorogation and Arbitration Agreements', 1976, 25 *The International and Comparative Law Quarterly*, no. 3, 543–582.

PURCELL, E. A., JR., 'Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court', 1992, 40 *UCLA Law Review*, 423.

QURAISHI, A., 'From a Gasp to a Gamble: A Proposed Test for Unconscionability', 1991, 25 *U.C. Davis Law Review*, 187–228.

RAFENOMANJATO, N. M., 'Volume Contracts Under the Rotterdam Rules: One Step Forward Or Two Steps Backward?', 2013, 19 *Revue Juridique Neptunus*, no. 2, 1–8.

RAKOFF, T. D., 'Contracts of Adhesion: An Essay in Reconstruction', 1983, 96 *Harvard Law Review*, 1173–1284.

Ralph Foss, 'Cooperation Between Special Libraries and Publishers' *Special Libraries*, 281.

RAMBANA, N., 'Arbitration as an Alternative to Forum Selection Clauses in the Travel Industry', 2000 *International Travel Law Journal*, no. 2, 96–102.

RAMBERG, J., 'Global Unification of Transport Law: A Hopeless Task', 2009, 27 *Penn State International Law Review*, 3 & 4, 851–857.

RAMBERG, J., 'Unification of the Law of International Freight Forwarding', 1998, 3 *Uniform Law Review*, no. 1, 5–14.

RANKIN BOHME, S. et al., 'Maximizing Profit and Endangering Health: Corporate Strategies to Avoid Litigation and Regulation', 2005, 11 *International Journal of Occupational and Environmental Health*, no. 4, 338–348.

RAPHAEL, J. & SHAPIRO, D. L., 'Violence in Indoor and Outdoor Prostitution Venues', 2004, 10 *Violence Against Women*, no. 2, 126–139.

RAPOPORT, J., 'Warsaw, Montreal, and the US Department of Transportation: Consumer Protection for Forum Selection', 2012, 77 *Journal of Air Law and Commerce*, no. 3, 247–274.

RATKOVIĆ, T. & ZGRABLJIĆROTAR, D., 'Choice-of-Court Agreements under the Brussels I Regulation (Recast)', 2013, 9 *Journal of Private International Law*, no. 2, 245–268.

RAYMOND, A. H., 'It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses within Contracts of Adhesion', 2012, 91 *Nebraska Law Review*, no. 3, 666–705.

RAYNER, S., 'A Note on Force Majeure in Islamic Law', 1991, 6 *Arab Law Quarterly*, no. 1, 86–89.

RE, E. D., 'Legal Writing as Good Literature', 1984-1985, 59 *St. John's Law Review*, no. 2, 211–227.

REESE, W. L. M., 'The Contractual Forum: Situation in the United States', 1964, 13 *American Journal of Comparative Law*, 187.

REESE, W. L. M., 'The Model Choice of Forum Act', 1969, 17 *The American Journal of Comparative Law*, no. 2, 292–296.

REESE, W. L. M., 'The Supreme Court Supports Enforcement of Choice-of-Forum Clauses', 1973, 7 *International Lawyer (ABA)*, no. 3, 530–540.

REILLY, J. M., 'Enforceability of Choice of Forum Clauses', 1971, 8 *California Western Law Review*, no. 2, 324–340.

REITER, B. J., 'The Control of Contract Power', 1981, 1 *Oxford Journal of Legal Studies*, no. 3, 347–374.

REUS, A., 'Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany', 1993, 16 *Loyola of Los Angeles International and Comparative Law Journal*, no. 2, 455–512.

REYNOLDS, F., 'Bills of Lading: Do They Have a Future', 1994, 10 *Australian and New Zealand Maritime Law Journal*, no. 2, 35–50.

REYNOLDS, F., 'The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules', 1990, 7 *Australian and New Zealand Maritime Law Journal*, 16–34.

REZA FIROOZMAND, M., 'Changed Circumstances and Immutability of Contract: A Comparative Analysis of Force Majeure and Related Doctrines', 2007, 8 *Business Law International*, no. 2, 161–185.

RICHARDSON, M. S., 'The Monopoly on Digital Distribution', 2014, 27 *Pacific McGeorge Global Business & Development Law Journal*, no. 1, 153–171.

RICHMAN, W. M., 'Carnival Cruise Lines: Forum Selection Clauses in Adhesion Contracts', 1992, 40 *The American Journal of Comparative Law*, no. 4, 977–984.

RILEY, C., 'Signing in Glitter or Blood: Unconscionability and Reality Television Contracts', 2013, 3 *New York University Journal of Intellectual Property and Entertainment Law*, no. 1, 106–141.

ROBERTS, N. M., 'Definitional Avoidance: Arbitration', 2016, 49 *UC Davis Law Review*, no. 4, 1547–1641.

ROBERTSON, D. W. & STURLEY, M. F., 'The Right to a Jury Trial in Jones Act Cases: Choosing the Forum versus Choosing the Procedure', 1999, 30 *Journal of Maritime Law and Commerce*, no. 4, 649–676.

ROBERTSON, G. B., 'Jurisdiction Clauses and the Canadian Conflict of Laws', 1982, 20 *Alberta Law Review*, no. 2, 296–313.

RODRIGO, G., 'Application of the Hague-Visby Rules in Singapore', 1985, 27 *Malaya Law Review*, no. 1, 197–204.

RODRIGO, T., 'Toward Fairness in the Guarantee Market: The Rationale for Expanding Interventions from Fraud to Unconscionability in the Enforcement of Demand Guarantees', 2013, 16 *International Trade and Business Law Review*, 225–253.

RODRÍGUEZ FERNÁNDEZ, M., 'La Interpretación e Integración de los Instrumentos de Derecho Comercial Internacional: El Caso de las Reglas de Rotterdam', 2013, 12 *Revista E-mercatoria*, no. 2, 143–171.

