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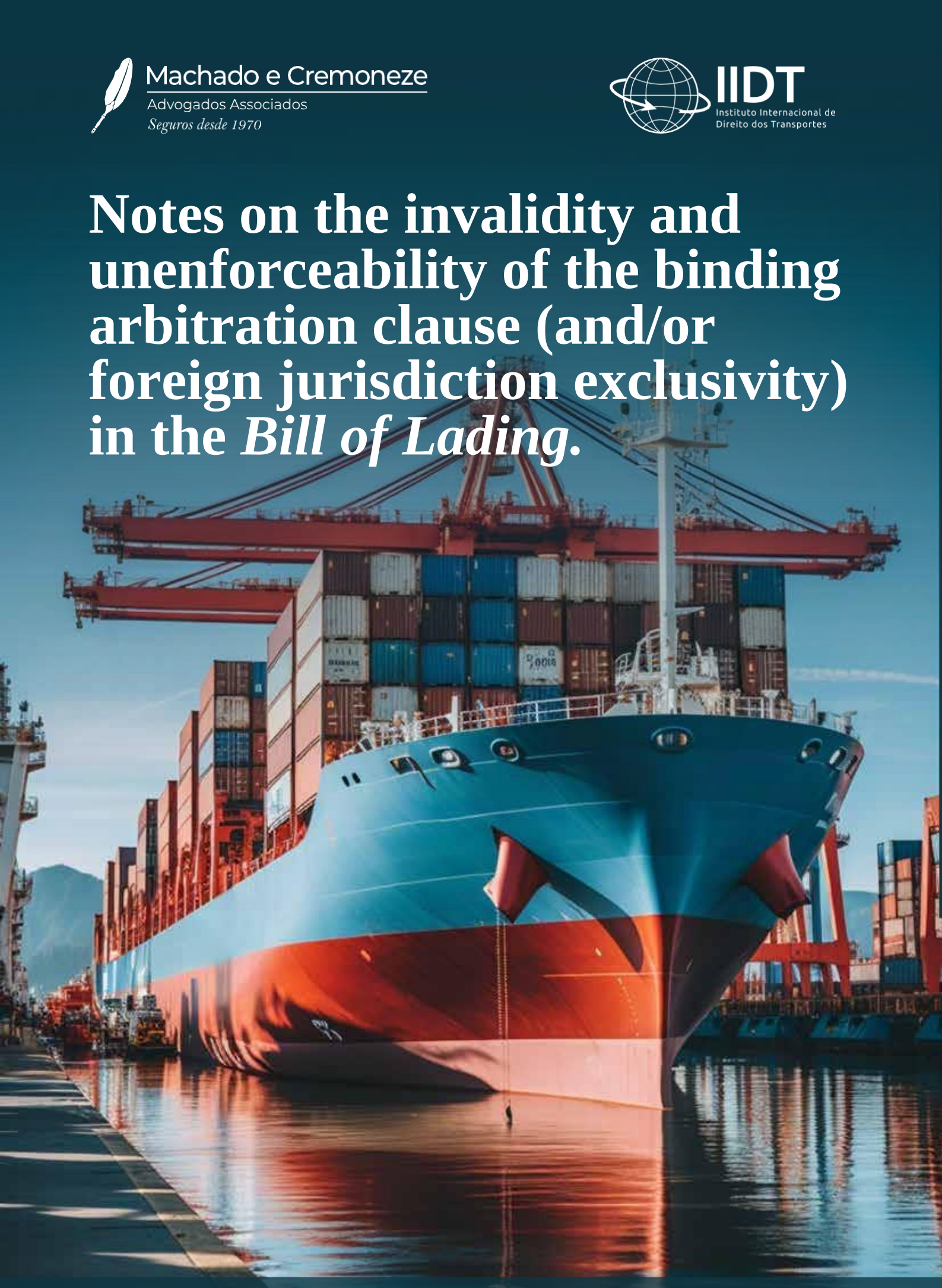
Notes on the invalidity and unenforceability of the binding arbitration clause (and/or foreign jurisdiction exclusivity) in the *Bill of Lading*.



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“Decíamos ayer. Diremos mañana”

Fray Luís de León, University of Salamanca

The intersection between Insurance Law, Civil Law (Law of Obligations), Maritime Law and Civil Procedure Law creates several interesting and controverted themes.

One of those, perhaps the most recent, the target of heated debate and conflicting rulings, is whether or not the insurer, in the capacity as assignee, is subject to the terms of the *Bill of Lading* (instrumental evidence of the international cargo maritime transportation business), to which it is not a party.

There are those who understand the terms (and by terms, we underscore the binding arbitration clause and/or foreign jurisdiction exclusivity clause) are unenforceable toward the assignee/insured, and there are those who are those terms are enforceable, especially if there is prior knowledge thereof.

