NOMOS

REVISTA DO PROGRAMA DE PÓS-GRADUAÇÃO EM DIREITO DA UFC

Solicita-se permuta
Pídese canje
On demande l´echange
Si richiede la scambio
We ask for exchange
Wir bitten um Austausch.

NOMOS

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A NATUREZA JURÍDICA DO MUNICÍPIO NA FEDERAÇÃO BRASILEIRA: UMA REVISITA SOB PERSPECTIVA KELSENIANA

Carlos Renato Cunha[1]

RESUMO

O presente artigo revisita o tema da natureza jurídica dos municípios na Federação Brasileira, contrastando a literalidade do art. 1º da Constituição da República de 1988 e o conceito clássico de federação, visando analisar o tema sob a óptica da teoria kelseniana sobre a organização estatal federativa. Conclui que os municípios são entes federativos no sistema brasileiro, buscando responder as principais críticas a essa conclusão.

PALAVRAS-CHAVE: Direito Constitucional. Federação. Municípios.

THE MUNICIPALITY'S LEGAL NATURE IN THE BRAZILIAN FEDERATION: A REVISITE UNDER KELSEN'S PERSPECTIVE

ABSTRACT

This article revisits the theme of the legal nature of municipalities in the Brazilian Federation, contrasting the literality of art. 1º of the Constitution of the Republic of 1988 and the classic concept of federation, aiming to analyze the theme from the perspective of the Kelsen's theory on the federative state organization. It concludes that the municipalities are federative entities in the Brazilian system, seeking to answer the main criticisms to this conclusion.

KEYWORDS: Constitutional right. Federation. Counties

1 INTRODUÇÃO

Pretende-se no presente trabalho realizar uma análise acerca da natureza jurídica do município brasileiro em face das disposições da Constituição Federal de 1988, verificando-se se é ou não ele uma entidade federativa.

Para tanto, se conceituará o Estado, desde o ponto de vista de uma teoria pura do Direito, para, em seguida, analisar-se juridicamente o Estado Federal, partindo de uma noção tradicional até se chegar a uma nova proposta de conceituação.

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Após, se analisará o município pátrio, e sua inserção dentro da estrutura federativa brasileira atual.

2 A FEDERAÇÃO: DA VISÃO CLÁSSICA A UMA NOVA PROPOSTA

2.1 ORIGENS

AMARO CAVALCANTI afirma que foram comuns na história mundial alianças temporárias entre povos, que algumas vezes chegaram ao *status* de uma verdadeira confederação de cidades ou Estados, podendo-se encontrar a origem remota das uniões federativas atuais já na Grécia antiga, com a *Amphyctionia*, que reuniu os doze povos gregos principais.[2]

O mesmo autor afirma que há historiadores que defendem que o regime federativo suíço surgiu já no ano de 1291, inicialmente com uma união por prazo determinado, que redundou, em 1315, numa liga perpétua de cantões, a liga de *Brunnen*.[3] Mas, de fato, somente a partir de 1848 pode-se afirmar que a confederação até então existente tornou-se efetivamente uma federação.[4] Da mesma forma, na Alemanha, poder-se-ia indicar que com o surgimento do Santo Império Romano da Nação Alemã, já existia um rudimentar sistema federativo, a partir do ano de 962 d.C.[5]

Parecer ser pacífico, no entanto, que "o Estado Federal é um fenômeno moderno, que só aparece no século XVIII, não tendo sido conhecido na Antiguidade e na Idade Média".[6]

Desse modo, *o "Estado Federal nasceu, realmente, com a constituição dos Estados Unidos da América, em 1787*", com a união das antigas treze colônias inglesas da América do Norte, recém-independentes, após um período de união confederativa.[7] Até então, "federal" era sinônimo de "confederativo".[8] Dessa forma,

> O federalismo nasce como um pacto político entre os Estados, fruto de esforços teóricos e negociação política. Um pacto político, digamos assim, fundante, pois, por seu intermédio, se constituía os Estados Unidos enquanto nação.[9]

Não é outro o motivo desta denominação, que etimologicamente provém de *foedus*, *foederis,* ou seja, aliança, pacto, união.[10]

Não se pode desconsiderar o intenso labor de Hamilton, James Madison e John Jay para que tal forma de Estado surgisse.[11] Os três, sob o pseudônimo de *Publius*, publicaram vários ensaios na imprensa nova-iorquina, cuja reunião é chamada de "O

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[2] CAVALCANTI, Amaro. Regime Federativo e a República Brasileira. Brasília: UnB, 1983, p. 27.
[3] *Id*., p. 29.
[4] CAVALCANTI, Amaro, *Op. Cit*., p. 30; DALLARI, Dalmo de Abreu. Elementos de Teoria Geral do Estado. 19. ed. atual. São Paulo: Saraiva, 1995, p. 216.
[5] CAVALCANTI, Amaro. *Op. Cit*., p. 35-36.
[6] DALLARI, Dalmo de Abreu. *Op. Cit*., p. 216.
[7] *Id., Ibid*.
[8] LIMONGI, Fernando Papaterra. "O Federalista": remédios republicanos para males republicanos. In: WEFFORT, Francisco C. [Org.]. Os clássicos da política: Maquiavel, Hobbes, Locke, Montesquieu, Rosseau, "O Federalista". Vol. 1. 13 ed. 3 impr. São Paulo: Ática, 2000, p. 248.
[9] *Id. Ibid*..
[10] DALLARI, Dalmo de Abreu, *Op. Cit*., p. 215; TEMER, Michel. *Elementos de Direito Constitucional*, p. 57.
[11] DALLARI, Dalmo de Abreu, *Op. Cit*., p. 245.

Federalista", defendendo a nova constituição americana e refutando críticas a ela dirigidas.[12]

Nascia ali a Federação e seu arquétipo eterno, o paradigma que pelos séculos posteriores serviria de fonte para a extração das características do Estado Federal, que muitos outros povos intentariam implantar mais tarde.

Uma constelação de países adotou a forma federal de Estado, seja a já citada Alemanha, com a união de Estados através de tratado e com a hegemonia prussiana, a Suíça em 1848, a Áustria em 1920, e uma constelação de países, mormente na América Latina, com Argentina, México e Venezuela, que despertavam para a independência, adotaram a forma Federal de Estado[13].

Hoje no mundo são considerados Estados Federais, além dos Estados Unidos da América (EUA), o Canadá, a Alemanha, a Bélgica, a Suíça, a Áustria, o México, a Venezuela, a Argentina, a Austrália, o Brasil, entre outros.

Aclaremos, doravante, com o corte epistemológico antes proposto, as diferenças jurídicas entre as diversas formas de união e de organização estatais.

2.2 FORMAS DE UNIÃO DE ESTADOS E DE ORGANIZAÇÃO ESTATAL

O Estado pode ser encontrado sob diversas formas[14]. De outro lado, entre os Estados no campo do Direito Internacional, é possível se encontrar diversas formas de uniões com os mais diversos fins.[15]

Apesar dos limites do presente trabalho, consideramos relevante um estudo sobre a classificação das chamadas "uniões estatais".[16]

PONTES DE MIRANDA classifica as chamadas uniões de Estados em duas espécies: uniões propriamente ditas e Confederações, sendo que aquelas se subdividem em pessoais e reais.[17] Nas confederações "*unem-se os Estados, com o fim de tratar em comum interesses que consideram comuns*".[18] Estes Estados mantém sua soberania[19].

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[12] *Id*., p. 245-246.
[13] MIRANDA, Pontes de. *Comentários à Constituição de 1967. Tomo I (art. 1º-7º).* São Paulo: RT, 1967, p. 309; BANDEIRA DE MELLO, Oswaldo A. Op. cit., p. 15-83 passim.
[14] Somente quanto às possibilidades de organização do Estado Federal, Pontes de Miranda afirmou ter notado ser possível mais de um nonilhão de formas possíveis. MIRANDA, Pontes de. *Op. Cit.*, p. 264.
[15] "Recordando que "*No hay línea divisoria absoluta entre derecho nacional y derecho internacional*".Cf. KELSEN, Hans, *Teoria General del Derecho y del Estado. Trad. Eduardo Garcia Maynez. 3. ed. Ciud. Mexico: Textos Universitários, 1969*p. 386.
[16] Chamadas de "Estados Compostos", por Darcy Azambuja (*In:* Introdução à ciência política. 40. ed. São Paulo: Globo, 2000, p. 364). Para ele, este é um gênero no qual se incluem as uniões estatais, as confederações e as federações.
[17] As chamadas uniões pessoais são as que ocorrem pela coincidência da pessoa do soberano. São completamente acidentais, pelos azares da sucessão ou de eleição. Pontes deixa claro que tal espécie de união "*interessa à Política, e não ao Direito*." Já as uniões reais são resultantes de tratado, em que "*dois ou mais Estados concordam em ter um só e único soberano, ou esse e outros órgãos comuns*". MIRANDA, Pontes. Op. cit., p. 67.
[18] MIRANDA, Pontes. Op. cit., p. 69.
[19] Soberania neste trabalho deve ser entendida como "*a pressuposição de uma ordem normativa como ordem suprema cuja validade não é dedutível de qualquer outra ordem superior*". Cf. KELSEN, Hans. *Teoria Pura do Direito.* Trad. João B. Machado. 6. ed. brasileira. São Paulo: Martins Fontes, 2003, p. 350. Em sentido diverso, REALE, Miguel. *Teoria do Direito e do Estado*, p. 127, *apud* DALLARI, Dalmo de A. *Elementos de Teoria Geral do Estado*, p.68, onde se lê que soberania é o "*poder de organizar-se juridicamente e de fazer valer dentro de seu território a universalidade de suas decisões nos limites dos fins éticos de convivência*."

Já os Estados, seriam unitários ou federativos. No primeiro caso, trata-se de tema afeito ao direito internacional, enquanto que as formas de organização estatal concernem, por sua vez, ao direito interno.[20]

Do ponto de vista interno, pode-se dividir os Estados, pela forma de organização que possuem, em dois grandes gêneros, quais sejam: o Estado unitário e o Estado Federal.[21] Basicamente, a diferenciação entre estes tipos estatais se faz pelo *quantum* de descentralização existente.[22] No entanto, no que consiste o ato de descentralizar? TEMER traz uma definição que consideramos adequada:

> Descentralizar implica a retirada de competências de um centro para transferi-las a outro, passando elas a ser do novo centro. Se se fala em descentralização administrativa quer-se significar a existência de novos centros administrativos independentes de outros. Se a referência é a descentralização política, os novos centros terão capacidade política.[23]

Se existe só centro de competência administrativa, legislativa, tributária, constitucional, etc, está-se, sem dúvida, diante de um Estado Unitário. Pode ocorrer, todavia, que para a consecução de seus fins, ocorra a descentralização administrativa, com o surgimento de centros de competência administrativa, com determinada autonomia. Seria o caso, então, de um Estado Unitário descentralizado, dentro do qual podem existir infinitas graduações de descentralização.

Pode existir também descentralização política num Estado Unitário, com a criação de centros com capacidade legislativa, que denota um grau maior de descentralização. Mas trata-se ainda de mera delegação de poderes por legislação infraconstitucional, que pode ser revogada:[24]

> Existindo centro único dotado de capacidade legislativa, pode ele, por meio de lei, conferir a várias circunscrições territoriais determinadas competências, atribuindo-lhes, também, capacidade legislativa. Quem delega competências pode fazer cessar a delegação. Basta a superveniência de legislação revogadora. Tudo depende da vontade do órgão central.[25]

Tal descentralização administrativa ou política pode ser trazida no bojo da constituição do Estado Unitário, o que demonstra um maior grau de autonomia dos entes infra-estatais, pois para que ocorra a supressão da delegação de competências, deverá se obedecer à rigidez normalmente impostas às reformas constitucionais. Mas, de qualquer forma, ainda se está no campo da mera delegação de competência num Estado Unitário.

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[20] MIRANDA, Pontes. Op. cit., p. 67.

[21] "Nas classificações tradicionais, os Estados são considerados unitários quando têm um poder central que é a cúpula e o núcleo do poder político. E são federais quando conjugam vários centros de poder político autônomo. Modernamente alguns autores sustentam a existência de uma terceira espécie, o Estado Regional, menos centralizado do que o unitário, mas sem chegar aos extremos de descentralização do federalismo." Cf. DALLARI, Dalmo de Abreu. Op. cit., p. 215.

[22] Deve-se diferenciar descentralização e desconcentração. Aquela é a retirada de competências de um centro a outro. Esta implica um único centro, onde se distribuem as competências decisórias entre vários órgãos. Cf. TEMER, Michel. Elementos de Direito Constitucional. 15. ed. rev. ampl. São Paulo: Malheiros, 1999, p. 94-95.

[23] TEMER, Michel. Elementos de Direito Constitucional, p. 57-58.

[24] A descentralização existente no Estado Unitário está a mercê do poder central. Cf. FERREIRA FILHO, Manoel Gonçalves, Curso de Direito Constitucional. 19. ed. rev. São Paulo: Saraiva, 1992, p. 42.

[25] TEMER, Michel. Op. cit., p. 58.

Este é o caso dos chamados Estados Regionais.[26] Esta espécie de Estado Unitário, que tem por exemplos clássicos a Itália e a Espanha, apresenta a característica de outorga de grande autonomia às chamadas Regiões nas mais variadas matérias.[27] Porém, ainda que este tipo de descentralização seja mais rígida e, portanto, estável, pode ser extinta através de uma reforma constitucional. Além disto, a organização destas autonomias regionais é realizada por lei nacional.[28]

Tem-se, por fim, o chamado Estado Federal. Quando existe uma Federação, há um Estado amplamente descentralizado, de tal forma, que deixa de ser Estado Unitário.

2.3 O ESTADO FEDERAL: VISÃO DOUTRINÁRIA

Como visto alhures, a Federação nasceu, inicialmente, da união de Estados antes independentes, como ocorreu nos EUA, na Alemanha ou na Suiça. No entanto, nem sempre ela nasce assim.[29] Várias surgiram da descentralização de um Estado antes Unitário, como ocorreu na Austria e no Brasil. [30]

Eis o motivo pelo qual não se analisará o Estado Federal através do estudo da forma como ele surgiu, o que não nos parece pertinente à Ciência do Direito em sentido estrito, sendo mais afeito à Ciência Política, História ou Sociologia do Direito. A análise se dará intra-sistematicamente, partindo-se do direito posto.