RODRÍGUEZ GREZ, P., 'Pacta Sunt Servanda', 2008, 18 *Revista Actualidad Jurídica*, 107–187.

ROGERS, J., 'To Rule The Waves: Why a Maritime Geostrategy is Needed to Sustain European Union', 2010, 6 *Egmont Security Policy Brief*, 1–7.

RONNEBERG, N. J., JR., 'An Introduction to the Protection & Indemnity Clubs and the Marine Insurance They Provide', 1990, 3 *University of San Francisco Maritime Law Journal*, no. 1, 1–36.

ROPPO, V., 'Del Contrato con el Consumidor a los Contratos Asimétricos: Perspectivas del Derecho Contractual Europeo', 2011, 20 *Revista de Derecho Privado*, 177–223.

ROPPO, V., 'From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?', 2009, 5 *European Review of Contract Law*, no. 3, 304–349.

ROSENBERG, A., 'Contract's Meaning and the Histories of Classical Contract Law', 2013, 59 *McGill Law Journal*, no. 1, 165–207.

RÖSLER, H., 'Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-level Private Law', 2010, 4 *European Review of Private Law*, 729–756.

RYAN, A. L., 'Principles of Forum Selection', 2000, 103 *West Virginia Law Review*, no. 2, 167–204.

RYAN, C., 'No Longer Perry Mason: How Modern American Television's Portrayal of Attorneys Shifts Public Opinion', 2015, 17 *University of Denver Sports and Entertainment Law Journal*, 133–166.

SACHS, S., 'The Forum Selection Defense', 2015 *Duke Journal of Constitutional Law & Public Policy*, 1-55

SALAZAR, D. F., 'Theoretical Approximation and Experimental Evaluation of Market Functioning when Transactions are Regulated by Adhesion Contracts', 2008 *Latin American and Caribbean Law and Economics Association (ALACDE) Annual Papers*, 1-44

SALEH, N., 'Origins of the Sanctity of Contracts in Islamic Law', 1998, 13 *Arab Law Quarterly*, no. 3, 252–264.

SALZWEDEL, M. R., 'The Lawyer's Struggle to Write', 2015, 16 *Scribes Journal of Legal Writing*, 69–90.

SANDERS, P. A., 'At Will Franchise Terminations and the Abuse of Rights Doctrine: The Maturation of Louisiana Law', 1981, 42 *Louisiana Law Review*, no. 1, 210–238.

SANDOVAL LÓPEZ, R., 'Análisis Comparativo de las Reglas de Hamburgo y las Reglas de Rotterdam', 2013, 19 *Ius et Praxis*, no. 2, 371–383.

SASSOON, D. M., 'Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparisons', 1971, 3 *Journal of Maritime Law and Commerce*, no. 4, 759–774.

SAUMIER, G. & BAGG, J., 'Forum Selection Clauses before Canadian Courts: A Tale of Two (or Three) Solitudes', 2013, 46 *U.B.C. Law Review*, 439.

SCHAUER, F., 'Ashwander Revisited', 1995, 1995 *The Supreme Court Review*, 71–98.

SCHELIN, J., 'The UNCITRAL Convention on Carriage of Goods by Sea: Harmonization or De-Harmonization', 2009, 44 *Texas International Law Journal*, no. 3, 321–328.

SCHMELTZER, E. & PEAVY, R. A., 'Prospects and Problems of the Container Revolution', 1969, 1 *Journal of Maritime Law and Commerce*, no. 2, 203–240.

SCHMITZ, A. J., 'Embracing Unconscionability's Safety Net Function', 2006, 58 *Alabama Law Review*, 73.

SCHMITZ, A. J., 'Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms', 2010, 15 *Harvard Negotiation Law Review*, no. 1, 115–194.

SCHMITZ, A. J., 'Pizza-Box Contracts: True Tales of Consumer Contracting Culture', 2010, 45 *Wake Forest Law Review*, no. 3, 863–901.

SCHNARR, C. N., 'Foreign Forum Selection Clauses Under COGSA: The Supreme Court Charts New Waters in the Sky Reefer Case', 1996, 74 *Wash. ULQ*, no. 3, 867–1315.

SCHREIBER, H. W., 'Appelability of a District Court's Denial of a Forum-Selection Clause Dismissal Motion: An Argument against Cancelling out the Bremen', 1988, 57 *Fordham Law Review*, 463.

SCHULTE-NÖLKE, H., 'No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts', 2015, 2 *European Review of Private Law*, 195–216.

SCHULZE, H. C. A., 'Forum Non Conveniens in Comparative Private International Law', 2001, 118 *South African Law Journal*, no. 4, 812–830.

SCHWARTZ, A. & WILDE, L. L., 'Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis', 1979, 127 *University of Pennsylvania Law Review*, no. 3, 630–682.

SCHWENZER, I., 'Force Majeure and Hardship in International Sales Contracts', 2008, 39 *Victoria University of Wellington Law Review*, 709.

SELVIG, E., 'The Hamburg Rules, the Hague Rules and Marine Insurance Practice', 1980, 12 *Journal of Maritime Law and Commerce*, no. 3, 299–326.

SENDEROWICZ, J., 'Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts', 1998, 32 *Columbia Journal of Law and Social Problems*, no. 3, 275–306.

SHAMAN, J. M., 'On the 100th Anniversary of Lochner v. New York', 2004, 72 *Tenn. L. Rev.*, 455–507.

SHANNON, B. S., 'Forum Selection After Atlantic Marine: Enforcing Forum-Selection Clauses', 2015, 66 *Hastings Law Journal*, 777–845.