Here, in this brief notes, we are not so concerned on this debate, but with another one, the one that precedes it, and which has been relatively ignored by the Judiciary: **the invalidity of that clause, on the basis of business dirigisme, and its unenforceability, for violating a legal rule.**

Even before addressing whether - due to a legally valid assignment - the insurer shall or shall not be subject to the provisions of the *Bill of Lading*, we have to discuss whether those provisions and clauses are valid and enforceable, legally binding under the Brazilian legal system, especially given the adhesive nature of the negotiation and, consequently, of the requirements that **Law 9.307, of September 23, 1996,** sets for such scenarios**.**

We are certain it is not, and we make that statement backed by an old - and still valid - position used in case law.

With an undeniable measure of pride, we point out that the founder of our law firm, the late **Rubens Walter Machado**, was one of those who helped forming this position and his arguments, transformed into the basis of many court rulings, are now, more than even before, used and deserve special attention.

Much more than discussing whether the *Bill of Lading* is, in and of itself, a contractual instrument or evidence of a legal deed, what is cer-tain is that the provisions on its back are unilaterally imposed by the transporter without any manifestation of free will by the party contracting the services, which is, usually, the shipper.

The beneficiary of the transport services is coerced into adhering to a true combo of terms, conditions and duties unilaterally dictated by the service provider. Although this business modality is regular practice, very common in several industries, the undeniable truth is that, to one of the parties, there is no free manifestation of free will, which renders it invalid.

In other words: either one adheres to the combo, or they cannot manage to transport their goods, which usually, after boarded, is referred to as cargo. In the name of transparency, we argue that this form may be inevitable for the flow of global Economy, which requires dynamism and practicality.

It is important to consider, however, in this case of this adhesion - arising of dirigisme, or disregarded despite it - , but the enforceability of the undisputed clause itself. And unenforceability for violating the formal rules set forth Article 4, § 2 of Law 9.307/1996, which governs arbitration in Brazil.

> *Art. 4 The binding clause is the convention through which the parties to a contract commit to submit to arbitration any litigation that may arise in connection with the relevant contract.*
>
> *§ 2 In contracts of adhesion, the binding arbitration clause will only be enforceable if the adhering party takes the initiative to file for arbitration or expressly agrees to the filing thereof, so long as in writing in an attached document or in bold font, with a signature or initials especially required for that specific clause.*

After a long time being discussed in the Supreme Court, the law was finally declared constitutional, and was thus affirmed, in the great legal debate that surrounded it, the need to respect the legal form, always and strictly, when using it, especially in contracts of adhesion, on penalty the clause being rendered **absolutely unenforceable.**

Eventual problems, which do not happen in every transportation, may and shall be resolved by Courts, observing the rules of Law, Moral order and the principles of reasonableness and proportionality, -as well as the social role of obligations and the common good, which requires the party that inflicted the damage to answer for losses arising thereof, and to not hide behind exaggerated formalism.

Well, if one who seeks services cannot freely negotiate the contractual conditions, how valid can be a clause inhibiting full exercise of Brazilian jurisdiction and imposing that which, in its very essence, requires both manifestation of free will and broad prior negotiation: arbitration proceeding and/or foreign jurisdiction exclusivity?

The clause is not licit, for being blatantly abusive. It violates the Civil Code, infringes the Arbitration Act itself (both in form and substance) and delivers a death blow to the Federal Constitution, since there is no possible tacit waiver of the constitutional guarantee of access to jurisdiction, which is the very pillar of the Democratic Rule of Law.

When the matter is approached from the perspective of Insurance Law, the situation escalates even further, because the insured, more often than not, is not even the shipper, signing the obligation to the transporter, but the consignee of the cargo, and not a party to the *Bill of Lading*.

The consignee (insured in the transport insurance contract) is named in the body of the *Bill of Lading* as a **mere concerned party**, the beneficiary of the obligation the transporter assumes to fulfill, characterized by a positive obligation.

Consequently, it's correct say this consignee – *who does not adhere to the terms of the transportation deal, does not freely choose the transporter, is not familiar (at least formally) with the term and conditions, does not pay the very high freight price* –, **is not a party to the transaction**.

That doesn't mean it is unrelated to the business relationship; it merely is not an actor, neither does it play any supporting role in any of the rights and obligations. At the most, for the purposes of compensation for damages, since there's what we may call the stipulation to the benefit of a third party, it's a party, by legal equivalence, however, that characterization is only punctual and on a clearly exclusive basis.

In fact, the consignee only uses the *Bill of Lading* instrument after transportation is finalized, since this document is essential for transferring ownership of the cargo sent by the shipper and serves as a credit instrument for nationalization of the goods and other tax procedures. In short: it is not part of the transport business instrument, and its content **is not, for it, contractual in nature**, but **record-keeping**. It's referred as a credit instrument but not as a contract. Therefore, it cannot be used in connection with any of the terms set forth on its back, especially terms imposed in violation of the Law that governs it in Brazil.

Therefore, one more question must be asked: can this consignee be compelled to be subject to the provisions of an instrument to which it is not a party, in the context of which it has not agreed or accepted, and of which it does not even have knowledge by derivation?

The answer is no.