Nem sempre é fácil precisar a linha divisória entre Estado Unitário e Federal, mormente quando aquele se encontra na forma descentralizada.[31]

Ademais, cada país, ao adotar a forma federativa, moldou a Federação às suas realidades histórico-sociais. Não é por outro motivo que existem diversas formas de Estado Federal, podendo-se afirmar, que:

> Nenhum Estado se assemelha a outro de tal forma que se possa dizer que os seus respectivos regimes sejam idênticos. Êles, quando muito, podem ser análogos. Para classificar um organismo estático nos quadros da noção **Estado Federal**, subsiste a mesma dificuldade. Os Estados que iniciaram o regime federativo, e que serviram, portanto, de base para a elaboração das diversas teorias sobre a natureza jurídica do Estado Federal são os únicos que nunca têm contestada a sua estrutura federal. O mesmo não se dá com os outros países, pois os seus regimes, embora modelados sobre os dos primeiros, dele sempre se afastam em muitas vezes, de maneira importante.[32] (grifo nosso)

[26] Alguns autores classificam os Estados Regionais como uma espécie diferente, intermediária entre o Estado Unitário e o Federal, diferentemente do que se entende neste trabalho. Neste sentido: MAGALHÃES, José Luiz Quadros, (Coord). Pacto Federativo. Belo Horizonte: Mandamentos, 2000, p. 14.
[27] "... o Estado Regional é apenas uma forma unitária um pouco descentralizada, pois não elimina a completa superioridade política e jurídica do poder central".Cf. DALLARI, Dalmo de Abreu. Op. cit., p. 215.
[28] FERREIRA FILHO, Manoel Gonçalves. Op. cit., p. 43.
[29] Por isso se fala em federação por agregação ou por segregação. Cf. FERREIRA FILHO, Manoel G. Op. Cit.,, p. 45.
[30] "Quando se faz federal o Estado que era unitário, [...] é à arte política, e não à realidade, que se deve isso".MIRANDA, Pontes de. Op. cit., p. 239.
[31] "...é dificil saber-se o que se há de entender por Estado federal, ou melhor, onde ele começa na escala: se em 1, 2, 3, ou noutro grau. " MIRANDA, Pontes de.Op. cit., p. 252.
[32] SUKIENNICKA, Zasztow. Fédéralisme en Europe Orientale, p. 247, apud BANDEIRA DE MELLO, Oswaldo A. Natureza jurídica do Estado Federal. São Paulo: Prefeitura do Município de São Paulo, 1948, p. 16.

Nestes mais de dois séculos, muito discutiu a doutrina acerca da natureza jurídica da Federação.[33] Ao apontar suas características básicas, os autores entram em profundo desacordo.[34]

Exemplificativamente, recorda-se a teoria da divisão da soberania entre a União e os Estados federativos, apresentada por Hamilton, Jay e Madison na obra "O Federalista"; a teoria do direito dos Estados-membros, apresentada por Jefferson e desenvolvida por Calhoun, que serviu de fundamento para a teoria que sustentou o movimento separatista dos estados sulistas, causando a guerra de secessão nos EUA; a visão de Le Fur, que entende que a característica principal de uma Federação é a participação dos Estados-membros na formação da vontade nacional; a teoria de Estados não-soberanos, muito acolhida na Europa, que teve por maior divulgador Jellinek; e o entendimento de Duguit, acerca da existência, no Estado Federal, de dois governos no mesmo território.[35]

A doutrina pátria também se divide quanto à natureza jurídica do Estado Federal, e quanto aos seus elementos caracterizadores. AZAMBUJA filia-se à doutrina dos Estados não soberanos, afirmando que "*os Estados-membros do Estado Federal são verdadeiros Estados, pois eles têm a faculdade de se organizarem, de elaborar e modificar a própria Constituição*."[36]

Para Dallari[37], a Federação é uma aliança ou união de Estados, com algumas peculiaridades importantes, que arrola:

a) a união faz nascer um novo Estado e, concomitantemente, aqueles que aderiram à Federação perdem a condição de Estados;

b) a união se faz através de constituição, e não por tratado;

c) não há direito de secessão, apesar dele dizer que existem exceções, como a antiga União Soviética;

d) só o Estado Federal tem soberania;

e) as atribuições da União e das unidades federativas são fixados na Constituição, através de distribuição de competências;

f) atribuição de renda própria a cada entidade;

g) poder político compartilhado pela União e pelas unidades federadas;

h) os cidadãos do Estado que adere à federação adquirem a cidadania do Estado Federal, perdendo a anterior.

PONTES DE MIRANDA explana, ao tratar do tema, acerca da distribuição de competências feita pelo direito das gentes aos Estados (ato supra-estatal), e a repartição feita do poder estatal recebido do direito das gentes às entidades internas, a que chama

[33] Sobre o tema, ver magnífica obra de Oswaldo Aranha Bandeira de Mello, *Op. Cit.*
[34] *"... poderíamos, com a maior facilidade, compor um grande mosaico, com excertos ou citações de renomados juristas, e, assim, não chegaríamos a uma conclusão definitiva sobre a natureza jurídica do Estado Federal*". CARRAZZA, Roque. *Curso de Direito Constitucional Tributário*, 20. ed. São Paulo: Malheiros, 2004, p. 115-116.
[35] BANDEIRA DE MELLO, Oswaldo A. *Op. cit*., p. 25-42, *passim*; CARRAZZA, Roque A. *Op. cit*., p. 116.
[36] AZAMBUJA, Darcy. Introdução à ciência política. 40. ed. São Paulo: Globo, 2000, p. 380.
[37] DALLARI, Dalmo de Abreu. *Op. cit*., p. 217-219.

de devolução.[38] Para ele, o direito das gentes distribui aos Estados as competências, legislativas, administrativas, etc. O Estado, que recebeu do direito das gentes estas competências, pode redistribuir internamente estes poderes, e para isto Pontes dá o nome de devolução. Surgem assim as entidades federativas. Conclui ele que:

> (1) Onde há dois ou mais sujeitos de direito das gentes, ligados entre si, quer *por meio de tratado*, quer *por meio de Constituição*, quer, até, por *subordinação material* (caso do Estado submetido a outro, sem que o direito das gentes reconheça tal submissão), há Confederação.
>
> (2) Onde o sujeito de direito das gentes é um só, o Estado é *federal* ou *unitário*, mas tal distinção só interessa ao direito interno. Se o Conceito de Confederação é conceito que pode ser de direito das gentes, o de Estado federal não no é, porque também se refere a distinções que não interessam a direito das gentes. [39](grifo do autor)

PONTES DE MIRANDA afirma que residindo o poder estatal no povo, é este que constitui o Estado Federal. É o povo quem cria o governo central e os Estados-membros.[40] Por fim, conclui ele que:

> O Estado federal, desde que os componentes *perdem*, ou *nunca tiveram* , o contacto (de direito próprio com o direito das gentes, constitui tipo de Estado, que se distingue do Estado unitário pelo **maior grau de descentralização**. Donde ser possível tôda uma escala miúda, que vai, teoricamente, do momento em que os Estados componentes perdem o caráter de Estados propriamente ditos [...] e se federam, ou em que o Estado Federal se forma, *quase* a dar às coletividades componentes o caráter de Estado, até aquele em que o Estado já se pode denominar Estado Unitário.[41] (grifo nosso)

OSWALDO ARANHA BANDEIRA DE MELLO, em brilhante monografia, define o Estado Federal como:

> Estado descentralizado por via de constituição rígida, em que os Estados federados são coletividades administrativa e constitucionalmente autônomas, e participam sempre, com maior ou menor extensão, nas deliberações da União.[42]

De se notar, também exemplificativamente, as definições de JOSÉ AFONSO DA SILVA, CELSO BASTOS, CARRAZZA e BARROS CARVALHO, que não diferem substancialmente, no sentido de ser a Federação a união de coletividades autônomas, que alguns consideram ser Estados, ainda que sem soberania.[43]

A visão que nos parece mais adequada sobre o tema, diante da ótica gnosiológica adotada no presente trabalho, é a de KELSEN, para quem a única característica que difere um Estado Federal do Estado Unitário dividido em províncias e da Confederação de Estados é o grau de descentralização.[44]

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[38] MIRANDA, Pontes de. *Op. cit*., p. 80.
[39] *Id*., p. 80.
[40] *Id*., p. 239.
[41] *Id*., p. 262.
[42] BANDEIRA DE MELLO, Oswaldo A., *Op. Cit*., p. 124.
[43] SILVA, José A. da. *Curso de Direito Constitucional Positivo*, p. 104; BASTOS, Celso R. Federação. *In*: BASTOS, Celso R.; MARTINS, Ives G. *Comentários à Constituição do Brasil*. 1º volume, p. 214; CARRAZZA, Roque A. *Op. cit*., p. 117; CARVALHO, Paulo de Barros. *Curso de Direito Tributário*. p. 161-164.
[44] KELSEN, Hans. Teoria General del Derecho y del Estado, p. 376.

Para ele, um Estado Federal é formado pela existência de ordens jurídicas locais ou regionais, e uma ordem jurídica central. Se as ordens jurídicas locais são ordens parciais, tendo em vista que sua competência legislativa é limitada material e territorialmente, a ordem jurídica central também é parcial, posto que limitada materialmente. A soma desta ordem jurídica central e das parciais é o Estado Federal Total.[45]

Cada uma das comunidades parciais, a federação (ordem jurídica central) e os Estados-membros possuem sua própria constituição, além da Constituição do Estado Federal Total.[46] Para referido autor, o que ocorre é que a doutrina tradicional confunde o Estado Federal Total com a federação (ordem jurídica central). Sem embargo, a Constituição da federação é a mesma do Estado Federal Total na prática, assim como seus órgãos se confundem, pragmaticamente.[47]

Todavia, a Constituição pode ser desdobrada em duas cartas distintas, a total e a da União[48]. KELSEN afirma que a coletividade central e as coletividades membros são juridicamente iguais, numa relação de coordenação e não de subordinação, pois estão subordinadas à comunidade total.[49] Para ele, o que caracteriza a Federação, vale dizer, o ponto mais importante desta é que os Estados-membros possuem "*um certo grau de autonomia constitucional*."[50]

É esta a visão que se adota sobre a Federação, diante do corte epistemológico da teoria pura do direito.

As características normalmente apontadas como essenciais num Estado Federal, foram bem sintetizadas por TEMER, que vislumbra, inicialmente, a existência de elementos tipificadores, que indicariam a existência do Estado Federal, que são os seguintes:

a) descentralização político-administrativa através de repartição constitucional de competências;

b) participação dos Estados-membros na formação da vontade nacional;

c) possibilidade de autoconstituição.[51]

Além destes, aponta referido autor os elementos mantenedores, vale dizer, os que possibilitariam a manutenção do Estado Federal:

a) rigidez constitucional, com cláusula pétrea no que tange à Federação;

b) órgão constitucional que controle a constitucionalidade das leis.[52]

Realizemos uma revisão crítica de tais elementos, no seguinte item.

[45] Id., p. 377.
[46] Prefere-se neste trabalho, juntamente com Pontes de Miranda (Op. cit. p. 295), a expressão "Estados-membros" para designar aos ordenamentos jurídicos parciais.
[47] KELSEN, Hans. Op. Cit., p. 377.
[48] BANDEIRA DE MELLO, Oswaldo Aranha. Op. cit., p. 49.
[49] Id., p. 48.
[50] KELSEN, Hans. *Teoria General del Derecho y del Estado*, p. 378.
[51] TEMER, Michel. Op. cit., p. 65-69.
[52] *Id., Ibid*.

2.4 UM OUTRO OLHAR SOBRE O TEMA

Tem-se por bastante demonstrado que "Federação" é simplesmente um nome dado a uma forma de organização de estado, mais precisamente a certo tipo de descentralização.

É bem sabido que a própria previsão de divisão de poderes em diferentes níveis, como se dá numa Federação, teve por base as idéias de James Madison, expostas nos artigos de "O Federalista", de que os atores políticos são auto-interessados, e que tal ambição deve ser limitada pela própria ambição, com a entrega de poder a diversas pessoas, com o objetivo de limitar o próprio poder. Isso foi feito, tanto através da clássica separação de poderes, quanto pela própria criação da Federação americana.[53]

Não por outro motivo, LIJPHART inclui a existência de descentralização federativa como uma das características diferenciadoras de uma democracia consensual para uma democracia majoritária (que ele chama de modelo de *Westminster*, já que o paradigma seria o sistema britânico).[54] Referido autor afirma que o modelo consensual, que teria por grandes exemplos os sistemas suíço e belga, pode ser considerado mais democrático.[55]

O que nos parece claro é que, no modelo federativo, espécie de Estado descentralizado, a Constituição delimita a existência de competências para pessoas jurídicas de direito público, chamados de Estados-membros, de Províncias, de Cantões, etc. Estas competências sempre incluem as de caráter constitucional (auto-organização), político (existência de órgãos governamentais próprios, eleitos independentemente) e administrativo (com competência delimitada já constitucionalmente, *a priori*, incluindo aí a autonomia financeira e legislativa).

Nesse diapasão, é característica primordial desta forma de organização estatal que o Ordenamento Jurídico preveja a existência de duas esferas governamentais, duas esferas legislativas: a chamada União, e os chamados Estados-Membros.

Não se trata da união de Estados, aclare-se, até mesmo porque tal idéia está presa ao paradigma da federação americana, que nasceu por agregação. Não se encaixaria no sistema brasileiro, que nasceu por segregação. Afinal, no Brasil, não houve união de Estados num novo Estado, mas a descentralização de Estado unitário para o tipo mais descentralizado possível de Estado, o Federal.[56]

A União possui competência normativa sobre todo o território estatal, mas materialmente diferente da dos Estados-Membros.[57] Estes possuem competência normativa com um âmbito de validade territorialmente menor que a da União. De qualquer modo, ambos, União e Estados-Membros, possuem competência legislativa parcial. Essa

[53] CARROL, Royce; SHUGART, Matthew. *Neo-Madisonian Theories of Latin American Institutions*. Center for the Study of Democracy, University of California, Irvine, Paper 05-01, 2005, p. 52-57, *passim;* LIMONGI, Fernando Papaterra, *Op. cit.,* p. 249-252, *passim*.