SHARMA, K. M., 'From Sanctity to Fairness: An Uneasy Transition in the Law of Contracts', 1999, 18 *The New York Law School Journal of International and Comparative Law*, no. 2, 95–179.

SHARP, M. P., 'Pacta Sunt Servanda', 1941, 41 *Columbia Law Review*, no. 5, 783–798.

SHELL, G. R., 'Fair Play, Consent and Securities Arbitration: A Comment on Speidel', 1996, 62 *Brooklyn Law Review*, no. 4, 1365–1380.

SHELL, G. R., 'Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend', 1987, 82 *Northwestern University Law Review*, 1198.

SHIFFRIN, S. V., 'Paternalism, Unconscionability Doctrine, and Accommodation', 2000, 29 *Philosophy & Public Affairs*, no. 3, 205–250.

SHLEIFER, A., 'The Age of Milton Friedman', 2009, 47 *Journal of Economic Literature*, no. 1, 123–135.

SHULKIN, M. B., 'Unconscionability--The Code, the Court and the Consumer', 1967, 9 *Boston College Industrial and Commercial Law Review*, 367.

SIIG, K. M., 'Maritime Jurisdiction Agreements in the EU - The Bergen', 1997 *Lloyd's Maritime and Commercial Law Quarterly*, 362–368.

SILARD, S. A., 'Carriage of the SDR by Sea: The Unit of Account of the Hamburg Rules', 1978, 10 *Journal of Maritime Law and Commerce*, no. 1, 13–38.

SIMON, S., 'Container Law: A Recent Reappraisal', 1976, 8 *Journal of Maritime Law and Commerce*, no. 4, 489–496.

SIMOONS, F. J., 'Traditional Use and Avoidance of Foods of Animal Origin: A Culture Historical View', 1978, 28 *BioScience*, no. 3, 178–184.

Simpson, A. W. B., 'Quackery and Contract Law: The Case of the Carbolic Smoke Ball', 1985, 14 *The Journal of Legal Studies*, no. 2, 345–389.

Slawson, W. David, 'Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form', 2006, 2006 *Michigan State Law Review*, no. 4, 853–882.

Slawson, W. David, 'Standard Form Contracts and Democratic Control of Lawmaking Power', 1971, 84 *Harvard Law Review*, no. 3, 529–566.

SLAYTON, P., 'The Unequal Bargain Doctrine: Lord Denning in Lloyds Bank v. Bundy', 1976, 22 *McGill Law Journal*, 94–109.

SMITH, H., 'Enforcement of Foreign Mandatory Rules', 2000, 1 *Hibernian Law Journal*, no. 2, 305–313.

SMITH, M. M., 'Adhesion Contracts Don't Stick in Michigan: Why Rory Got It Right', 2007, 5 *Ave Maria Law Review*, no. 1, 237–272.

SNEDDON, M., 'Unconscionability in Australian Law: Development and Policy Issues', 1991, 14 *Loyola of Los Angeles International and Comparative Law Journal*, 545–568.

SOLIMINE, M. E., 'Forum-Selection Clauses and the Privatization of Procedure', 1992, 25 *Cornell International Law Journal*, 51–102.

SONO, K. & FUJIOKA, Y., 'The Role of the Abuse of Right Doctrine in Japan', 1975, 35 *Louisiana Law Review*, no. 5, 1038–1057.

SOOKSRIPAISARNKIT, P., 'Enhancing of Carriers' Liabilities in the Rotterdam Rules—Too Expensive Costs for Navigational Safety?', 2014, 8 *The International Journal on Marine Navigation and Safety of Sea Transportation*, no. 2, 309–315.

SOPHIA TANG, Z., 'Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts - A Pragmatic Study', 2012, 61 *International and Comparative Law Quarterly*, no. 2, 459–484.

SORENSEN, M. J., 'Enforcement of Forum-Selection Clauses in Federal Court after Atlantic Marine', 2013, 82 *Fordham Law Review*, no. 5, 2521–2562.

SOTO COAGUILA, C. A., 'El Pacta Sunt Servanda y la Revisión del Contrato', 2012 *Revista de Derecho Privado (México, D.F.)*, no. 1, 197–235.

SPANOGLE, J. A., 'Analyzing Unconscionability Problems', 1969, 117 *University of Pennsylvania Law Review*, no. 7, 931–969.

SPECK, P. K., 'Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul', 1987, 18 *Journal of Maritime Law and Commerce*, no. 2, 185–218.

SPEIDEL, R. E., 'Unconscionability, Assent and Consumer Protection', 1969, 31 *University of Pittsburgh Law Review*, 359–376.

SQUILLANTE, A. M., 'Doctrine of Just Price - Its Origin and Development, The', 1969, 74 *Commercial Law Journal*, 333.

SQUILLANTE, A. M., 'Unconscionability: French, German, Anglo-American Application', 1969, 34 *Albany Law Review*, 297–313.

STARING, G. S., 'Forgotten Equity: The Enforcement of Forum Clauses', 1999, 30 *Journal of Maritime Law and Commerce*, no. 3, 405–412.

STEMPEL, J. W., 'Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism', 2004, 19 *Ohio State Journal on Dispute Resolution*, no. 3, 757–860.

STEPHAN, P. B., 'The Futility of Unification and Harmonization in International Commercial Law', 1999, 39 *Virginia Journal of International Law*, no. 3, 743–798.

STEPHAN, P. B., 'The Skeptic Speaks: I Am Not a Blind, Pig-Stupid Opponent of Unification', 2002, 96 *Proceedings of the Annual Meeting (American Society of International Law)*, 336–338.

STEPHENS, B., 'How Milton Friedman Saved Chile', 2010 *Wall Street Journal*

STERNLIGHT, J. R. & JENSEN, E. J., 'Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?', 2004, 67 *Law and Contemporary Problems*, 1/2, 75–103.