Thinking otherwise would be far to costly. It would be, prima facie and ultimately, rewarding dirigisme, imposition of will, abuse by unjust excellence.

The cargo consignee, we stress, does not even chose the transporter, much less so the terms of the provisions of the business instrument. If the adhesive nature is invincible relative to one who chooses the transporter, pays the freight (always high) and see themselves crushed by a clause combo, what about the cargo consignee, who is not a party in the strict sense but a mere beneficiary?

The same logical of thinking applies to the cargo insurer, an even on a more egregious level. Well, if its insured, the cargo consignee, is not a party to the negotiating instrument, not even by adhesion, the insurer will then most definitely not be a party to it, making it unsuitable - not to say intolerable - demanding it to uphold the clauses and provisions therein.

We are not discussing any random clause, but one that does not respect the Brazilian legal system (starting with the great Arbitration Act) and which, more than being abusive, is unconstitutional, because it inhibits full exercise of the fundamental guarantee of access to jurisdiction.

Then, before addressing if, in claims for damages against the maritime transporter, that type of clause extends to the insurer through assignment, what we must remember is that the clause, in an of itself, is abusive, illegal and unconstitutional, ergo null and void. That is the first point about it. Second, it is unenforceable, for failing to respect the form required by the Arbitration Act.

All of that applies first to the shipper, who is the user in the transaction and the one who pays for the costly freight, and, even more so, to the cargo consignee, the beneficiary of the services, who is not even a party to the transaction instrument. That which is inapplicable to the latter is even more so to the former, who may and shall be considered a victim of the act/fact within the context of the trans-

-ation that caused the damage.

Within this context, the insurer - who, much more than its insured, the consignee - is not, by far, a party to the transportation transaction and only exercises a legitimate right, guaranteed by law (Article 786 of the Civil Code) and consolidated by the Supreme Court (Binding Precedent 181).

Whenever we're given the opportunity, we say that pursuing reimbursement through the right of recourse is more than a right, it is a duty, an ethical imperative of the insurer, provided it defends the rights and interests of the group, the universal pool of insured parties. The claim for compensation has a magnificent social role and is of interest to society, standing as one of the healthiest forms of keeping the health of the insurance business, its economic viability and all the good it allows.

By seeking compensation through the right of recourse, the assignee/insurer does not merely fulfill a business transaction to which it is not even a party, but it does so in connection with a damage identified as a risk in a policy that required it to pay insurance indemnity. Therefore, it is not litigating against one to defaulted an obligation, but against one who has caused damage, the main role in tort, which is just accidentally related to the transportation itself.

We can refer to the *Bill of Lading* as a contract relative to the shipper (contracting party) and the transporter (carrier/contractor), but not relative to the consignee of the cargo, who is the mere beneficiary of services contracted to its benefit, and to whom the instrument is merely a bill of credit, a promissory note. The consignee of the cargo and its insurer can never be considered parties to the contract, which highlights even more the abusive nature of the clause in question. We see here a dual illegality: one, on the context of validity, for attempting to submit one who has not previously and freely participated in the contract; the other, on the context of enforceability, for violating the form determined by the Arbitration Act. And, built on the foundation of that illegality, the most blatant unconstitutionality: inhibiting exercise of the fundamental guarantee of access to jurisdiction.

Considering the clause in question illegal and unconstitutional means rendering the proper respect to national jurisdiction, means separating the transportation and insurance activities, means not unduly curtailing the right of recourse, means respecting the Arbitration Act, especially, and Civil Law as a whole, means respecting the oldest and perhaps the most important definition set by Law (as a vehicle for Justice), given by the Code of Justinian: "*Justice is giving to everyone that to which he is entitled"*.

As the one who causes the damage or misplaces the goods, either completely or partially, the transporter cannot be rid of the duty to fully compensate the respective loss based on a clause of a transaction instrument issued exclusively by it, to which the one it seeks to bind are not parties: the consignee of the cargo and its insurer.

The debtor of a duty in connection with a specific obligation and manager of the source of risk for others, the transporter fully and objectively answers for any losses it causes, except if proving, through the reversal of the burden of proof, Force Majeure, Act of God or defect in origin (or packaging) or, moreover, exclusive liability of the victim. It cannot and shall not escape that responsibility that means a civilizational legal milestone, through formal and business traps seeking to impose a burden on those who, according to law, should have none.

Recognition of this clause as abusive, illegal, unconstitutional, null and void, unenforceable, is imperative for the vitality of Maritime Law in Brazil and so as not to pervert the path of Justice. No transaction clause can be of any use against anyone who is not even a party (not even by adhesion) of the instrument sought to impose on them. There is, in fact, *erga omnes* liability, but not a legal deed in the strict sense beyond the effective parties thereof.

We are enthusiasts of the arbitration proceeding (or of the use of foreign jurisdiction), so long as free, previously and formally negotiated between the parties. Our many experiences with both have been and are quite positive. What we cannot accept is the authoritarian imposition thereof on those who did not acquiesce to it (not even by adhesion), and especially given that its implementation happened in clear violation of legal requirements.


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