[54] LIJPHART, Arend. *Modelos de democracia*: desempenho e padrões de governo em 36 países, p.19.

[55] Id., p. 22 e 53.

[56] Poder-se-ia afirmar, numa ficção jurídica, que o Estado Brasileiro se dissolveu nos diversos estados, que depois se uniram para a criação de um novo Estado, do tipo Federal, como explana Pontes de Miranda (Op. Cit., p. 71). Porém, além de ser uma inverdade sociológica, esta discussão não é objeto do presente trabalho, que parte do direito posto.

[57] No conceito de competência normativa, incluímos a capacidade de expedição de normas gerais e abstratas, como as leis, mas também normas individuais e concretas, como atos administrativos e sentenças judiciais.

divisão constitucional de competências entre União e Estados-membros é a primeira característica tipificadora do Estado Federal.

Ademais, na federação a existência da descentralização está inscrita em constituição rígida, em cláusula pétrea, e de forma nenhuma poderão ser retirados do sistema os entes federativos.[58] Estes entes, no modelo federativo, são dotados de autonomia.[59] A existência deste ente intra-estatal é mediatamente proveniente da Constituição, e ele se auto-organiza. Esta descentralização tem, por postulado, existência enquanto persistir o ordenamento jurídico.

Diferentemente, num Estado unitário, eventual descentralização advém da legislação infraconstitucional, o que redunda na existência imediata, em relação à Constituição, do ente autônomo, que pode perdr através de outra lei, afinal, *lex posteriori revogat priori*; ou, ainda que o ente dotado de autonomia esteja previsto na constituição, o é em norma modificável por emenda, como exposto alhures.

O abismo jurídico entre ambos os casos, mesmo nos chamados Estados Regionais, é imenso. Para melhor compreensão, pode-se representar graficamente um Estado Unitário Simples da seguinte maneira:

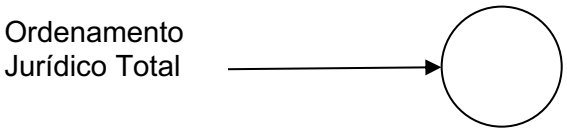

Figura 1 – Estado Unitário Simples

E aqui, um Estado Unitário descentralizado:

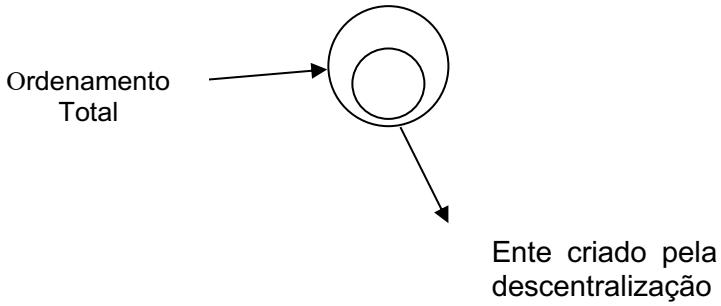

Figura 2 – Estado Unitário Descentralizado

[58] As cláusulas pétreas são regras de ordem superior, em que se limitam as mudanças possíveis. Sobre o tema, numa ótica da ciência política calcada na teoria da escolha racional, veja-se: TSEBELIS, George. *Jogos Ocultos*, p. 98.

[59] "*Autonomia é a margem de discrição de que uma pessoa goza para decidir sobre os seus negócios, mas sempre delimitada essa margem pelo próprio direito*." BASTOS, Celso R. Op. cit., p. 284.

O modelo federativo, como visto, é diferente. Para se vislumbrar o ordenamento jurídico de um Estado Federal como um todo, ou seja, o Estado Total, para utilizar o léxico kelseniano, deve-se incluir as normas emitidas pela União, e as emitidas por cada Estado-Membro. Quanto às normas emitidas pela União, deve-se se diferenciar as normas jurídicas federais e as nacionais.

Normas federais são as de competência da União enquanto ente federativo. Normas nacionais são as de competência do Estado Total, que obrigam a todos os entes federativos. Ocorre que, pela comum coincidência de órgãos entre a União e o Estado Total, só há possibilidade de diferenciá-las pela sua natureza.

Michel Temer disserta sobre o tema:

> No *plano interno*, revela a vontade da Federação quando edita *leis nacionais* e demonstra a sua vontade (da União) quando edita *leis federais*.
>
> Geraldo Ataliba precisou essa distinção ao salientar que as leis nacionais são as que alcançam todos os habitantes do território nacional (leis processuais, civis, penais, trabalhistas, etc.) e as federais são aquelas que incidem apenas sobre os jurisdicionados da União (são aquelas que dizem respeito aos servidores da União e ao seu aparelho administrativo).
>
> [...]
>
> Também manifesta-se pela Federação, no plano interno, quando intervém nos Estados federados (art. 34 da CF), quando decreta o estado de sítio e o estado de defesa (arts. 21, V, 136 e 137 da CF).
>
> No plano internacional, representa a Federação quando mantém relações com Estados estrangeiros, participa de convenções internacionais, declara guerra e faz a paz. Exerce-a. Não a titulariza, dado que a soberania é nota tipificadora do Estado.[60]

Pode-se representar o ordenamento jurídico yotal de um Estado Federal da seguinte forma: $T = U + E$, onde $E = e_1 + e_{2+}\ e_{3+}\ e_{4+}.e_n$. Nesta fórmula, "T" é o Estado Total ou Federação, "U" são as normas emitidas pela União (federais e nacionais), "E" as emitidas pelos ordenamentos jurídicos parciais chamados Estados-membros. Isto abrange todas as normas do sistema, incluindo-se as constitucionais, que também podem ser nacionais, federais ou estaduais.

Desse modo, tanto a União quanto os Estados-membros são entes intra-estatais que possuem um diferente feixe material e territorial de competência normativa, imposto pela Constituição.

Numa demonstração gráfica, teríamos a seguinte visão de um Estado Federal:

[60] TEMER, Michel. Op. Cit., p. 78.

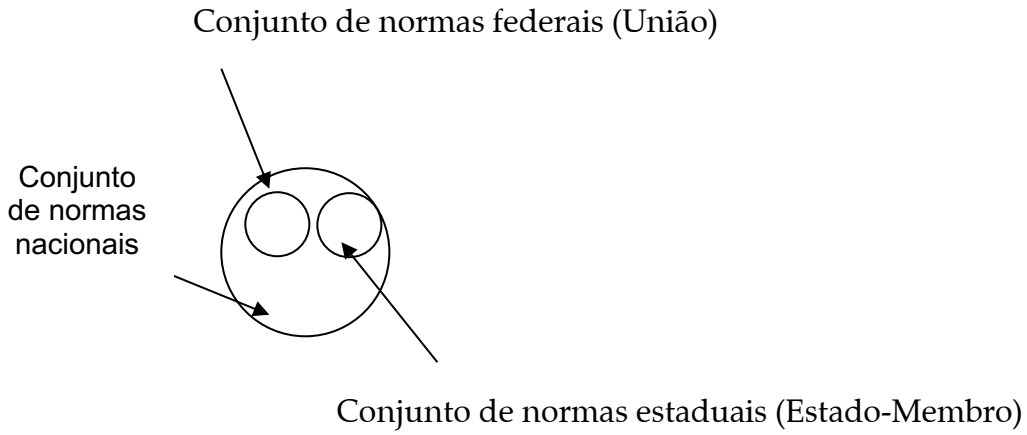

Figura 3 – Estado Federal (Ordenamento Total)

Portanto, se presentes: a) a descentralização político-administrativa de um Estado na Constituição; b) entes intra-estatais com autonomia constitucional, política, administrativa e financeira no âmbito de sua competência; e c) a impossibilidade de extinção desta descentralização - está-se diante de uma federação. São estes os elementos identificadores desta forma de organização estatal.

Costumeiramente, como visto, aponta-se como requisito essencial da forma federativa de Estado a chamada "participação das entidades federativas na formação da vontade nacional", que se dá pela existência de um Poder Legislativo Bicameral, onde além da Casa dos representantes do povo, existe a Casa dos representantes das entidades federativas, normalmente chamada de Senado Federal, também ocorrendo, com freqüência, a necessidade da aprovação de qualquer emenda à Constituição Federal pela maioria dos órgãos legislativos dos Estados-membros.[61]

Se isso ainda teria sentido ao se entender a Federação como um "pacto", em que os pactuantes devem participar na formação da vontade geral, é um completo sem-sentido nas Federações que surgiram por segregação, como a brasileira.

Entendemos que tal elemento é desnecessário para a configuração de um Estado Federal, pois, como visto, a forma com a qual a descentralização se dá basta para a diferenciação deste em relação ao Estado Unitário. Quando muito, seria um elemento acidental. Aliás, sua presença não garante a natureza jurídica do Estado como Federal.[62]

LIJPHART, tratando de teóricos do federalismo, aduz que se costuma apontar que a federação possui significados primários e secundários. A primária seria que a federação *"constitui uma divisão garantida de poder entre o governo central e os governos regionais*".[63]

[61] Apesar de muitos autores a considerar secundária. Veja-se MIRANDA, Pontes. Op. cit., p.303. FERREIRA FILHO, Manoel G. Op. cit., p. 43.
[62] MIRANDA, Pontes de. Op. cit., p. 303. Ressalte que existem federações sem senado, e, como exemplos, teríamos São Cristóvão e Névis e a Venezuela atual. Veja-se: *São Cristóvão e Névis*. *Constitution.* Disponível em: https://www.oas.org/juridico/PDFs/mesicic5_skn_constitution_annex1.pdf. Acesso em 3 Maio 2020; Venezuela (República Bolivariana de) 1999 (rev. 2009). Constitute. Disponível em: https://www.constituteproject.org/constitution/Venezuela_2009?lang=es. Acesso em 3 Maio 2020.
[63] LIJPHART, Arend. Op. Cit., p. 20.

Os secundários seriam um "*forte bicameralismo, uma constituição rígida e revisões judiciais rigorosas*":[64]

> Seu argumento é que a garantia de uma divisão federal do poder só pode operar bem nos seguintes casos: (1) se tanto as garantias quanto as linhas precisas da divisão de poder estiverem claramente definidas na Constituição, e se essas garantias não puderes ser modificadas unilateralmente, nem no nível central nem no regional – donde a necessidade de uma Constituição rígida; (2) se houver um árbitro neutro para resolver conflitos relativos à divisão de poder entre os dois níveis de governo – donde a necessidade de revisões judiciais; e (3) se houver uma câmara federal na legislatura nacional, em que as regiões tenham uma forte representação – donde a necessidade de um forte bicameralismo. Além disso, (4) o principal propósito do federalismo é promover e proteger um sistema descentralizado de governo. [65]

Apesar de referido trabalho se voltar à ciência política, e não a um estudo propriamente jurídico do tema, serve bem para a diferenciação aqui proposta. Consideramos que somente o significado primário acima referido configura a nota diferenciadora de uma federação. A necessidade de constituição rígida - e, conseqüentemente, de controle judicial - está pressuposta, pois é o único meio de garantir a divisão de competência de forma imutável num ordenamento jurídico (e aqui, a necessidade de cláusulas pétreas transparece).

A existência de uma segunda casa legislativa que "represente" os entes federativos é, de modo claro, benéfica para o funcionamento político da Federação. Mas não o consideramos um elemento definidor.

Assim, o termo "federação" será aqui utilizado para denotar a forma de descentralização política, legislativa, administrativa e financeira de um Estado, prevista em cláusula pétrea na Constituição, em que os entes federativos, dotados de autonomia irrestrita no âmbito da competência estabelecida constitucionalmente, podem se auto-organizar.

3 O MUNICÍPIO NA CONSTITUIÇÃO DA REPÚBLICA DE 1988

3.1 O MUNICÍPIO: VISÃO GERAL

Desde a pré-história reuniu-se o homem em aldeias, vilas, burgos, cidades, condados, mas é a partir de Roma que se conheceu o Município com a estrutura que teve mais tarde, de unidade político-administrativa.[66] Nesse sentido, PINTO FERREIRA afirma que "*o município é uma entidade social e histórica antes de transformar-se em uma instituição político-jurídica*."[67]

[64] Id., Ibid.
[65] Id., Ibid.
[66] CRETELLA JUNIOR, J. *Direito Administrativo Municipal*, p. 31; MEIRELLES, Hely Lopes. *Direito Municipal Brasileiro*, p.1.
[67] FERREIRA FILHO, Manoel G. *Op. Cit.*, p. 190.

Houve diferentes formas de organização dos municípios, no transcorrer do tempo, em diversas culturas, com períodos de maior autonomia, em determinados locais, e outros em que quase não existiram, como na Idade Média, em parte da Europa.[68]

Atualmente, também são múltiplas as formas de organização dos municípios nos diferentes ordenamentos jurídicos, que divergem profundamente entre si, sejam em Estados Unitários ou Federais.[69]

No Brasil, os municípios surgiram nos moldes da tradição portuguesa, quando vigoravam as Ordenações do Reino, tendo por embriões as vilas, cuja primeira teria sido a de São Vicente, com diversas formas de organização com o passar dos séculos.[70]

Alguns autores afirmam que os municípios se tornaram grandes centros de decisão política na época colonial, como se denota deste trecho de CELSO BASTOS:

> Ainda que a realidade de um país dependente, assim como a existência de um governo central, não estivesse, de direito, a conferir ao município brasileiro uma tal dimensão ou magnitude político-decisória, de fato, as coisas se passaram como se desfrutasse ele de uma autonomia institucional.[71]

Tal visão não é compartilhada por ALCIDES JORGE COSTA:

> Autonomia dos municípios no Brasil é uma coisa curiosa. É um pouco como autonomia estadual. Existe toda uma onda em torno da autonomia dos municípios, da autonomia estadual, e, para justificar a autonomia dos municípios, é freqüentíssimo invocar-se o passado. Só que o passado não foi exatamente o que se apregoa. [...] Na verdade, [na época colonial] os municípios não tinham autonomia, como não tiveram durante o Império, em que eram meras repartições administrativas. [...][72]

Com a independência e o suceder de constituições, o município brasileiro foi conhecendo diferentes formas de organização e de autonomia.[73] Autonomia garantida juridicamente, ao menos, só se pôde vislumbrar na Carta de 1934 e 1946.[74] Isso até se chegar à Constituição de 1988, que trouxe ao município posição de destaque na organização político-administrativa brasileira.