STERNLIGHT, J. R., 'Is the U.S. out on a Limb?: Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World', 2001, 56 *University of Miami Law Review*, no. 4, 831–864.

STERNLIGHT, J. R., 'Panacea or Corporate Tool--Debunking the Supreme Court's Preference for Binding Arbitration', 1996, 74 *Washington University Law Quarterly*, no. 3, 637–712.

STEVERSON, J. W., 'I Mean What I Say, I Think: The Danger to Small Businesses of Entering into Legally Enforceable Agreements That May Not Reflect Their Intentions', 2003, 7 *Journal of Small and Emerging Business Law*, 283–321.

STEWART, A., 'What's Wrong with the Australian Law of Contract?', 2012, 29 *Journal of Contract Law*, no. 1, 74–90.

STEYN, J., 'The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy', 1991, 6 *Denning Law Journal*, 131–142.

STILGLITZ, R. S., 'Contrato de Consumo y Cláusulas Abusivas', 1999, 4 *Con-texto: Revista de Derecho y Economia*, 32.

STOCKTON, D., 'Cicero the Man', 1974, 24 *The Classical Review*, no. 1, 68–70.

STORK, F. X., 'Arbitration Clauses: Potential Conflicts With the Carriage of Goods by Sea Act', 1982, 21 *Columbia Journal of Transnational Law*, no. 1, 157–175.

STRAUSS, D. A., 'Why Was Lochner Wrong?', 2003, 70 *The University of Chicago Law Review*, no. 1, 373.

STREET, C. T. & CAMERON, A.-F., 'External Relationships and the Small Business: A Review of Small Business Alliance and Network Research', 2007, 45 *Journal of Small Business Management*, no. 2, 239–266.

STURLEY, M. F., 'Bill of Lading Choice of Forum Clauses: Comparisons Between United States and English law', 1992 *Lloyd's Maritime and Commercial Law Quarterly*, 248–260.

STURLEY, M. F., 'Bill of Lading Forum Selection Clauses in the United States: The Supreme Court Charts a New Course', 1996 *Lloyd's Maritime and Commercial Law Quarterly*, 164–167.

STURLEY, M. F., 'Carriage of Goods by Sea', 2000, 31 *Journal of Maritime Law and Commerce*, no. 2, 241–250.

STURLEY, M. F., 'Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence', 1993, 24 *Journal of Maritime Law and Commerce*, no. 1, 119–150.

STURLEY, M. F., 'Forum Selection Clauses in Cruise Line Tickets: An Update on Congressional Action Overruling the Supreme Court', 1993, 24 *Journal of Maritime Law and Commerce*, no. 2, 399–401.

STURLEY, M. F., 'International Uniform Laws in National Courts: The Influence of Domestic Laws in Conflicts of Interpretation', 1986, 27 *Virginia Journal of International Law*, no. 4, 729–802.

STURLEY, M. F., 'Jurisdiction and Arbitration under the Rotterdam Rules', 2009, 14 *Uniform Law Review*, no. 4, 945–980.

STURLEY, M. F., 'Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States', 2009, 44 *Texas International Law Journal*, no. 3, 427–456.

STURLEY, M. F., 'Overruling Sky Reefer in the International Arena: A Preliminary Assessment of Forum Selection and Arbitration Clauses in the New UNCITRAL Transport Law Convention', 2006, 37 *Journal of Maritime Law and Commerce*, no. 1, 1–22.

STURLEY, M. F., 'Proposed Amendments to the Carriage of Goods by Sea Act: An Update, The', 2000, 13 *University of San Francisco Maritime Law Journal*, no. 1, 1–30.

STURLEY, M. F., 'Proposed Amendments to the Carriage of Goods by Sea Act', 1996 *Houston Journal of International Law*, no. 3, 609–708.

STURLEY, M. F., 'Strengthening the Presumption of Validity for Choice of Forum Clauses', 1992, 23 *Journal of Maritime Law and Commerce*, 131.

STURLEY, M. F., 'The History of COGSA and the Hague Rules', 1991, 22 *Journal of Maritime Law and Commerce*, no. 1, 1–58.

STURLEY, M. F., 'Uniformity in the Law Governing the Carriage of Goods by Sea', 1995, 26 *Journal of Maritime Law and Commerce*, no. 1, 553–580.

STURLEY, M. F., 'United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress, The', 2003, 39 *Texas International Law Journal*, no. 1, 65–110.

SUMMERS, R. S., '"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code', 1968, 54 *Virginia Law Review*, no. 2, 195–267.

SUMMERS, R. S., 'General Duty of Good Faith-Its Recognition and Conceptualization', 1981, 67 *Cornell Law Review*, 810.

SUP LEE, E., 'Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance', 1997, 4 *ILSA Journal of International & Comparative Law*, no. 1, 153–172.

SUP LEE, E., 'The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules', 2002, 15 *Transnational Lawyer*, no. 2, 241–256.

SWANSON, C. B., 'Unconscionable Quandary: UCC Article 2 and the Unconscionability Doctrine', 2001, 31 *New Mexico Law Review*, no. 2, 359–400.

SWEENEY, J. C., 'Forty-Five Years of Teaching Admiralty Law', 2010, 55 *Saint Louis University Law Journal*, no. 2, 633–638.

SWEENEY, J. C., 'From Columbus to Cooperation - Trade and Shipping Policies from 1492 to 1992', 1989, 13 *Fordham International Law Journal*, no. 4, 481–523.

SWEENEY, J. C., 'Happy Birthday, Harter: A Reappraisal of the Harter Act on Its 100th Anniversary', 1993, 24 *Journal of Maritime Law and Commerce*, no. 1, 1–42.

