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THE INSURANCE SPRINGTIME:

Subrogation, restitution and social function

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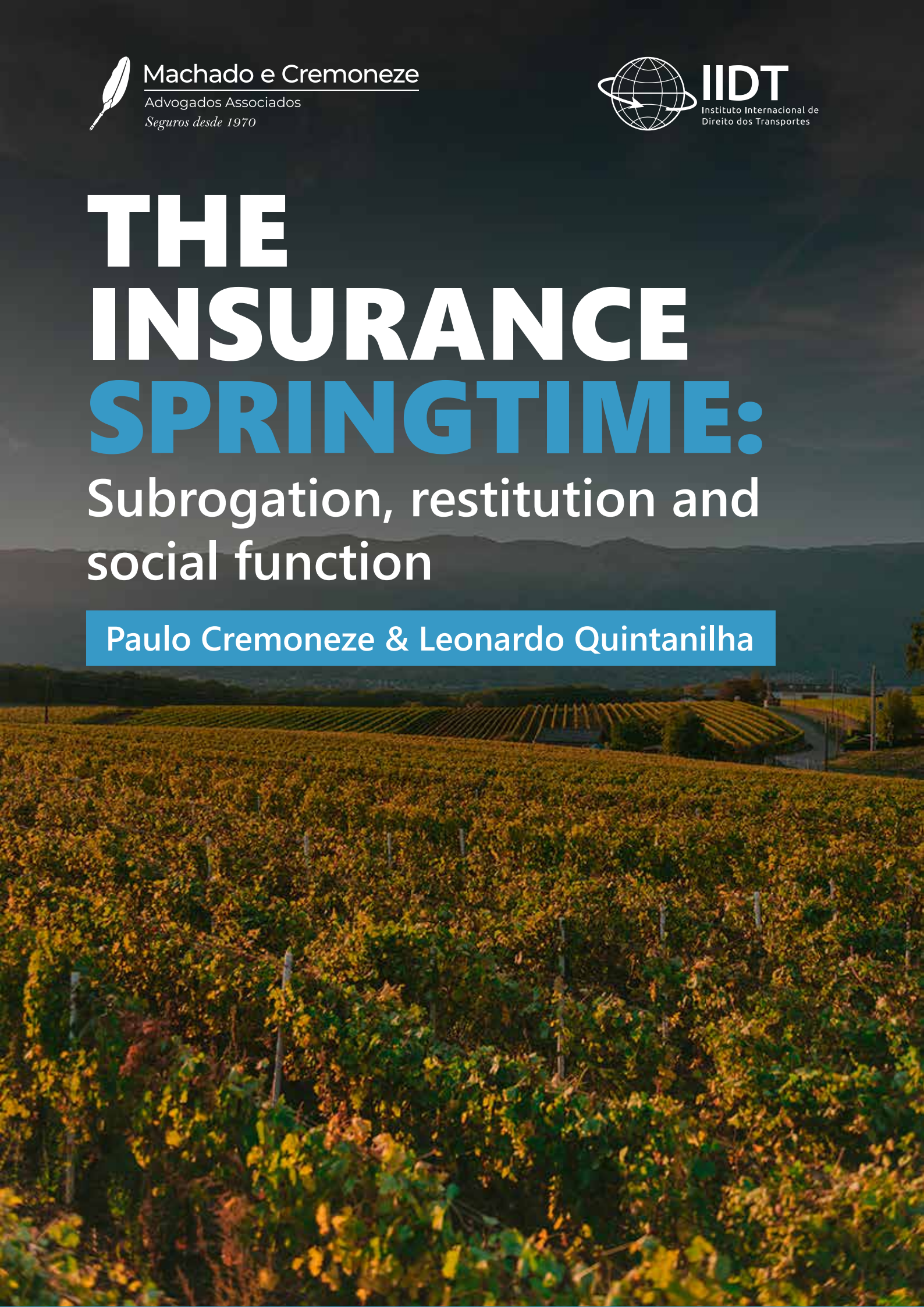

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For some time now, we have been devoting special attention to payment by subrogation in the insurance business. This rule ensures that, as a result of the indemnity paid on account of the loss, the insurer puts itself in the insured shoes, and is entitled to seek restitution against the one who caused the damage.