3.2 É O MUNICÍPIO BRASILEIRO ATUAL ENTE FEDERADO?

Antes do atual texto constitucional, a natureza jurídica do município brasileiro já era motivo de celeuma doutrinária. No entanto, a redação do artigo 1º da Constituição de 1988 aprofundou o debate, ao dispor o seguinte:

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[68] Sobre o tema, veja-se, exemplificativamente: FERREIRA FILHO, Manoel G. *Op. Cit.*, p. 190-196; MEIRELLES, Hely Lopes. *Op. Cit.*, p.1-2; CRETELLA JR. Op.cit., p. 32.

[69] Sobre o tema, veja-se exemplificativamente: CRETELLA JR. Op. cit., p. 36; MEIRELLES, Hely Lopes. Op. cit, p. 18-37;

[70] Sobre o tema, veja-se exemplificativamente: PAUPÉRIO, Machado. *O Município e seu regime jurídico no Brasil*, p. 29-30; TEMER, Michel. *Op. Cit.*, p. 105; CRETELLA JR. Op. cit., p. 40; FERREIRA, Pinto. Op. cit., p. 198; BASTOS, Celso R. Federação. In: BASTOS, Celso R.;Martins, Ives G. *Comentários à Constituição do Brasil*. 1º volume, p. 230.

[71] BASTOS, Celso R. Federação. In: BASTOS, Celso R.;Martins, Ives G. *Op. Cit.*, p. 230.

[72] COSTA, Alcides Jorge. História da tributação: do Brasil-Colônia ao Imperial. In: SANTI, Eurico Marcos Diniz de [Coord.] *Curso de Direito Tributário e Finanças Públicas*: do fato à norma, da realidade ao conceito jurídico. São Paulo: Saraiva, 2008, p. 61-62.

[73] Sobre o tema, veja-se, exemplificativamente: MEIRELLES, Hely Lopes, Op. cit., p. 6-9; PAUPÉRIO, Machado. Op. cit., p. 40; CRETELLA JR. Op. cit., p. 42; BASTOS, Celso R. Op. cit., p. 231;

[74] MEIRELLES, Hely Lopes. Op. cit, p. 9; CRETELLA JR. Op. cit., p. 42; BASTOS, Celso R. Op. cit., p. 231;

> Art. 1º. A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado Democrático de Direito [...].

Rápida leitura da Carta Magna demonstra que a divisão de competência constitucional inclui o Município, juntamente com a União e os Estados-membros e o Distrito Federal, numa organização harmoniosa e de coordenação.

Convém questionar-se se a inclusão formal do município na federação brasileira, como ente federativo, espelha a realidade. Afinal, os "*nomes não mudam a natureza das coisas, embora os termos impróprios possam criar confusões e impecilhos*".[75]

Se no direito alienígena, a visão assente é a de que o município não passa de simples divisão administrativa dos Estados Unitários ou dos Estados-membros num Estado Federal, na doutrina pátria, já antes de 1988, as opiniões divergiam.[76]

PONTES DE MIRANDA colocava o município em igualdade jurídica aos Estados-membros, como entes intra-estatais.[77] Afirmou que o município pátrio era "*entidade intraestatal rígida, como a União e o Estado-membro*", asseverando que se deve fugir "*à busca no Direito norte-americano e argentino, porque a concepção brasileira de autonomia municipal é diferente*."[78]

Nesse mesmo sentido pensavam, exemplificativamente, PAUPÉRIO, MEIRELLES, CRETELLA JR. e DIOGO LORDELO DE MELO.[79]

Após a Constituição de 1988, por exemplo, compartilham desta opinião, com pequenas nuances, FERREIRA FILHO, BONAVIDES, PINTO FERREIRA, MAGALHÃES, VITALINO, ALCIDES JORGE COSTA e BASTOS.[80]

Enquanto TEMER não esclarece seu posicionamento, eminentes juristas entendem que o município não é ente federativo, como BARROS CARVALHO, EDSON CARLOS FERNANDES, CARRAZZA e SILVA.[81]

Este último, sintetiza os motivos de seu opinar, no seguinte rol:

a) não existe Federação de Municípios, mas sim, de Estados. Municípios seriam Estados-membros dentro de Estados-membros, se fossem entes federativos;

b) não há representação dos Municípios na formação da vontade nacional;

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[75] MIRANDA, Pontes de.*Op. cit.,*, p. 314.
[76] MEIRELLES, Hely Lopes. *Op. Cit.*, p. 23-37 passim.
[77] MIRANDA, Pontes de. *Op. Cit.*, p. 250-251.
[78] Pontes de Miranda, apud MEIRELLES, Hely Lopes. *Op. Cit.*, p. 17.
[79] PAUPÉRIO, Machado. *Op. Cit.,* p. 13-20, *passim*; MEIRELLES, Hely Lopes. Op. cit., p. 16-17; CRETELLA JR, José. Op. cit., p. 55-66, *passim*; MELO, Diogo L. de. *Organização do Município. Cadernos de Administração Pública*, p. 27-30.
[80] FERREIRA FILHO, Manoel G. Op. Cit., p.47-59, passim; BONAVIDES, Paulo. Curso de Direito Constitucional, p. 311; FERREIRA, Pinto. *Curso de Direito Constitucional*, p. 269; MAGALHÃES, José Luiz Quadros de. O pacto federal Descentralização e Democracia. In: *Pacto Federativo*, p.15-17; MELO FILHO, Urbano Vitalino. *Direito Municipal em Movimento*, p. 169; COSTA, Alcides Jorge. Op. Cit., p. 61-62; BASTOS, Celso R. *Curso de Direito Constitucional*, p. 294; BASTOS, Celso R. Federação. In: BASTOS, Celso R.;Martins, Ives G. *Comentários à Constituição do Brasil*, 1º volume, p.232.
[81] CARVALHO, Paulo de Barros. *Op. Cit.,* p. 161-164; FERNANDES, Edison Carlos. *Sistema Tributário do Mercosul*, p. 102; CARRAZZA, Roque A. *Op. Cit.*, p. 153-154; SILVA, Jose A. da. *Op. Cit.*, p. 619.

c) se fossem entes federativos, ocupariam o mesmo território dos Estados-membros, não havendo território próprio não compartilhado para ambos, o que é necessário para a configuração da autonomia federativa;

d) a intervenção nos municípios cabe aos Estados e não à União;

e) a criação, incorporação, fusão e desmembramento de municípios far-se-ão por lei estadual. [82]

Filiamo-nos à corrente que considera o município como ente federativo no atual ordenamento jurídico pátrio. Isso porque, como exposto alhures, considera-se ente federativo às pessoas jurídicas de direito público interno constituídas por um feixe de competência constitucionalmente prevista em cláusula pétrea, em face das disposições da Constituição de 1988.

E as críticas porventura existentes não se sustentam, a nosso ver. As críticas mais relevantes, seriam a falta de participação dos municípios na formação da vontade nacional, e a falta de um Poder Judiciário próprio.

A falta de representação dos municípios no Senado não é um óbice, pelo exposto em item anterior. Isso porque, ainda que se considere que o Senado "representa" as entidades da federação na formação da vontade nacional, com o que não concordamos, não o incluímos na definição de ente federativo, que se basta com menos elementos.

Por fim, a falta de um Judiciário próprio, também não impressiona. Se assim fosse, o Distrito Federal não poderia ser considerado ente federativo, pois seu Judiciário é criado e organizado pela União. Inclusive, tem-se que é totalmente possível a existência de um Estado Federal onde não exista Poder Judiciário nos Estados-Membros. Inclusive, é a opinião do eminente jurista PONTES DE MIRANDA, que considerava tal órgão um despropósito.[83] Na mesma esteira, RUI BARBOSA.[84] Ademais, seguindo tal raciocínio, eventual extinção da Justiça Federal causaria a perda da natureza jurídica de ente federativo da União.[85]

Ora, o município possui competências outorgadas pela própria Constituição Federal, e não por lei estadual ou federal. Do mesmo modo, a lei municipal é da mesma natureza que a federal e a estadual, dentro de seu âmbito de validade material e territorial. Pode-se afirmar que o Município, O Distrito Federal, o Estado-Membro e a União encontram-se justapostos na organização estatal brasileira, e não há qualquer prevalência da União sobre os Estados, ou destes sobre os Municípios. Estão devidamente coordenados.[86]

A constituição garante aos municípios competência de elaborar sua Lei Orgânica. Esta nada mais é do que o arremate da própria Constituição Federal. A Constituição

[82] SILVA, Jose A. da. *Op. Cit.*, p. 475.
[83] MIRANDA, Pontes de. Op. cit., p. 306.
[84] BARBOSA, Rui. *Excursão eleitoral ao Estado da Bahia*, 1910, p. 28, *apud* BANDEIRA DE MELLO, Oswaldo A. *Op. Cit.*, p. 102.
[85] Com a Proclamação da República, foi instituída a Justiça Federal. No entanto, no período de 1937 a 1946 não havia Justiça Federal no Brasil, e de 1946 a 1964, só existia o Tribunal Federal de Recursos. Sobre o tema, veja-se: BRASILCONSELHO DA JUSTIÇA FEDERAL. Breve Histórico da Justiça Federal. Disponível em: https://www.cjf.jus.br/atlas/1Ahist.htm. Acesso em 3 Maio 2020. De se ressaltar que o STJ e STF possuem nítida natureza de órgãos nacionais, e não de órgãos da União, tão somente.
[86] Deve-se fazer uma ressalva quanto à atuação da União como legisladora do Estado Total, emitindo leis nacionais. Neste caso, pode-se dizer que existe uma subordinação entre eles. Mas a União, enquanto ente federativo, encontra-se justaposta ao lado do Estado-membro, do Distrito Federal e do Município.

Total no atual ordenamento jurídico brasileiro compõe-se da Constituição Federal, das 26 Constituições Estaduais, da Lei Orgânica do Distrito Federal e das 5.570 Leis Orgânicas Municipais existentes. Somente assim podemos ter o conjunto total de normas constitucionais pátrias.[87]

O município no Brasil existe independentemente do Estado-Membro. Tal é sua relevância que, se uma porção territorial de um Estado-Membro for transformada em Território Federal, os municípios que passarem a fazer parte deste território continuam com sua existência garantida, pelo que dispõe a Constituição Federal.

Em representação gráfica, poderíamos notar que o Município, nos Estados Unidos por exemplo, é subordinado ao Estado-membro:

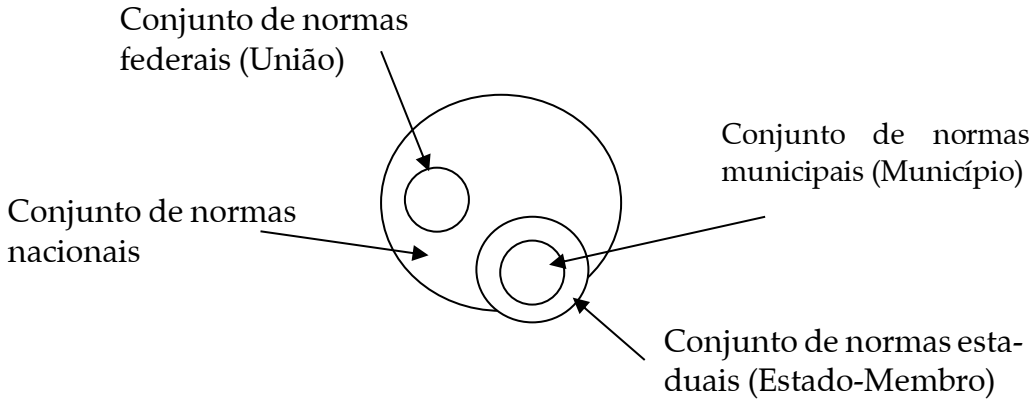

Figura 4 – Estado Federal americano (Ordenamento Total)

Outra é a visualização do ordenamento jurídico brasileiro:

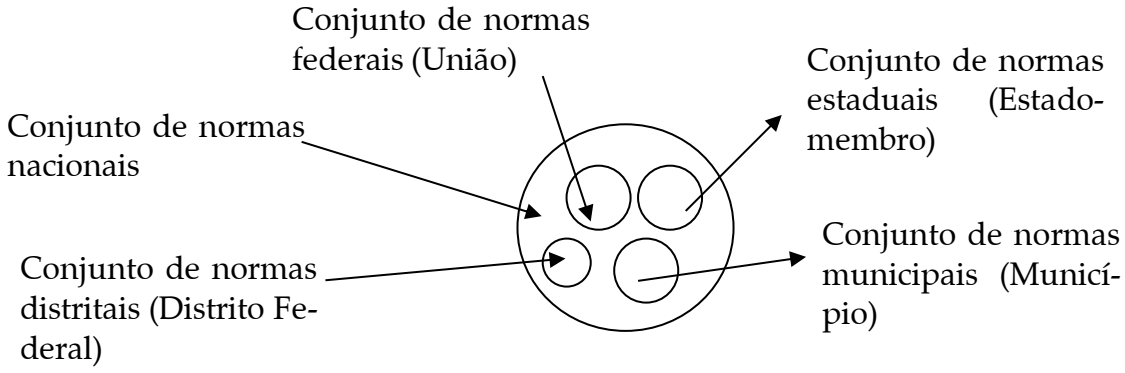

Figura 5 – Estado Federal Brasileiro (Ordenamento Total)

Em conclusão, pode-se representar o Ordenamento Jurídico Total da República Federativa do Brasil da seguinte forma: T = U + E + D + M, onde E= e_1+e_{2+} e_{3+} $e_{4+}.e_n$ e M= m_1+m_{2+} m_{3+} m_{4+} $m_{.n}$. Nesta fórmula, "T" é o Estado Total ou Federação, "U" são as normas emitidas pela União (federais e nacionais), "E" as emitidas pelos Estados-

[87] IBGE. Instituto Brasileiro de Geografia e Estatística. *Brasil: panorama*. Disponível em: https://cidades.ibge.gov.br/brasil/panorama. Acesso em 3 Maio 2020.

membros, "D" são as emitidas pelo Distrito Federal e "M" as emitidas pelos municípios. Isto abrange todas as normas do sistema, incluindo-se as constitucionais, que também podem ser nacionais, federais, estaduais, distritais e municipais.