SWEENEY, J. C., 'The Uncitral Draft Convention on Carriage of Goods by Sea (Part V)', 1976, 8 *Journal of Maritime Law and Commerce*, no. 2, 167–194.

SWEENEY, J. C., 'The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)', 1975, 7 *Journal of Maritime Law and Commerce*, 69–126.

SWEENEY, J. C., 'The Uncitral Draft Convention on Carriage of Goods by Sea (Part II)', 1975, 7 *Journal of Maritime Law and Commerce*, no. 2, 327–350.

SWEENEY, J. C., 'The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part III)', 1975, 7 *Journal of Maritime Law and Commerce*, no. 3, 487–504.

SWEENEY, J. C., 'The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)', 1975, 7 *Journal of Maritime Law and Commerce*, no. 4, 615–670.

SYKE, W. E., 'Agreements in Advance Conferring Exclusive Jurisdiction on Foreign Courts', 1949, 10 *Louisiana Law Review*, no. 3, 293–301.

SZEMEBÉNYI, O., 'The Latin Gerundive and Other -ND- Formations', 1950, 49 *Transactions of the Philological Society*, no. 1, 169–179.

TAMBA, A., 'Lesion and Its Functional Equivalents - A Glance at France, Quebec, Louisiana and the Untied States Common Law', 2013 *Studia Universitatis Babes-Bolyai Jurisprudentia*, no. 4, 260–310.

TAN, D., 'No Dispute Amounting to Strong Cause; Strong Cause for Dispute', 2001, 13 *Singapore Academy of Law Journal*, 428–450.

TANG, Z., 'Exclusive Choice of Forum Clauses and Consumer Contracts in E-Commerce', 2005, 1 *Journal of Private International Law*, no. 2, 237–268.

TAYLOR, D. H., 'The Forum Selection Clause: A Tale of Two Concepts', 1993, 66 *Temple Law Review*, no. 3, 785–856.

TAYLOR, J., 'International Maritime Arbitration and the Rotterdam Rules: A New Perspective on Party Autonomy', 2014, 28 *Australian and New Zealand Maritime Law Journal*, no. 1, 25–43.

TETLEY, W., 'An Update on the Per Package Limitation and National Intentions Regarding Future Carriage of Goods by Sea Legislation', 1983, 14 *Journal of Maritime Law and Commerce*, no. 3, 331–346.

TETLEY, W., 'Canadian Comments on the Proposed Uncitral Rules - An Analysis of the Proposed Uncitral Text', 1978, 9 *Journal of Maritime Law and Commerce*, no. 2, 251–268.

TETLEY, W., 'Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering', 2004, 35 *Journal of Maritime Law and Commerce*, no. 4, 561–616.

TETLEY, W., 'Maritime Law as a Mixed Legal System (with Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both Its Civil and Common Law Heritages)', 1998, 23 *Tulane Maritime Law Journal*, no. 2, 317–350.

TETLEY, W., 'Package & Kilo Limitations and the Hague, Hague/Visby and Hamburg Rules & Gold', 1995, 26 *Journal of Maritime Law and Commerce*, no. 1, 133–156.

TETLEY, W., 'Per Package Limitation and Containers under the Hague Rules, Visby & Uncitral', 1977, 4 *Dalhousie Law Journal*, no. 3, 685–707.

TETLEY, W., 'Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law, The', 1999, 30 *Journal of Maritime Law and Commerce*, no. 4, 595–626.

TETLEY, W., 'Reform of Carriage of Goods-The UNCITRAL Draft and Senate COGSA'99', 2003, 28 *Tulane Maritime Law Journal*, no. 1, 1–44.

TETLEY, W., 'Selected Problems of Maritime Law under the Hague Rules', 1963, 9 *McGill Law Journal*, no. 1, 53–67.

TETLEY, W., 'The General Maritime Law - The Lex Maritima', 1994, 20 *Syracuse Journal of International Law and Commerce*, 105–146.

TETLEY, W., 'The Hamburg Rules-A Commentary', 1979, 1 *Lloyd's Maritime and Commercial Law Quarterly*, 1-20

TETLEY, W., 'The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law', 1999, 30 *Journal of Maritime Law and Commerce*, no. 4, 595–626.

TETLEY, W., 'Uniformity of International Private Maritime Law - The Pros, Cons, and Alternatives to International Conventions - How to Adopt an International Convention', 1999, 24 *Tulane Maritime Law Journal*, no. 2, 775–856.

THAL, S. N., 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness', 1988, 8 *Oxford Journal of Legal Studies*, 17–33.

THAYER, J. B., 'Laesio Enormis', 1936, 25 *Kentucky Law Journal*, 321.

THEIS, W. H., 'Admiralty Proceedings and the Proposed Hague Convention on Jurisdiction and Judgements', 2001, 32 *Journal of Maritime Law and Commerce*, no. 1, 59–94.

THOMAS, D., 'Contractual Obligations of Good Faith', 2012, 7 *Construction Law International*, no. 3, 31–34.

THOMPSON, S. M., 'Hamburg Rules: Should They Be Implemented in Australia and New Zealand, The', 1992, 4 *Bond Law Review*, no. 2, 1–18.

TIPLADY, D., 'The Judicial Control Of Contractual Unfairness', 1983, 46 *The Modern Law Review*, no. 5, 601–618.

TISNÉS, J. D. Z. et al., 'Colombia, una Piedra Más en la Torre de Babel de la Legislación del Contrato de Transporte Marítimo Internacional', 2012, 3 *Ejil - EAFIT Journal of International Law*, no. 2, 54–65.

TOH, K. S., 'Staying an Action Commenced in Breach of a Jurisdiction Clause: A Note on the Asian Plutus', 1991, 3 *Singapore Academy of Law Journal*, 314–323.