This is something that can even be said to be inherent to the genesis of the business, since it influences the contracting party's consideration by contributing to the evaluation of the premium that it must pay, to obtain the guarantee of the interest that concerns it. Art. 786 of the Civil Code directly regulates it in Brazil today.

However, even before the article and the code, in relation to damage insurance in general, all this had already been settled and ordered, through the enunciation of Precedent 188/STF: "*Insurers have a regressive action against the causer of the damage, for what they effectively paid, up to the limit provided for in the insurance contract*".

If the Supreme Court set a precedent on the subject, when it was its competence to address to Insurance Law issues, it is because it was much questioned in judicial disputes. Many times, through the rhetorical effort and the clippings that reason is capable of operating even for fun, what at first, we don't ponder, becomes for some a pondered hypothesis. Naturally, a precedent is prepared to settle the subject and, with it, preserve legal security. This precedent, in addition to having been inspired by art. 728 of the Commercial Code, did not ignore the content of art. 989 of the old Civil Code: "*In legal subrogation, the subrogee may not exercise the rights and actions of the creditor, except up to the sum that he has paid to release the debtor.*"

Let's be clear: subrogation does not happen because the insurance contract provides for it, but because the law dictates it. In this regard, the policy merely repeats the norm. So that subrogation, in the insurance context, ends up not being conventional, but legal.

Its first consequence for the insurance company is the right to demand the credit it has paid on behalf of the third party, against whom it may make its claims for restitution. More than a right, restitution is a duty of the insurer, an act of loyalty and respect for the association of insureds (principle of mutualism), besides being critical to the health of the insurance.

Its second consequence, to restrict the terms in which the first should be interpreted, is that the insurer is not bound exactly by contracts and conditions that the insured has executed.

Bound to the material limits of the credit, the subrogation operates, from one to the other, the transfer of rights that existed in the original relationship. Procedural and personal characteristics, no matter how much they are assumed by the emphatic will of the insured, in no way pass through the curtain of subrogation, under penalty of offending the *ratio* that orders it and the ontology that constitutes it. As it is understood until today by the **Superior Court of Justice**, *the subrogation transmits no more than material rights* (REsp 1.038.607/SP, Justice- Rapporteur **Massami Uyeda**).

Based on Donati's teachings, **Pedro Alvim** will remind us of the three functions of this *sui generis* institute, which is the subrogation:

> *"[...] the institution of legal subrogation of the insurer in the insured's rights against the responsible third party is the result of a legislative policy that, by eliminating the unjust enrichment of the insured in safeguard of the indemnity principle, also prevents the third party from being exempted from the protection of the principle of responsibility; on the other hand, under the double aspect of the decrease of the premium and the greater collective guarantee, the unjust enrichment of the insurer is prevented.*

In other words, the subrogation exists for three reasons in the insurance: to prevent the insured from being compensated twice, not to release the causer of the damage - who would otherwise be freed by the precaution of their victim - and to safeguard the mutual fund.

In this case, the Roman *motto* does not really apply - *he who receives the bonus must bear the burden*; the insurer has already borne it at the time immediately before, by paying the compensation for the risk that the third party's conduct materialized.

If it were also taken to the duties arising from the insured's exclusive will, there would be a sort of *bis in idem* of charges; and this legal subrogation, together with the right of recourse it entails, it would end up diverted from the legal contours of origin, which are certainly not found with those of the instrument by means of which the insured is bound before a third party. After all, they cannot dispose of that right of which exercise would no longer be incumbent upon him, since subrogation, by removing their interest in receiving compensation for damages from the one who caused them and making the insurer bear it, who virtually already held it and later became able to exercise it, would well change the focus of the reparatory dynamics.

Therefore, it is a substitution that must always be understood in terms. Never literally.

Article 786 expressly determines that, when paying the compensation, the insurer will subrogate itself, complying with the limits of the respective amount, "*in the rights and actions that belong*

to the insured against the author of the damage".

Excepting for the amount, restrictions and duties are not spoken about, only rights and actions. From the assumption that the law does not employ useless words, nor would it fail to mention essential ones, adding to this a teleological interpretation of the subrogation, one can conclude that the legislator has safeguarded, for the insurer who pays the compensation, the right to demand the full restitution of that amount, unbound from any hardships not freely and unimpededly accepted by it. So much so that it took care to ratify the meaning of the head provision in the text of §2: *Any act of the insured which diminishes or extinguishes, to the detriment of the insurer, the rights to which this article refers, is ineffective*.