4 CONCLUSÃO

Com o presente trabalho, verificou-se, inicialmente, que apesar das diferentes visões sobre o Estado, é possível estudá-lo mediante um corte epistemológico que prestigie seus caracteres unicamente jurídicos, como uma ordem de conduta humana.

Após, analisou-se o Estado Federal, desde uma visão clássica até se chegar à conclusão de que se trata de forma de descentralização política, legislativa, administrativa e financeira de um Estado, prevista em cláusula pétrea na Constituição, em que os entes federativos, dotados de autonomia irrestrita no âmbito da competência estabelecida constitucionalmente, podem se auto-organizar.

Com base em tais premissas, verificou-se que o município brasileiro, na Constituição Federal de 1988, é integrante da Federação, como ente federativo, eis que se trata de pessoas jurídicas de direito público interno constituídas por um feixe de competência constitucionalmente prevista em cláusula pétrea.

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A PERSPECTIVA ESTATAL DA MOBILIDADE E A SUBJETIVIDADE DOS QUE SE DESLOCAM: A MIGRAÇÃO HAITIANA AO BRASIL

Marcele Scapin Rogerio[1]

RESUMO

O artigo tem como objetivo analisar, teoricamente, como o posicionamento do Estado diante das migrações pode influenciar na relação de alteridade entre os nacionais diante dos indivíduos que se deslocam. Além disso, visa identificar o significado da mobilidade para os migrantes haitianos, sobretudo dos que se estabelecem no Brasil. Identifica-se que o projeto migratório de alguns migrantes simbolizam o projeto de vida, o sonho de muitos, caracterizando o protagonismo e autonomia do migrante. Este estudo é resultado de uma pesquisa etnográfica, realizada entre os anos de 2017 a 2020 no Vale do Taquari, no Rio Grande do Sul, região que atrai haitianos devido às oportunidades laborais, aliado às pesquisas bibliográfica e documental.

PALAVRAS-CHAVE: Migração. Políticas Estatais. Mercado de trabalho. Haitianos. Protagonismo.

THE STATUS PERSPECTIVE OF MOBILITY AND THE SUBJECTIVITY OF THOSE WHO DISPLACEMENT: HAITIAN MIGRATION TO BRAZIL

ABSTRACT

The article aims to analyze, theoretically, how the position of the State in the face of migration can influence the relationship of otherness among nationals in relation to individuals who move. In addition, it aims to identify the meaning of mobility for Haitian migrants, especially those who live in Brazil. It is identified that the migratory project of some migrants symbolizes the life project, the dream of many, characterizing the role and autonomy of the migrant. This study is the result of an ethnographic research, carried out between the years 2017 to 2020 in the Taquari Valley, in Rio Grande do Sul, a region that attracts Haitians due to job opportunities, combined with bibliographic and documentary research.

KEYWORDS: Migration. State Policies. Labor market. Haitians. Protagonism.

INTROCUÇÃO

A presença do migrante nem sempre é vista com bons olhos pelos nacionais, os quais percebem nele uma ameaça, seja pela diferença identificada ou pelo medo de que ocupem as vagas de trabalho disponíveis no mercado de trabalho. Esse estranhamento,

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muitas vezes, é despertado pela retórica do poder público que difunde posicionamento hostil aos indivíduos que se deslocam.

Abordam-se as políticas de controle estatal sobre o deslocamento humano que visam excluir ou, até mesmo, impedir a regularização documental dos seres humanos que se movem pelos territórios. No entanto, a perspectiva do migrante "invasor" muda quando há interesse em sua mão de obra para ocupações, geralmente, de baixos salários.

De estranhos se tornam necessários para ocupar vagas que são, em algumas ocasiões, desprezadas pelos nacionais. O contexto econômico, assim, pode condicionar o posicionamento político de um país, de modo a torná-lo receptivo aos migrantes. A partir de 2010, quando o Brasil tornou-se rota de permanência de haitianos, algumas regiões do país absorveram a mão de obra em setores, mormente, da construção civil e em indústrias de transformação. Foi nesse período que, a partir de 2012, haitianos foram recrutados no Acre para o trabalho nessas áreas à região do Vale do Taquari.

A pesquisa etnográfica desenvolvida nesse local entre os anos de 2017 a 2020 viabilizou a interação com os migrantes haitianos e possibilitou delinear as significações da mobilidade, inclusive a perspectiva subjetiva desta prática que é constitutiva do mundo social haitiano. Os deslocamentos são nutridos por sentimentos, planos, expectativas, sonhos. O projeto migratório parece ser também o projeto de vida.

O artigo, nesse sentido, tem como objetivo analisar, teoricamente, como o posicionamento do Estado diante das migrações pode influenciar na relação de alteridade entre os nacionais diante dos indivíduos que se deslocam. Além disso, visa identificar o significado da mobilidade para os migrantes haitianos, sobretudo dos que se estabelecem no Brasil. É resultado de experiência etnográfica, aliada à investigação bibliográfica e documental.

1. A MOBILIDADE: PARA O MIGRANTE, O RECOMEÇO; PARA O NACIONAL, A DESCONFIANÇA

A opinião difundida após percebida a presença de migrantes no país, sobretudo com a visibilidade da migração haitiana, foi a de que eles iriam ocupar as vagas de trabalhadores brasileiros. O medo de que os migrantes "roubassem" os empregos sugeriu uma resistência em aceitá-los e respeitá-los como seres humanos, que se movimentam em busca de um "lugar ao sol", como diria Érico Veríssimo.

Bauman (2009) diz que os migrantes representam o pesadelo de que as pessoas – no caso os nacionais - possam perder os meios de sobrevivência e posição social em razão das pressões econômicas. O pesquisador segue refletindo que "eles representam a fragilidade e a precariedade da condição humana, e ninguém quer se lembrar dessas coisas horríveis todos os dias, coisas que preferiríamos esquecer" (BAUMAN, 2009, p. 77). Nesse sentido, a presença do migrante é um estigma do sofrimento, do abandono, da vida que não deu certo. Invisibilizar a presença dos migrantes é uma estratégia para evitar que a lembrança do sofrimento desperte em pessoas que não estão em mobilidade.

Nas análises críticas de Bauman (2009, p. 77), os migrantes "tornaram-se os principais portadores das diferenças que nos provocam medo e contra as quais

demarcamos fronteiras". Isso se reflete na resistência demonstrada pelas sociedades em que os migrantes se estabelecem em aceitá-los, sem discriminação e estranhamento. Muitas vezes essa resistência é justificada pelo medo das pessoas perderem seu emprego e sua posição social[2] na comunidade para um "estranho".

Se acentuou o discurso de que a culpa pelo aumento do desemprego e, também, da violência, era em razão da presença do migrante: em tempos de crise, é apontado como "bode expiatório", responsável pela crise econômica porque gera despesas aos cofres públicos, o que acarreta insuficientes prestações de serviços públicos à população em geral (VENTURA; ILLES, 2012).

O migrante quando tem acesso aos direitos sociais e usufrui dos programas e políticas públicas e de serviços sociais, como educação e saúde, passa a "depender" do Estado, e, potencializando a reflexão, caso ele esteja (sobre)vivendo em um país que passa por um contexto econômico de instabilidade, a sua presença, então, será desaprovada, pois gera despesas. Sayad (1998) observou que o migrante que causa menores despesas sociais é considerado mais vantajoso em relação àqueles que não trabalham, produzem menos ou são inativos economicamente, os quais são relegados a uma situação de parasitismo. Como descrevem Ventura e Illes (2012), o migrante será acusado como único responsável pela redução de recursos do Estado, fomentando os discursos de criminalização da migração.

A análise levantada por Ventura e Illes (2012) acerca da presença do migrante ser "aceita ou não" pelo Estado e pela opinião pública é a de que enquanto ele está gerando renda, ou seja, quando contribui com impostos e, ainda, não provoca custos, a presença até se torna tolerada (muitas vezes ela não faz diferença alguma, sequer é notada, a não ser que características físicas "saltem" aos olhos, como a cor da pele, no caso dos haitianos no Vale do Taquari, região colonizada, principalmente, por alemães e italianos). Essa hipótese considera um migrante que possui documentação, ou seja, que está "autorizado" a permanecer e circular no país. O migrante sem a documentação que autoriza a sua presença no território é ainda mais rejeitado e excluído pelo poder público e pela população nacional.

Os que não possuem documentação são, praticamente, invisibilizados e rejeitados – um "papel", um documento, é valorado mais do que o ser humano. Wermuth (2014, p. 186) diz que os migrantes em situação irregular sob o ponto de vista jurídico vivem em "estado moribundo, submetidos a sucessivos processos de exclusão que paulatinamente os submetem a mais e mais violência". Ele aprofunda a reflexão ao afirmar que as constantes cesuras "transformam" os migrantes indocumentados em "mera *vida nua*, ou seja, vida matável (*zoé*)", conforme trecho que segue:

> De fato, os imigrantes em situação irregular, pela sua própria condição, não conseguem se normalizar do modo imposto pelo direito. Em razão disso, uma vez catalogados como perigosos, submetem-se a sofrer a suspensão do direito, o que, por sua vez, os coloca em uma situação de exceção, quando o Estado realiza a separação entre os direitos dos cidadãos autóctones da mera

[2] Cavalcanti (2014, p. 13), em seus estudos relacionados à inserção dos migrantes no mercado de trabalho brasileiro, ressalta que é no mercado de trabalho que se compreende a "posição social" que ocupam os migrantes. Se apropriando dos termos do autor, é possível refletir que os brasileiros, ou nacionais, também mantém uma posição social de acordo com a função laborativa que desempenham, e perder o emprego seria perder essa posição social.

> vida nua dos migrantes. Nessa situação de vulnerabilidade extrema, os imigrantes estão expostos às mais variadas formas de violação sem que possam invocar qualquer norma jurídica em sua defesa. A lição de Foucault (2010), [...] de acordo com a qual o controle biopolítico não significa simplesmente a morte direta, mas também a indireta, por meio da multiplicação do risco, da exposição maior à morte de determinados estratos, é aqui perfeitamente vislumbrada (WERMUTH, 2014, p. 186-187).

Na visão de Agamben (2007, p. 18) a relação da política com o homem (vida) é de uma "exclusão inclusiva", o expondo à vida nua. Implica dizer que a vida nua é "presa à política (que assumiu mais a forma de biopolítica) sob a forma de exceção", "isto é, de alguma coisa que é incluída somente através de uma exclusão". Argumenta que "a exceção é uma espécie de exclusão", de modo que o excluído não está, completamente, fora de relação com a norma: "se mantém em relação a ela na forma de suspensão", de maneira que "a norma se aplica à exceção desaplicando-se, retirando-se desta". O "estado de exceção não é, portanto, o caos que precede a ordem, mas a situação que resulta da sua suspensão" (AGAMBEN, 2007, p. 25).

Agamben (2007, p. 26) explica que a situação criada na exceção não pode ser definida "nem como situação de fato, nem como uma situação de direito[3]", mas "institui entre estas um paradoxal limiar de indiferença". De acordo com a elaboração teórica e reflexiva do autor, "a relação de exceção é uma relação de *bando*[4]", ou seja, "de abandono", o que significa que o "banido" ou, no caso, o migrante indocumentado, não é, simplesmente, um "fora da lei" ou "indiferente a esta", mas é "abandonado" por ela, exposto em risco "no limiar em que vida e direito, externo e interno, se confundem". A relação da lei com a vida é de abandono e não de aplicação, o que denota a ideia de que as pessoas não estão protegidas pela lei, mas estão sujeitas ao poder do soberano (AGAMBEN, 2007, p. 36).

O controle soberano não se restringe, somente, aos migrantes indocumentados. Os documentados, embora tenham a presença reconhecida pelo Estado e, em razão disso, acesso facilitado, por exemplo, aos empregos formais, também são submetidos ao controle biopolítico que age, normalmente, pelas condicionantes econômicas. O controle estatal sobre a população encontra respaldo na teoria de Foucault (2003) sobre as formas de controle e vigilância, onde a governamentalidade do Estado se instrumentaliza como poder na multiplicidade de forças manifestadas nas relações e práticas humanas. O Estado, por meio de mecanismos de controle, utiliza estratégias e ações políticas sobre a população, tornando-a objeto de seu governo (FOUCAULT, 1987; AGAMBEN, 2007).

Alguns países, inclusive, criam barreiras físicas e jurídicas de acesso aos migrantes que consideram indesejados, legitimada, muitas vezes, pela ação da polícia e do discurso amedrontador da população da cidade em que se estabelecem acerca dos perigos

[3] Conforme Agamben (2007, p. 26), a situação criada na exceção "não é um fato, porque é criado apenas pela suspensão da norma; mas, pela mesma razão, não é nem ao menos um caso jurídico, ainda que abra a possibilidade de vigência da lei".

[4] Em Agamben (2007, p. 36) se encontra a explicação de bando, que diz respeito à figura do excluído, e que se origina "do antigo termo germânico que designa tanto a exclusão da comunidade quanto o comando e a insígnia do soberano"; "em sua origem, *in bando, a bandono* significam em italiano tanto 'a mercê de' quanto 'a seu talante, livremente', como na expressão *correre a bandono,* e *bandito* quer dizer tanto 'excluído, posto de lado' quanto 'aberto a todos, livre", como em *mensa bandita* e *a redina bandita'".*

que os migrantes representam, discursos difundidos, inclusive, pela mídia (WERMUTH; SENGER, 2017). Em razão desse controle a fim de atender os interesses do desenvolvimento econômico, normalmente são movimentados à margem da sociedade – empregos com baixo salário, baixa qualificação e funções penosas – e expostos à vulnerabilidade social. Essa lógica excludente exige estratégias de sobrevivência que incluem habilidade e criatividade diante da escassez e ausência da tutela do Estado (WERMUTH, 2014).

Os discursos que desaprovam a permanência dos migrantes geralmente são de cunho econômico e levam em conta os custos ao Estado para mantê-los dependentes dos serviços públicos. A perspectiva econômica não "tolera" o migrante que onera os recursos públicos e, nesse sentido, Sennett (2007, p. 167) diz que as redes assistenciais e os direitos são "destruídos" a fim de libertarem a "economia política para agir com mais flexibilidade".