TRAPPE, J., 'Maritime Arbitration in Hamburg', 1986, 14 *International Business Lawyer*, no. 2, 12–16.

TRAYNOR, R. J., 'Is This Conflict Really Necessary', 1958, 37 *Texas Law Review*, 657–675.

TREBILCOCK, M. J., 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords', 1976, 26 *The University of Toronto Law Journal*, no. 4, 359–385.

TSIMPLIS, M. N., 'The Effect of European Regulations on the Jurisdiction and Applicable Law for Limitation of Liability Proceedings', 2011 *Lloyd's Maritime and Commercial Law Quarterly*, no. 2, 307–321.

UDELL, G. G., 'Franchising: America's Last Small Business Frontier?', 1973, 11 *Journal of Small Business Management*, no. 2, 31–34.

URIBE, M. A. et al., 'Transport Facilitation from the Perspective of the Rotterdam Rules', 2010, 283 *Bulletin FAL*, no. 2, 1–7.

VAFIDIS, M. P., 'No Sanity Clause: Thoughts on the Bill of Lading Package Limitation', 2012, 25 *University of San Francisco Maritime Law Journal*, no. 2, 235–252.

VALDERRAMA, F. A. J., 'Contratos de Transporte Marítimo de Mercancías: Del Harter Act Norteamericano de 1893 a las Reglas de Rotterdam de 2008 y los Tratados de Libre Comercio de Colombia con los Estados Unidos de América y la Unión Europea', 2012, 38 *Revista de Derecho*, 109–141.

VALDERRAMA, F. J., 'Las Obligaciones del Porteador en el Contrato de Transporte Marítimo de Mercancías', 2015, 42 *Revista Chilena de Derecho*, no. 2, 515–543.

DE LA VEGA JUSTRIBÓ, B., 'Las Reglas de Rotterdam y el Seguro Marítimo de Mercancías. Su Influencia en el Proyecto de Ley General de Navegación Marítima: La Duración de la Cobertura', 2012, 4 *Cuadernos de Derecho Transnacional*, no. 2, 384–397.

VERHEUL, H., 'The EEC Convention on Jurisdiction and Judgments of 27 September in Dutch Legal Practice', 1981, 28 *Netherlands International Law Review*, no. 1, 68–86.

VIËTOR, D. A. & WIJNSTEKERS, B. W., 'Het Redelijkheidsbeding in Commerciële Contracten', 2013, 4 *Tijdschrift Overeenkomst in de RechtsPraktijk*, no. 8, 26–31.

VIGURI PEREA, A., 'Los Contratos de Adhesión: Tendencias en la Evolución de la Protección del Consumidor en el Derecho Estadounidense', 1996, 12 *Revista Española de Estudios Norteamericanos*, 73–80.

VILLAREAL, D. R., JR., 'Carrier's Responsibility to Cargo and Cargo's to Carrier', 1970, 45 *Tulane Law Review*, 770–780.

VILLAREAL, M. L. N., 'Buena fe Subjetiva y Buena fe Objetiva; Equivocos a los que Conduce la Falta de Claridad en la Distincion de Tales Conceptos', 2009, 17 *Revista de Derecho Privado*, 45–76.

VISSER, C., 'The Principle Pacta Servanda Sunt in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade', 1984, 101 *The South African Law Journal*, no. 4, 641–655.

W. O'HARE, C., 'Cargo Dispute Resolution and the Hamburg Rules', 1980, 29 *International and Comparative Law Quarterly*, 2-3, 219–237.

WADDAMS, S. M., 'Abusive or Unconscionable Clauses from a Common Law Perspective', 2010, 49 *The Canadian Business Law Journal*, no. 3, 378–399.

Waddams, S. M., 'Unconscionability in Contracts', 1976, 39 *The Modern Law Review*, no. 4, 369–393.

WADDAMS, S., 'Autonomy and Paternalism from a Common Law Perspective: Setting Aside Disadvantageous Transactions', 2010, 3 *Erasmus Law Review*, no. 2, 121–140.

WAGENER, M., 'Legal Certainty and the Incorporation of Charterparty Arbitration Clauses in Bills of Lading', 2009, 40 *Journal of Maritime Law and Commerce*, no. 1, 115–125.

WAISMAN, D. A., 'Preserving Substantive Unconscionability', 2015, 44 *Southwestern Law Review*, no. 2, 101–112.

WALL, J. F., 'Social Darwinism and Constitutional Law with Special Reference to Lochner v. New York', 1976, 33 *Annals of Science*, no. 5, 465–476.

WALLACE, M. A. & MAHER, J. R., 'Commercial Unfairness and Economic Inefficiency as Exemplified by Unfair Risk Allocations in Computer Contracts', 1986, 6 *Journal of Law and Commerce*, no. 1, 59–105.

WALSH, C., 'The Uses and Abuses of Party Autonomy in International Contracts', 2010, 60 *University of New Brunswick Law Journal)*, no. 1, 12–31.

WARE, S. J., 'The Case for Enforcing Adhesive Arbitration Agreements - With Particular Consideration of Class Actions and Arbitration Fees', 2011, 5 *The Journal of American Arbitration*, no. 2, 251–293.

WARKENTINE, E. R., 'Article 2 Revisions: An Opportunity to Protect Consumers and Merchant Consumers through Default Provisions', 1996, 30 *John Marshall Law Review*, no. 1, 39–94.

WATERS, C. A., 'The Enforceability of Forum Selection Clauses in Maritime Bills of Lading: An Update', 1990, 15 *Tulane Maritime Law Journal*, no. 1, 29–46.

WATSON, H., 'Forum Selection Clauses in Maritime Contracts', 1973, 33 *Louisiana Law Review*, 481–488.

WEBB, P. R. H., 'The Fehmarn', 1958, 7 *The International and Comparative Law Quarterly*, no. 3, 599–610.