In other words: no burden or duty shall be transmitted to the subrogated insurer. Having this main idea further filtered, no condition inhibiting the exercise of the right against the causer of the damage shall be enforceable against it. Since subrogation is an institute that seeks primarily to avoid the impunity of the tortfeasor, it should always be interpreted for the benefit of the payer, and not the third party for whom they pay.

Here is an example: in the international context of purchase and sale, in a case where the maritime carrier returns, at the end of a trip, entirely varied goods entrusted to it, it is common and almost certain that the owner of the goods will be compensated by some insurer; it is just as common and even more certain that it will then seek restitution from the company that transported them badly. In contracts of this kind, which are adhesion contracts, there is usually a clause that in theory requires the adherents to settle their disputes in arbitration chambers abroad. Well, this clause is perfectly ineffective in relation to the insurer.

This is because, by dealing with procedural aspects and with a very personal obligation to do, the contractual provision cannot, through unjustified interpretative expansions, project effects beyond the figure of the insured, who was part of it. They must never exceed the subrogation, if the insurer has not expressly agreed with its content, against the risk of a fatal, tacit and abusive impediment to the exercise of its right.

The subrogation originating from the payment of insurance compensation, although special, is greater than that of art. 346 of the Civil Code, which is general and covers more hypotheses. Also born from the law, but by virtue of the insurance contract, it ends up gaining greater strength by virtue of a differentiated, sensitive and eminently social nature.

This is also why transferring anything that is not restricted to the material aspects of the credit is not admitted.

The misunderstanding may occur because it is often confused with a certain type of credit assignment. Its condition, however, is at the same time smaller and larger than that of the assignment of credit. Smaller because it is specific; larger because it is more demanding and subject to protection. In the same regard of what is defended herein, we bring the weight of the doctrine: classic position, not only of the STJ, but also of **Pontes de Miranda**, **J. M. de Carvalho Santos, Clóvis**

Beviláqua, Arruda Alvim.

In principle, the law would have no reason to create two institutes to regulate the same situation. Nor are the two to be confused. Credit assignment is a sale; subrogation is the effect of the payment of the debt. Credit assignment transmits the value with all the charges that surround it; subrogation only transmits the right in its material portion. Credit assignment can go well beyond the amount paid; subrogation is restricted to it.

As stated by the good old doctrine and supported by perennial court precedent, subrogation is, in the words of the Italians, a "*tipo giuridico completo e non controverso*" (complete and uncontroversial type of law), and it is surprising that discussions are re-emerging in this regard, based on the SEC 14.930-EX decision, which is not a precedent and is much quoted, little understood and rarely read.

More than a legal certainty, this transfer is based on some of the most guiding principles of Law: proportionality, reasonability, equity.

To think of transmitting obligations agreed to by the insured is wrong, because it empties the dignity of the subrogation and produces negative effects on the restitution in return. It is no exaggeration to state that it may benefit the author of the unlawful act. And that, it would seem, is as or more serious than harming the insurer. It would be to turn subrogation inside out.

If the institute were loaded with defects from which by its very nature it is free, restitution would be inhibited, punished, obliterated; and we all know how important it is for the defense of the mutual interests and the triumph of the common good.

Subrogation and restitution are basically two critical stages of insurance. Because of the consequences that arise from their direct connection with the activities of the corporate structure, because of their location in the heart of the premium - capable of increasing or decreasing it, to the times of systole and diastole, to guide the economic circulation - both are fundamental to maintain the welfare of society.

It is in this way, by punishing the guilty party and honoring the indemnity principle, that the prosperity of restitution renews that primal fund, the morning idyll of contracts, under which the insurer assumed the risks of the insured, providing them with the proper environment to breathe with relief; by the repeated return to the primitive condition, this repair, which the simple nature of things suggests as correct and nothing less than natural, moistens the fertile soil of business and makes all confidence in the cycle, which the illicit has shaken, flourish again. The exercise of return is, therefore, the end and the beginning; it is the eternal springtime of insurance.

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