No que se refere a viver – ou sobreviver – e possuir liberdade no atual processo de globalização, Supiot (2014, p. 23) adverte que "o objetivo de justiça social foi substituído pelo da livre circulação de capital e de mercadorias". Os homens são tratados como "capital humano a serviço da economia". Sassen (2014), por sua vez, reforça essa ideia dizendo que pode haver a redução das prestações sociais aos cidadãos em nome de um Estado competitivo neoliberal.

Além disso, reforçando essa linha de pensamento, Sennett (2007, p. 167) afirma que o regime neoliberal "trata os dependentes do Estado com a desconfiança de que são parasitas sociais". Nessa senda, o estigma do migrante de dependente social do Estado, de acordo com Bauman (2005), pode causar ódio e, ainda, temor porque sua presença representa perigo e risco à segurança estatal. O migrante se torna inimigo e problema para a seguridade: quanto mais desconhecido e invisível esse inimigo, mais medo ele desperta e, com isso, mais segurança é preciso (BAUMAN, 2008).

O sentimento de insegurança que os migrantes despertam, para Bauman (2005, p. 73), representa a própria condição de descartável a que todos estão sujeitos. São comparados a "refugos humanos provenientes de lugares distantes descarregados em 'nosso próprio quintal'", evidenciando a vulnerabilidade que pode vitimar qualquer indivíduo em todas as partes do mundo:

> Quando todos os lugares e posições parecem balançar e não são mais considerados confiáveis, a presença de imigrantes joga sal na ferida. Os imigrantes, e em particular os recém-chegados, exalam o odor opressivo do depósito de lixo que, em seus muitos disfarces, assombra as noites das potenciais vítimas da vulnerabilidade crescente. Para aqueles que os detratam e odeiam, os imigrantes encarnam – de modo visível, tangível, em carne e osso – o pressentimento inarticulado, mas pungente e doloroso, de sua própria condição de descartável (BAUMAN, 2005, p. 73).

Seguindo o entendimento do autor, os migrantes são considerados "lixo global", "perigosos", "parasitas" e "terroristas", o que produz preconceitos e gera a mixofobia. A "mixofobia" retratada por Bauman (2009, p. 17) é o "medo de misturar-se". De acordo com o autor:

> Essa mixofobia não passa da difusa e muito previsível reação à impressionante e exasperadora variedade de tipos humanos e de estilos de vida que se

> podem encontrar nas ruas das cidades contemporâneas e mesmo na mais "comum" (ou seja, não protegida por espaços vedados) das zonas residenciais. Uma vez que a multiforme e plurilingüística cultura do ambiente urbano na era da globalização se impõe - e, ao que tudo indica, tende a aumentar -, as tensões derivadas da "estrangeiridade" incômoda e desorientadora desse cenário acabarão, provavelmente, por favorecer as tendências segregacionistas (BAUMAN, 2009, p. 17).

O autor (2009, p. 18) explica que esse medo de relacionar-se com os desconhecidos impulsiona à uma "comunidade de semelhantes" que visa evitar "riscos que caracterizam a vida cotidiana". A mixofobia, então, "se manifesta como impulso em direção a ilhas de identidade e de semelhança espalhadas no grande mar da variedade e da diferença".

Wermuth (2014, p. 254) evidencia que as "novas tecnologias" e a "incerteza que o futuro da sociedade globalizada representa", aliadas ao enxugamento do modelo de Estado do bem-estar social, geram "medo e insegurança às relações sociais na contemporaneidade", o que conduz "a um ambiente de mixofobia" e se acentua o "medo de misturar-se com estrangeiros".

A mixofobia pode desencadear a rejeição ao migrante na sociedade em que eles se estabelecem. É uma reação que pretende proteger o "nós", como define Sennett (2007). Esse sentimento de resguardo da "nossa" comunidade é fortalecida em decorrência do próprio capitalismo, conforme elucida o autor:

> Lugar é geografia, um local para a política; comunidade evoca as dimensões sociais e pessoais do lugar. Um lugar se torna uma comunidade quando as pessoas usam o pronome "nós". Falar desse jeito exige uma ligação particular, embora não local; um país pode constituir uma comunidade quando nele as pessoas traduzem crenças e valores partilhados em práticas diárias concretas. [...] Umas das consequências não pretendidas do capitalismo moderno é que fortaleceu o valor do lugar, despertou o anseio de comunidade. Todas as condições emocionais que estudamos no local de trabalho animam esse desejo: as incertezas da flexibilidade; a ausência de confiança e compromisso com raízes fundas; a superficialidade do trabalho em equipe; acima de tudo, o espectro de não fazermos nada de nós mesmos no mundo, de não "arranjarmos um galho" com o nosso trabalho (SENNETT, 2007, p. 165).

A autoproteção da comunidade, sugerida pelo autor, gera o isolamento das pessoas semelhantes que convivem nela, o que dificulta o entrosamento com migrantes. Consequentemente, quanto menos convivem com pessoas diferentes a eles, mais medo tem deles, razão pela qual buscam a companhia de seus iguais (BAUMAN, 2009). A rejeição ao migrante é entendida, nesse caso, como um modo de defesa à própria comunidade do que é diferente dela.

Viver com "estrangeiros", para Bauman (2009, p. 07) "é uma experiência que gera muita ansiedade", razão pela qual muitas pessoas tendem a evitar essa experiência. Por muito tempo o "estrangeiro", na Europa e na América do Norte, foi considerado uma presença "forte e assustadora". Hoje ele se tornou um lugar simbólico no qual se projetam angústias e ansiedades. Para Sennett:

> A diferença está naquilo que vêm a ser essas angústias e ansiedades. Hoje, além das marcas há muito conhecidas do puro e simples preconceito e da manipulação política, a pecha de que são recobertos os imigrantes também é determinada pela vivência da burocracia instável e de curto prazo. No terreno do trabalho, o estrangeiro é objeto de ansiedades em torno da inutilidade ou da perda de emprego. [...] nesse trabalho perverso da imaginação, não se percebe que perseguir esses estranhos mais fracos que estão por perto adianta muito pouco, no sentido de tornar seguro nosso próprio emprego (SENNETT, 2006, p. 152-153).

Nesse trecho, Sennett (2006) evidencia que a presença do migrante desperta angústia e ansiedade em diferentes contextos: seja pelo preconceito ou pela instabilidade no emprego. Sassen (2014) esclarece que a migração causa desconforto não somente por questões pontuais, como o medo de perder o emprego. Ela "é uma ponte entre dois mundos", mesmo que esse "mundo" seja a mesma região ou o mesmo país. O que se estranha, se discrimina, é o "outro", o estranho, o desconhecido (SASSEN, 2014, p. 17).

A autora esclarece que os trabalhadores migrantes, já no século XIX, sofriam discriminação, sendo considerados indesejáveis por muitos setores da sociedade. Eles pertenciam, basicamente, ao mesmo grupo étnico, religioso e cultural do que a maioria das pessoas do local em que se estabeleciam. Os argumentos que banalizavam a presença deles, no entanto, eram relacionados aos seus comportamentos, como maus hábitos, moral equivocada e a prática inadequada da religião (SASSEN, 2014).

Segue explicando que os discursos atuais de rejeição ao migrante são diferentes: o "outro" – migrante – é discriminado pela raça, pela religião e pela cultura. Para a autora, os atuais argumentos de desprezo focados em questões de raça, religião e cultura são, na verdade, novos conteúdos para uma paixão antiga: a racialização do estranho, do outro (SASSEN, 2014, p. 17).

Algumas pessoas condenam os migrantes, também, porque tem medo do que Sennett (2006, p. 81) denomina de "fantasma da inutilidade". Em um mundo capitalista onde se dissemina a ideia de que o homem somente é útil trabalhando, produzindo para gerar capital, e, necessariamente, para subsistir, o medo de não ter um emprego ou ser substituído por um migrante assombra como um fantasma. Sob uma perspectiva romantizada de uma questão quase que, puramente, mercadológica, sentir-se útil pode dizer respeito, inclusive, a fazer algo importante para os outros.

Ao irradiar indiferença (SENNETT, 2007), o sistema reduz o senso de que somos necessários aos outros. A indagação "quem precisa de mim?" revela a ideia de que contamos pouco como pessoa. Nos termos do autor, todos enfrentam a perspectiva de "ficar à deriva", de deixar de existir, de ser inútil, seja no aspecto profissional como no aspecto humano (SENNETT, 2006, p. 32). Bauman (2009) reforça as reflexões de Sennett acerca do medo dos migrantes e refugiados.

Esse medo da inutilidade é evidenciado pela "economia – ou sociedade – das capacitações", onde existem muitas pessoas qualificadas mas que não encontram espaço para as quais foram capacitadas. A máquina econômica, de acordo com Sennett (2006, p. 83-84), "pode ser capaz de funcionar de maneira eficiente e lucrativa" com uma elite qualificada cada vez menor.

O fantasma da inutilidade se configura a partir de três forças, que são: oferta global de mão de obra, automação e gestão do envelhecimento. Entre elas, destaca-se nesse argumento a oferta de mão de obra global, intensificada pelo fenômeno migratório, seja pela migração de indivíduos quanto pela de empregos (SENNETT, 2006).

Nos termos de Sennett (2006, p. 85), "o mercado de trabalho [...] busca talentos baratos". A lógica do capitalismo, assim, facilita a busca de mão de obra mais barata, onde quer que ela esteja, ocorrendo nesse processo um fenômeno caracterizado pelo autor como "seleção natural" que visa ao trabalhador melhor capacitado, melhor preparado e que aceite o menor salário para desempenhar determinada função. Pode-se incluir como exemplo nessa narrativa o recrutamento que as empresas localizadas no Vale do Taquari empenharam para atrair os haitianos que estavam no Acre a fim de que assumissem vagas descartadas pelos nacionais.

Conforme observado na pesquisa, as funções pelas quais foram demandados, no entanto, não exigia qualificação profissional. Incluía, principalmente, o corte e desossa de aves e suínos, ocupações que envolvem movimentos físicos repetitivos e ocorrem, geralmente, em escalas noturnas, além de exigirem a permanência em ambiente artificialmente refrigerado. Muitos brasileiros desprezam essas atividades porque são consideradas penosas e não exigem capacitação, o que justifica os baixos salários.

Se percebeu que a escassez de mão de obra barata empregada, sobretudo, nos frigoríficos, impulsionou a busca desses migrantes haitianos no norte do país. Eles sim, em vista da extrema necessidade, aceitariam esses empregos desprezados pela comunidade brasileira local, situação ilustrativa de que a migração potencializa a oferta de mão de obra. Muitos haitianos contratados na época, inclusive, possuíam ensino superior e boa qualificação, mas as vagas não as exigiam.

Os migrantes haitianos, nesse contexto, foram contratados, principalmente, na região Sul e Sudeste do país porque são necessários para o funcionamento de setores nos frigoríficos e demais serviços da economia brasileira – como construção civil. Essa realidade corrobora a análise de Sassen (2014), a qual declara que a migração está condicionada ao funcionamento do sistema econômico dos países para o qual se deslocam, incluindo o recrutamento direto, tal como ocorreu com os migrantes haitianos recrutados, em 2012, por empresas dos setores da indústria de transformação e construção civil na região do Vale do Taquari (MEJÍA; CAZAROTTO; ROGERIO, 2018).

O reconhecimento social desses indivíduos, parafraseando Sayad (1994), é como mera força de trabalho. Eles são "estranhos necessários" (SENNETT, 2006, p. 151) para desempenhar atividades econômicas nos locais em que se estabelecem.

2. "ESTRANHOS NECESSÁRIOS": A DESCONFIANÇA PERDE LUGAR À NECESSIDADE

Sassen (2014) observa que as condições econômicas, políticas e sociais do país em que os migrantes se estabelecem determina os parâmetros dos fluxos migratórios. Brzozowski (2012, p. 143) manifesta opinião semelhante, dizendo que "o desenvolvimento econômico exerce influência sobre a migração". O Brasil, em 2012, quando o primeiro grupo de haitianos foi recrutado no Acre para o trabalho nos frigoríficos e na construção civil à região do Vale do Taquari, vivia um período econômico e político de

importância no cenário mundial e, consequentemente, favorável à migração: foi considerado a sexta maior economia do mundo[5].

No que se refere à migração haitiana, Joseph (2015, p. 50) destaca que uma das motivações da escolha do Brasil como rota de mobilidade foi "a posição pública e internacional de abertura e de hospitalidade do Governo brasileiro em relação aos haitianos". Silva (2012) informa que o então presidente do país, Luiz Inácio Lula da Silva, ao visitar o Haiti logo após o terremoto, em 2010, manifestou apoio e declarou que os haitianos seriam acolhidos caso viessem ao Brasil.

Bersani e Joseph (2017, p. 10) reforçam o discurso de que o espaço de mobilidade transfronteiriço Haiti-Brasil, a partir de 2010, foi construído na ideia "do Brasil como 'terra de oportunidades'"[6]. Além disso, foi difundida a informação de que havia "expectativa da existência de uma demanda de mão de obra para o trabalho nas obras da Copa do Mundo de 2014 e dos Jogos Olímpicos de 2016".

O bom contexto econômico e político em que o país vivia no cenário mundial, aliado à "postura pública de abertura e hospitalidade adotada internacionalmente pelo governo brasileiro" propícia à migração haitiana (BERSANI; JOSEPH, 2017, p. 10) podem ter favorecido o aumento do fluxo migratório haitiano ao Brasil a partir do ano de 2010. Nesse sentido, é possível endossar a ideia de Sassen (2014) quando ela afirma que as condicionantes econômicas, políticas e sociais do país "receptor" podem determinar os fluxos migratórios.

Mas, e se o Brasil não estivesse em um contexto econômico de crescimento, alinhado a um posicionamento político de aparente hospitalidade à migração? E se as empresas não estivessem precisando dessa mão de obra que foi suprida pelos migrantes, o governo federal estaria interessado em demonstrar empatia à mobilidade haitiana e em regularizar a permanência desses migrantes por meio do visto humanitário? Não fossem trabalhadores assalariados e contribuintes, seriam aceitos ou tolerados pela sociedade? E se não atendessem aos interesses e necessidades do mercado?