WEHBERG, H., 'Pacta Sunt Servanda', 1959, 53 *The American Journal of International Law*, no. 4, 775–786.

WEINBERG, K. S., 'Equity in International Arbitration: How Fair is Fair-A Study of Lex Mercatoria and Amiable Composition', 1994, 12 *Boston University International Law Journal*, no. 1, 227–254.

WERTH, D. A., 'The Hamburg Rules Revisited - A Look at U.S. Options', 1991, 22 *Journal of Maritime Law and Commerce*, no. 1, 59–80.

WHITE, J. J., 'Autistic Contracts', 1999, 45 *Wayne Law Review*, no. 4, 1693–1731.

WILHELMSSON, T. & TWIGG-FLESNER, C., 'Pre-Contractual Information Duties in the Acquis Communautaire', 2006, 2 *European Review of Contract Law*, no. 4, 441–470.

WILHELMSSON, T., 'Control of unfair contract terms and social values: EC and Nordic approaches', 1993, 16 *Journal of Consumer Policy*, 3-4, 435–453.

WILKINSON-RYAN, T., 'A Psychological Account of Consent to Fine Print', 2014, 99 *Iowa Law Review*, no. 4, 1745–1784.

WILLISTON, S., 'Freedom of Contract', 1920, 6 *The Cornell Law Quarterly*, no. 4, 365–380.

WILSON, C. P., 'Notas Críticas Sobre el Fundamento de la Fuerza Obligatoria del Contrato. Fuentes e Interpretación del Artículo 1545 del Código Civil Chileno', 2004, 31 *Revista Chilena de Derecho*, no. 2, 225–237.

WILSON, N. S., 'Freedom of Contract and Adhesion Contracts', 1965, 14 *The International and Comparative Law Quarterly*, no. 1, 172–193.

WOOD, S. G. & SCHARFFS, B. G., 'Applicability of Human Rights Standards to Private Corporations: An American Perspective', 2002, 50 *The American Journal of Comparative Law*, 531–566.

WOODARD, M. L., 'Ghosts Have Rights Too! A New Era in Contractual Rights: Third-Party Invocation in Forum Selection Clauses', 2014, 26 *St. Thomas Law Review*, no. 4, 467–495.

WOODWARD JR, W. J., 'Contraps', 2015, 66 *Hastings Law Journal*, no. 4, 915–936.

Woodward, William J. Jr., 'Legal Uncertainty and Aberrant Contracts: The Choice of Law Clause', 2014, 89 *Chicago-Kent Law Review*, no. 4, 197–228.

YAN, A. & GRAY, B., 'Negotiating Control and Achieving Performance in International Joint Ventures: A Conceptual Model', 2001, 7 *Journal of International Management*, no. 4, 295–315.

YANCEY, B. W., 'Carriage of Goods: Hague, Cogsa, Visby, and Hamburg', 1982, 57 *Tulane Law Review*, no. 5, 1238–1259.

YEO, T. M., 'Natural Forum and the Elusive Significance of Jurisdiction Agreements', 2005, 2005 *Singapore Journal of Legal Studies*, no. 2, 448–461.

YEO, T. M., 'The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements', 2005, 17 *Singapore Academy of Law Journal*, no. 1, 306–360.

YIANNOPOULOS, A. N., 'Conflicts Problems in International Bills of Lading: Validity of Negligence Clauses', 1957, 18 *Louisiana Law Review*, no. 4, 609–627.

YIMER, G. A., 'Adjudicatory Jurisdiction in International Carriage of Goods by Sea: Would the Rotterdam Rules Settle the Controversy', 2013, 21 *African Journal of International and Comparative Law*, no. 3, 467–488.

YOUNGS, R., 'Constitutional Limitations on Freedom of Contract: What Can the Germans Teach Us', 2000, 29 *Anglo-American Law Review*, no. 4, 498–512.

YU, X. & LI, T., 'A Legal Analysis of the Provisions of Volume Contract under Rotterdam Rules', 2012, 7 *Frontiers of Law in China*, no. 4, 581–615.

ZAMORA RIVERA, F., 'Un Análisis Crítico del Régimen de Responsabilidad del Cargador Bajo las Reglas de Róterdam en Contraste con el sistema de Hamburgo. Innovaciones y Ventajas en la Regulación del Transporte Marítimo de Mercancías', 2012, 1 *Revista de Filosofía y Ciencias Jurídicas*, no. 1, 107–117.

ZAPHIRIOU, G. A., 'Choice of Forum and Choice of Law Clauses in International Commercial Agreements', 1977, 3 *International Trade Law Journal*, no. 2, 311–334.

ZEKOS, G. I., 'The Contractual Role of Documents Issues under the CMI Draft Instrument on Transport Law 2001', 2004, 35 *Journal of Maritime Law and Commerce*, no. 1, 99–120.

ZHAO, L., 'The Limited Scope of Seaborne Cargo Liability Regime: New Political–Economic Environments in the 21st Century', 2016 *Maritime Policy & Management*, 1–15.

ZHAO, L., 'Transportation, Cooperation and Harmonization: GATS as a Gateway to Integrating the UN Seaborne Cargo Regimes into the WTO', 2015, 27 *Pace International Law Review*, no. 1, 60–118.

ZHAO, L., 'Uniform Seaborne Cargo Regimes--A Historical Review', 2015, 46 *Journal of Maritime Law and Commerce*, no. 2, 133–373.

ZIEGLER, A. V., 'The Liability of the Contracting Carrier', 2008, 44 *Texas International Law Journal*, no. 3, 328–349.

ZIETLOW, R. E., 'Exploring a Substantive Approach to Equal Justice under Law', 1998, 28 *New Mexico Law Review*, no. 3, 411–450.