Sassen (2014) sugere que a migração se apresenta como parte integrante dos espaços e períodos de crescimento da economia do país "receptor". E aí fica o questionamento: o posicionamento favorável à migração haitiana manifestado pelo governo brasileiro em 2010 foi simples e, puramente, hospitalidade e gentileza ou havia o interesse na mão de obra?

A autora denomina de "país receptor" o local em que os migrantes se estabelecem e chama à atenção o fato de que o Estado não pode se considerar um observador passivo e acreditar que a migração é um processo exógeno, constituído e configurado por condições externas ao país e que fogem de seu domínio e controle (SASSEN, 2014).

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[5] Reportagens dos anos de 2011 e 2012, amplamente difundidas na rede mundial de internet, destacam esse dado. Para mais informações, acessar: <https://economia.uol.com.br/noticias/redacao/2013/03/01/pib-2012.htm>; <https://oglobo.globo.com/economia/brasil-a-sexta-maior-economia-do-mundo-4233033>; <https://www.bbc.com/portuguese/noticias/2011/12/111226_grabretanhabrasil_ss>; <https://istoe.com.br/184334_BRASIL+ULTRAPASSA+REINO+UNIDO+E+SE+TORNA+6+ECONOMIA+DO+MUNDO/>.

[6] Os autores Bersani e Joseph (2017, p. 10) esclarecem que "relações entre Haiti e Brasil remontam à década de 1940, particularmente no campo diplomático, mas foi a partir de 2004 que elas se intensificaram. No referido ano, o Haiti se tornou espaço de atuação de várias instituições brasileiras, como, por exemplo, as tropas militares da Missão das Nações Unidas para a Estabilização do Haiti (MINUSTAH), além de outras Organizações Não-Governamentais (ONGs) e religiosas brasileiras já presentes no país".

Devido à dificuldade em conseguir informações, diretamente, das empresas que recrutaram e contrataram os migrantes haitianos[7], algumas, inclusive, ainda são as maiores empregadoras dessa mão de obra, - como a Dália Alimentos, em Encantado, que buscou um grupo de, aproximadamente, 50 haitianos -, reportagens divulgadas em 2012 em jornal de circulação regional dão conta do otimismo da cooperativa pela vinda dos migrantes, os quais teriam a possibilidade de "reconstruir suas vidas através do trabalho"[8].

Figura 4 - Reportagem divulgando a chegada de haitianos em Encantado/RS

Fonte: Pastoral do Migrante Regional Sul (2012)[9].

No que se refere à vinda dos haitianos a Lajeado, reportagem veiculada no mesmo jornal em 2012 informa que a construtora Zagonel supriu a escassez de operários na região recrutando haitianos que estavam em Manaus, no Amazonas. O proprietário da construtora informou que muitas obras estavam sendo construídas e com o grupo que veio a falta de mão de obra para serventes, pedreiros e operadores foi

[7] No decorrer da pesquisa de campo, todas as tentativas de contato com algumas empresas que contratam haitianos nas cidades de Lajeado e Encantado, no Rio Grande do Sul, restaram inexitosas. As aproximações foram mediadas via ofício, email, telefone e, até mesmo, presencialmente, mas mesmo identificando, devidamente, o projeto e a Universidade, as conversas foram negadas e, em alguns casos, as solicitações sequer respondidas. Pelo observado, a temática migração e trabalho não é bem recebida como um ponto de convergência entre a academia e o ramo empresarial. Só não se entende a razão que motiva esse afastamento pois, se não há nada de irregular na contratação de migrantes, por que não é possível o diálogo sobre o assunto? Para elucidar a recusa específica ao tema, em uma oportunidade contatamos uma empresa, via telefone, e solicitamos uma conversa com o representante do setor de Recursos Humanos sobre desenvolvimento regional, apenas, sem mencionar o interesse pela contratação de migrantes. A conversa foi, prontamente, marcada. Porém, em outro momento, para a mesma empresa requeremos uma conversa para tratar da importância da mão de obra migrante ao desenvolvimento regional: a solicitação teve que ser reforçada via email, passou de um setor para outro, exigindo trâmites excessivos, além da demora no retorno. Esses entraves impediram a obtenção de informações diretamente das empresas.

[8] Essa informação foi divulgada na reportagem veiculada no jornal "O Informativo", intitulada "Haitianos chegam para trabalhar no Vale do Taquari", em 16 de outubro de 2012. Disponível em: <https://www.informativo.com.br/geral/haitianos-chegam-para-trabalhar-no-vale-do-taquari,7876.jhtml>. Acesso em: 26 ago. 2020. Outra reportagem foi divulgada no blog da Pastoral do Migrante Regional Sul, com o título "50 haitianos vão trabalhar em empresa de Encantado", no dia 15 de outubro de 2012. Disponível em: <http://pastoraldomigranteregionalsul.blogspot.com/2012/10/cidade-de-encantado-rs-recebe-o.html>. Acesso em: 20 ago. 2020.

[9] Imagem divulgada no blog da Pastoral do Migrante Regional Sul, no dia 15 de outubro de 2012, em matéria denominada "50 haitianos vão trabalhar em empresa de Encantado". Disponível em: <http://pastoraldomigranteregionalsul.blogspot.com/2012/10/cidade-de-encantado-rs-recebe-o.html>. Acesso em: 17 set. 2020.

resolvida[10]. As informações divulgadas revelam o interesse laboral que os migrantes despertaram e não dizem respeito, necessariamente, a um direito de livre circulação. A presença do migrante haitiano estaria relacionada à necessidade do mercado de trabalho.

Figura 5 - Haitianos trabalhando no setor da construção civil em Lajeado/RS

Fonte: O Informativo (2012)[11].

Essa ideia, inclusive, foi difundida por meio de mídia jornalística, na matéria com o seguinte título: "Estudo revela que a imigração ajudará manter o desenvolvimento"[12]. A mensagem parecia justificar a presença do migrante haitiano no Vale do Taquari por questões de desenvolvimento econômico, informando, sobretudo, que o mercado de trabalho precisa de pessoas economicamente ativas e os migrantes demonstram boa disposição para o trabalho.

O informe revelou, ainda, que o número de filhos por casal diminuiu na região, razão pela qual se projetava a seguinte situação: com menos pessoas nascendo e a população envelhecendo, os migrantes poderiam manter o ritmo de crescimento das cidades. Apesar da abordagem com viés mercadológico da importância do migrante haitiano, houve destaque para o fato de que o Vale do Taquari se tornaria ainda mais rico em cultura e etnias.

[10] Matéria divulgada no jornal "O Informativo", em 27 de junho de 2012, denominada "Haitianos viram pedreiros na cidade". Disponível em: <https://www.informativo.com.br/geral/haitianos-viram-pedreiros-na-cidade,6051.jhtml>. Acesso em: 26 ago. 2020.

[11] Matéria divulgada no jornal "O Informativo", em 27 de junho de 2012, denominada "Haitianos viram pedreiros na cidade". Disponível em: <https://www.informativo.com.br/geral/haitianos-viram-pedreiros-na-cidade,6051.jhtml>. Acesso em: 26 ago. 2020.

[12] A reportagem "Estudo revela que a imigração ajudará manter o desenvolvimento" foi divulgada no jornal "O Informativo", no dia 22 de junho de 2015, e pode ser acessada no seguinte endereço eletrônico: <https://www.informativo.com.br/tema-do-dia/estudo-revela-que-a-imigracao-ajudara-manter-o-desenvolvimento,29633.jhtml>. Acesso em: 26 ago. 2020.

Essas notícias jornalísticas, além de ajudarem a contextualizar a vinda dos haitianos à região, podem revelar a influência dos meios de comunicação na difusão da imagem do migrante haitiano e na construção da opinião pública. O migrante haitiano foi caracterizado como trabalhador e necessário ao desenvolvimento econômico das cidades, o que pode ter colaborado na formação de opinião sobre esse fluxo migratório.

Não se pode ignorar que o ambiente laboral na região do Vale do Taquari é atrativo aos migrantes haitianos e a vinda e permanência de alguns para esse local é definida pelas oportunidades que o mercado de trabalho oferece: mão de obra para ser empregada em postos de trabalho com baixos salários. Mesmo constatando que a economia é elemento que intervém na circulação de pessoas, outra observação é possível delinear: os migrantes também constroem as dinâmicas migratórias através das experiências e trajetórias de vida nos espaços em que se mobilizam.

Exemplificando esta observação, num primeiro momento, um pequeno grupo foi atraído e recrutado para cidades da região. Depois, porém, a vinda constante de haitianos foi mobilizada pelas redes migratórias construídas entre eles e dinamizada para as demais regiões do país. Nieto (2014) assevera que o dinamismo dos haitianos transformou os territórios devido às interações das redes migratórias e Joseph (2015, p. 168) acrescenta que a "difusão espacial da mobilidade haitiana" foi impulsionada pelas "redes de trabalho e os contratos de empresas".

A migração de haitianos ao Vale do Taquari, sob a perspectiva da maioria dos brasileiros, se caracteriza como uma migração econômica, mas, e sob o ponto de vista dos haitianos, afinal, qual a motivação da mobilidade? Migram para trabalhar, estudar, para ascender economicamente? É uma necessidade, um sonho, um projeto de vida?

3. AFINAL, QUAL O SIGNIFICADO DA MOBILIDADE PARA OS HAITIANOS?

Conforme Joseph (2015, p. 163), "o trabalho, a atividade econômica é uma dimensão importante da mobilidade" haitiana. No entanto, são diversos os fatores que os mobilizam, entre eles políticos, culturais, educacionais, estratégias geográficas e sociais. O pesquisador salienta que a "mobilidade é um fenômeno antigo e estrutural entre os haitianos" (JOSEPH, 2015, p. 48).

As remessas monetárias constituem importante dimensão da migração haitiana, e são fatores que tornam complexo esse fenômeno migratório. Muitas famílias que permanecem no Haiti são dependentes dessas remessas. Sob essa perspectiva se compreende a observação de Joseph (2015, p. 74), de que a "mobilidade dos que partem contribui à imobilidade dos que ficam e vice-versa", identificada pelas remessas enviadas pelos migrantes haitianos aos que permanecem ou pelo financiamento da viagem aos que partem.

De acordo com pesquisa de Baeninger e Peres (2017, p. 136), quantia significativa dos salários de haitianos que trabalham no Brasil foram enviadas para familiares no Haiti, o que caracteriza as remessas "elemento estruturante do campo social desta migração". Para Magalhães (2017, p. 241), "as remessas de migrantes são responsáveis por financiar parte significativa do consumo corrente das famílias receptoras". Além do âmbito familiar, favorecem a economia do país: conforme pesquisa de Magalhães (2017, p.

240), nos últimos dez anos as remessas de migrantes constituíram "entre 22% e 26% do PIB nacional" haitiano.

O contexto da dependência de remessas parece ser significativo no caso haitiano. Para além desse indicativo, Joseph indica que a migração constitui o mundo social haitiano, como descrito a seguir:

> O mundo da mobilidade possui lógicas próprias que ordenam a vida das pessoas e o seu mundo social. A mobilidade se desenvolve, ao mesmo tempo, como uma perspectiva econômica, mas também como um modelo social. De prática conjuntural, a mobilidade tende a se constituir, a partir de uma lógica estrutural. No Haiti, ela se impõe como uma realidade social de primeira ordem. [...] A mobilidade é constitutiva do cotidiano haitiano (JOSEPH, 2015, p.186).

O que o autor destaca é que além da mobilidade ser "constitutiva do mundo social" haitiano, ainda é um universo que constituiu a "trajetória de vida das pessoas e dos horizontes de possibilidades delas" (JOSEPH, 2015, p. 393). Ao descrever a historicidade da mobilidade haitiana, ele conta que não seria exagero afirmar que a maioria da população tem o "sonho de partir ou viajar", assim como é comum que as redes familiares tenham, pelo menos, um componente em outro país.

Parafraseando Joseph (2015, p. 67), existem expressões que marcam o mundo social haitiano, como as frases: "'Tenho de viajar um dia para *peyi etranje'* (país estrangeiro), 'Desde que nasci, meu sonho era partir um dia', e 'Antes de morrer com certeza vou partir'". Ele retrata que a migração, para muitos, "se constitui numa 'obrigação', como 'algo predestinado' e num 'sonho' a ser realizado" (JOSEPH, 2015, p. 67).

A prática da mobilidade é comum no Haiti desde a fundação colonial, como demonstra o trecho que segue:

> Desde a fundação do Haiti como colônia, a mobilidade – mesmo tendo sido forçada – esteve presente com a vinda dos milhares de escravizados africanos através do comércio transatlântico. Posteriormente, a peculiaridade e o contexto singular da luta pela independência – entre 1793 e 1803 – coincidente com a libertação dos escravizados, teria constituído uma nova cultura de *marronnage*, de mobilidade e de migração. Os principais estudos sobre a história da emigração haitiana, geralmente não dão ênfase aos descendentes dos *affranchis* (ex-escravizados) e aos *mûlatres* (mulatos) considerados como parte da elite e proprietários de terras, que mandavam seus filhos, desde o final do século XVIII, e também, posteriormente, no século XIX, após a Independência do Haiti, para realizar seus estudos na França (JOSEPH, 2015, p. 67-68).

A prática da mobilidade entre os haitianos é tão habitual na configuração histórica do país que, inclusive, os processos migratórios, desde o início do século XX até a atualidade, são divididos em quatro fluxos[13]. O aumento da dinâmica migratória haitiana

[13] Conforme explicação de Joseph (2015, p. 69, 70, 72 e 73), "o primeiro grande fluxo de mobilidade de haitianos para o exterior constituiu-se no período no qual as forças armadas americanas ocuparam Haiti (1915-1943) e República Dominicana (1912-1924) simultaneamente. [...] O segundo fluxo de migração haitiana inaugura-se quando os Estados Unidos se tornaram mais familiar no universo haitiano. No plano cultural, no Governo Élie Lescot (1941-1946), o inglês tornou-se obrigatório no sistema educacional do país e cresceram significativamente as igrejas protestantes americanas. [...] O fenômeno do *boat people* teve seu auge nesse segundo fluxo migratório de 1977 a 1981 quando 50.000 a 70.000 haitianos chegaram vivos às costas da Flórida, tendo

ao Brasil corresponde ao quarto fluxo de mobilidade, que teve início em 2010. Diversas foram as razões que impulsionaram "novos sujeitos e circuitos no espaço migratório internacional" nessa quarta classificação, entre elas: "insegurança pública, política, socioeconômica, alimentícia, educacional, incluindo a área da saúde e do saneamento básico" no Haiti, quadro que foi "agravado pela tragédia provocada pelo terremoto de janeiro" de 2010 (JOSEPH, 2015, p. 73).