ZINAM, O., 'A note on Reaganomics', 1982, 10 *Atlantic Economic Journal*, no. 4, 98.

ZUMBANSEN, P., 'Public Values, Private Contracts and the Colliding Worlds of Family and Market: German Federal Constitutional Court, 'Marital Agreement' Decisions of 6 February 2001 and 29 March 2001', 2003, 11 *Feminist Legal Studies*, no. 1, 71–84.

ZUSMAN, S., 'La Buena Fe Contractual', 2005 *THEMIS: Revista de Derecho*, no. 51, 19–30.

Academic Theses

CROUCHER, T. M. S., *Changing the Rules: An Evaluation of Whether the Norwegian Maritime Code Should Implement the Rotterdam Rules Approach to Transferring Obligations and Rights Through the Trading of Bills of Lading,* Master Thesis, 2016, The University of Bergen, Norway.

SVENSSON, G., *Forum Shopping in the Carriage of Goods by Sea,* Master Thesis, 2014, University of Gothenburg, Sweden

ZHOU, B., *Carrier's Obligations and Liabilities in International Sea Carriage: A Comparative Study of the Nordic Maritime Codes, Chinese Maritime Code and Rotterdam Rules,* Master Thesis, 2014, Helsingfors Universitet, Finland.

BERESNEVIČIUS, S., *Limitation of Party Autonomy in European Contract Law*, Master Thesis, 2011, University of Amsterdam, The Netherlands.

MOMBERG URIBE, R. A., *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives,* Doctoral Dissertation, 2011, University of Amsterdam, The Netherlands.

SANCHEZ, N. I., *An Historical and Multi-Jurisdictional Study of Jurisdiction Clauses in International Maritime Carriage contracts*, Master Thesis, 2011, University of Cape Town, South Africa.

WEBB, E., *From the Reid Committee to the Appointment of the Expert Panel: An Assessment of the Efficacy of Section 51AC Trade Practices Act 1974 (CTH) in Australian Retail Leasing,* Doctoral Dissertation, 2010, University of Western Australia, Australia.

XU, L., *China's Approach Toward International Conventions: The Impact of the Hamburg Rules on the Maritime Code of the PRC,* LLM Thesis, 2008, University of Georgia, United States.

CHEREDNYCHENKO, O., *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions,* PhD Thesis, 2007, University of Utrecht, The Netherlands.

Internet Documents

BIMCO, 'BIMCO Dispute Resolution Clause 2015', <https://www.bimco.org/en/Chartering/Clauses_and_Documents/Clauses/Dispute_Resolution_Clauses.aspx> (last visited 24 July 2015).

Commission of the European Communities, 2003, 'Green Paper: on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernisation', <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0654:FIN:EN:PDF> (last visited 29 November 2015).

DYER, C., March 6, 1999, 'Lord Denning, Controversial 'People's Judge', Dies Aged 100', <http://www.theguardian.com/uk/1999/mar/06/claredyer1> (last visited 20 October 2014).

JOHANSSON, S. O. & OLAND, B. et al., 2009, 'A Response to the Attempt to Clarify Certain Concerns Over the Rotterdam Rules', <http://www.pysdens.com/v2/material/Rotterdam%20Rules%20Summation.pdf> (last visited 20 March 2016).

MAGID, Larry, 'It Pays To Read License Agreements', <http://www.pcpitstop.com/spycheck/eula.asp> (last visited 26 August 2015).

Lord Neuberger, 2013, 'Justice in an Age of Austerity', <https://www.supremecourt.uk/docs/speech-131015.pdf> (last visited 19 February 2016).

Match.com, 2011, 'Terms of Use Agreement', <https://web.archive.org/web/20110113041408/http://www.match.com/registration/membagr.aspx> (last visited 25 May 2015).

TETLEY, W., 2008, 'A Summary of General Criticisms of the UNCITRAL Convention (The Rotterdam Rules)', <http://www.fd.unl.pt/docentes_docs/ma/wks_MA_24612.pdf> (last visited 4 March 2016).

Table of Cases

Australia

Blomley v Ryan, 99 CLR, 362.
Commonwealth Bank of Australia v White; ex parte The Society of Lloyd's [1999], 2 VR, 681.

Canada

Continental Securities v. McLeod [1995] CanLII, 355.
Harry v. Kreutziger [1978] CanLII, 393.

Town Shoes Ltd and Emfaro Calzature Srl v Panalpina Inc. and M.G. Transport Ltd [2000] ILPR, 172–180.

European Court of Justice

C-453/99*, Courage Ltd. v Crehan* [2001], 6314.
C-25-79*, Sanicentral GmbH v. René Collin* [1979] ECR, 3423.

Germany

Bürgschaft [1993] BVerfGE 89, 214.
Peep-Show [1991] BVerwGE 64, 274.

Mexico

Amparo Directo 1477/87. Compañía Mexicana de Aviación, S.A de C.V. 7 de diciembre de 1987 [1988], 1 SJF Octava Época, 794.

United Kingdom

A. Schroeder Music Publishing Co. Ltd. v Macaulay [1974], 1 WLR, 1308.
Ace Insurance SA-NV v Zurich Insurance Co & Anor [2001] CLC, 526–549.
Black Diamond Offshore Limited & Others v Fomento de Construcciones y Contratas S.A. [2015], 997509 WL, Unreported.
British Aerospace Plc v Dee Howard Co. [1993], 1 Lloyd's Rep, 368.
Carvalho v Hull, Blyth (Angola) Ltd. [1979], 1 W.L.R., 1228.
Chapman v. Honig [1963], 2 All ER, 513.
Cho Yang Shipping Co. Ltd. v. Coral (UK) Ltd. [1997] CLC, 1100–1108.

United States