Joseph explica que os interlocutores de sua pesquisa alegavam que não estavam abandonando o país, como fundamentado abaixo:

> Os meus interlocutores explicavam a escolha pela mobilidade não como uma opção de deixar o Haiti ou um abandono do país, mas através da expressão evocada por eles: *chèche lavi*: busca daquilo não encontrado no país, isto é, estabilidade política e socioeconômica, serviços de saúde, infraestrutura, estudo, trabalho, dinheiro para enviar aos próximos. Nas palavras deles, na busca *d'un mieux être* (do bem-estar), uma qualidade de vida cotidiana melhor do que aquela do Haiti. A profundidade histórica abordada aqui revela o caráter constitutivo que a mobilidade tem no universo social haitiano (JOSEPH, 2015, p. 73-74).

Esta observação do autor foi confirmada em conversas com colaboradores da pesquisa. Um deles contou que migrou porque lá no Haiti estava tudo devastado, comentou do desastre que o terremoto causou e que não gostava de lembrar, a expressão de seu rosto denunciava a tristeza que sentia. Porém, ele seguiu contando, como um desabafo, sobre o dia do terremoto. Ele estava na escola, um prédio de 10 andares, e ouviu a voz de Jesus no seu ouvido dizendo para ir embora – em muitas narrativas é recorrente a manifestação da religiosidade como um recurso simbólico de sentido às experiências pessoais. Pegou sua mochila e foi para casa. Pouco depois que chegou em casa houve o sismo. O prédio de sua escola, onde estava, virou um andar só, disse:

> Sabe uma gaita fechada? De repente ele estava inteiro e depois caiu tudo. Meus amigos estavam lá e morreram todos. Perdi muitas pessoas. Estava tudo devastado, sem futuro. Não tinha futuro ficar lá. Muita gente estudando, não tem o que fazer, onde se empregar. Aí vem embora pra começar uma nova vida, é um recomeço. Recomeço porque se você era empresário, advogado, engenheiro, professor, o que você estudou, isso não importa mais, fica para trás. Você tem que recomeçar a sua vida. Aí pra ter uma vida melhor as famílias se organizam e os filhos vão para outros países recomeçar, ter um futuro (DIÁRIO DE CAMPO, 23/01/2019, p. 04).

O recomeço é definido e apoiado, muitas vezes, pela família, como dito pelo interlocutor. Na diáspora haitiana as famílias transnacionais constituem redes sociais e familiares que compartilham recursos materiais e financeiros, o que possibilita a existência do espaço social transnacional em constante movimento (NIETO, 2014).

Outro colaborador, em diálogos sobre a saudade que o Haiti desperta, disse: "nem fale, todo dia, é muito difícil". Revelou que quer voltar para lá: "Todo mundo quer. Mas

morrido muitos nesse mesmo período em alto mar. [...] Um terceiro fluxo de mobilidade haitiana iniciou-se na primeira metade da década de 1990. No contexto do golpe de Estado e da deportação do ex-presidente Jean-Bertrand Aristide, aproximadamente 46.000 *boat people* foram interceptados em alto mar e conduzidos aos campos de detenção de Guantânamo Bay em Cuba. [...] O quarto registro de fluxo de mobilidade haitiana iniciou-se a partir de 2010".

agora não dá. Muito problema lá ainda, Haiti não melhorou, agora problemas políticos. Sempre teve na verdade". Essas declarações evidenciam o quanto a busca por bem-estar e qualidade de vida são prioridade nas escolhas e trajetórias de vida dos migrantes, assim como declarou Joseph (2015).

O sonho de partir é alimentado pela possibilidade do recomeço. A estrutura social haitiana tem no fenômeno migratório uma prática social. O imaginário é recheado de sentimentos, planos, expectativas e de sonhos. O sonho de uma vida melhor, de aprendizado, de satisfação em proporcionar à família o que no Haiti não é possível devido à miséria e falta de oportunidade.

O projeto migratório parece ser também o projeto de vida, que é planejado pelo próprio indivíduo que migra, pela sua família ou por ambos na busca por uma vida melhor. O migrante, mesmo sob influência da globalização, pode ser considerado, então, o protagonista de sua trajetória de vida. Mezzadra (2012) propõe analisar a migração sob a perspectiva da autonomia do migrante uma vez que a migração não é, simplesmente, uma resposta aos problemas econômicos e sociais, mas também um movimento social.

A perspectiva economicista das migrações, para Mezzadra (2012, p. 71), não deve ser abordada isoladamente, deve ceder espaço à perspectiva subjetiva pois, em seus termos, é preciso dar destaque à "produção de subjetividade", que "produz cotidianamente" "choques" "por um lado, da ação de dispositivos heterogêneos de assujeitamento e, por outro, de uma multiplicidade de práticas de subjetivação". A perspectiva da autonomia, para o autor, requer sensibilidade, como descrito a seguir:

> Adotar a perspectiva da autonomia das migrações requer, portanto, uma "sensibilidade diferente", um olhar diferente, eu diria. Significa olhar os movimentos e os conflitos migratórios em termos que priorizem as práticas subjetivas, os desejos, as expectativas, e os comportamentos dos próprios migrantes. Isto não quer dizer, contudo, 'romantizar' a migração; ao contrário, a ambivalência dessas práticas e experiências subjetivas deve ser sempre levada em conta. No âmbito do fenômeno das migrações enquanto movimentos sociais, novos dispositivos de dominação e exploração são forjados, ao lado de novas práticas de liberdade e igualdade. A abordagem da autonomia das migrações deve, neste sentido, ser compreendida como uma nova perspectiva de análise das "políticas de mobilidade" (MEZZADRA, 2012, p. 73).

A partir da perspectiva do protagonismo se desconstrói o "estigma do migrante passivo, em situação de vulnerabilidade, aquele que tende a aceitar viver em condições de precariedade" (JOSEPH, 2018, p. 10). O indivíduo, diante de tantas imposições do mundo globalizado e dos interesses econômicos e políticos, age e se mobiliza para transformar a sua realidade e o meio ambiente em que habita.

Para muitos haitianos, a mobilidade é uma prática tão comum que, na verdade, a imobilidade é o que se torna curioso. Joseph (2018) argumenta que o ser humano é tendente a se deslocar, é intrínseco ao ser migrar em escala local, regional, nacional e supranacional, como destacado na abordagem seguinte:

> O migrante é um ser aberto ao mundo, um ser dinâmico que se constrói e se ressignifica através do movimento e em movimento. [...] Foram esses movimentos migratórios que acompanharam a história da humanidade, os que

> introduziram os primeiros processos globalizantes. Processos no âmbito dos quais a migração foi e continua sendo uma prática construtiva em diversas esferas da vida das pessoas, por fornecer meios e mecanismos para aprender a lidar com as alteridades e as interculturalidades. Contudo, nem sempre as pessoas dão vazão a essa vocação de estar em mobilidade por diversas razões, pessoais, familiares, econômicas, sociopolíticas, religiosas, e até de saúde. Essa vazão não está associada apenas à vontade individual e coletiva das pessoas, por vezes, também são escolhas. Alguns ficam para que outros partam. O que caracteriza uma relação mútua entre mobilidade e imobilidade (JOSEPH, 2018, p. 09).

Conforme entendimento do autor, a vocação inerente à condição humana da mobilidade nem sempre desperta. Em países em que a migração não é entendida como uma prática social constitutiva, assim como no Haiti, as pessoas que não se mobilizam, geralmente, desconfiam dos que se deslocam. Os que estão imóveis, mesmo que a qualquer momento possam se tornar seres em mobilidade, tendem a suspeitar e questionar o motivo pelo qual um indivíduo deixa "para trás" a família, os amigos, a cidade, a casa, o emprego, o estudo.

Essas inquietações, que muitas vezes dizem respeito às insatisfações de muitos dos que julgam (por exemplo, tem pessoas que não estão felizes com seu emprego mas se resignam e se acomodam à situação; essas pessoas, ao perceberem que outras estão se deslocando para mudar a realidade da qual não aceitam, não se conformam pois acham que se elas estão vivendo algo que não gostam, os demais também não tem o direito de buscar algo melhor; algumas não conseguem lidar com seus defeitos e fraquezas e apontam para o outro), são reforçadas pelos discursos preconceituosos construídos pelo governantes.

Refletir sobre a migração a partir da perspectiva de quem migra, apesar de ser um desafio, é uma experiência que desconstrói paradigmas e descortina novos horizontes, novos olhares e, com isso, reorganiza as percepções e os sentimentos.

CONCLUSÃO

O posicionamento hostil à migração que alguns governos propagam mascara interesses que dizem respeito, normalmente, as questões econômicas. A narrativa estatal que visa segregar e criminalizar o migrante como estranho, invasor e indesejado cria um clima de insegurança, reforçando as políticas restritivas respaldadas pela comunidade nacional. Esses discursos de estranhamento são alimentados pela competição acirrada do capitalismo: o medo do "estranho" não é nem tanto o medo da pessoa, mas do que ela pode "tirar de mim", como o emprego.

Muitos dos que desconfiam da presença do migrante deveriam entender que a mobilidade não é só por trabalho: é o sonho, a vida, o sentido existencial. A motivação é tão mais simples do que as narrativas negativamente construídas que parece se perder no emaranhado de complexidade do mundo globalizado tão comercial e nem tanto humano. Sob esse prisma, como afirma Joseph (2018, p. 09), migrar "vai além de um deslocamento no tempo e no espaço", é um "modo de vida do migrante".

Os deslocamentos humanos são pensados e analisados, geralmente, sob a perspectiva estatal. As questões legais impostas pelo Estado, para as pessoas em mobilidade,

são pensadas estrategicamente e, apesar das políticas restritivas, algumas, inclusive, desconhecidas por elas, é preciso "saber circular entre mundos legais". Buscar afirmar-se diante do Estado, mesmo perante tantas barreiras, é tentar "levar a vida" e buscar o "bem-estar", seja juntando dinheiro, cumprindo as obrigações com os que ficam", "mantendo "reputações pessoais e familiares", tendo acesso à documentação, entre outros (JOSEPH, 2015, p. 36).

Porém, o projeto migratório parece ser também o projeto de vida de muitos haitianos que se deslocam, no caso específico ao Brasil, que é planejado pelo próprio indivíduo que migra, pela sua família ou por ambos na busca por uma vida melhor. O migrante, mesmo sob influência da globalização, pode ser considerado, então, o protagonista de sua trajetória de vida.

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PERSPECTIVAS HISTÓRICAS ACERCA DA TRIBUTAÇÃO NO BRASIL E SEUS REFLEXOS NA CONSTITUIÇÃO FEDERAL DE 1988

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RESUMO

Trata-se de artigo desenvolvido com o objetivo de demonstrar, ainda que forma breve, alguns aspectos históricos da tributação brasileira e seus reflexos no atual sistema tributário trazido pela Constituição Federal de 1988. Busca-se dar ênfase aos aspectos principais da tributação brasileira, desde o período Colonial até a atualidade, com o intuito de evidenciar as opções feitas pelos governantes e que implicam em uma tributação regressiva e, portanto, que se afasta do ideal da justiça fiscal. Será utilizado o método de raciocínio dedutivo, partindo-se de uma ideia geral para conclusões particulares, realizando-se consultas doutrinárias, de sites especializados em temas jurídicos, revistas qualificadas, entre outros, que desempenham ação difusora de informações, cujas referências serão colacionadas ao final. Busca-se, como resultado do trabalho, demonstrar que a tributação é um importante meio para a satisfação dos direitos fundamentais, desde que seja direta e equilibrada, bem como proporcione a distribuição dos recursos arrecadados e a prestação de serviços públicos capazes de satisfazer as necessidades da população.

PALAVRAS-CHAVE: História do Brasil. Tributação. Direitos Fundamentais.

HISTORICAL PERSPECTIVES ON TAXATION IN BRAZIL AND ITS REFLECTIONS ON THE FEDERAL CONSTITUTION OF 1988

ABSTRACT

This article is developed in order to demonstrate, albeit briefly, some historical aspects of brazilian taxation and its reflections in the current tax system brought by the Federal Constitution

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of 1988. It seeks to emphasize the main aspects of brazilian taxation, from the colonial period to the present time, with the aim of eviding the choices made by the rulers and implying a regressive taxation and, therefore, that departs from the ideal of justice tax. The method of deductive reasoning will be used, starting from a general idea for particular conclusions, conducting doctrinarian consultations, of sites specialized in legal issues, qualified journals, among others, who perform action Information broadcaster, whose references will be collated at the end. It seeks, as a result of the work, to demonstrate that taxation is an important means for the satisfaction of fundamental rights, provided that it is direct and balanced, as well as providing the distribution of funds collected and the provision of services able to meet the needs of the population.

KEYWORDS: History of Brazil. Taxation. Fundamental Rights.

1. INTRODUÇÃO

O presente trabalho, no qual será utilizado o método de raciocínio dedutivo, posto que se parte de uma ideia geral para conclusões particulares, através de consultas doutrinárias, sites especializados em temas jurídicos, entre outros, que desempenham ação difusora de informações, cujas referências serão colacionadas ao final, busca avaliar as relações de poder político presentes na esfera da tributação brasileira, analisando contextos históricos e suas implicações no sistema jurídico atual.

Procura-se abordar os temas pertinentes à tributação e às mudanças sofridas com base em uma breve análise do contexto histórico e político em que foram estabelecidas suas diretrizes. Para isto, serão utilizadas como fontes de pesquisa as obras jurídicas relacionadas ao direito tributário, e, ainda, os livros de história que trazem ideias referentes à história da tributação brasileira, para que seja possível debater tais questões voltadas ao direito tributário atual frente aos ideais de justiça que permeiam o ordenamento jurídico brasileiro.

2. DESENVOLVIMENTO

2.1 BREVES PERCEPÇÕES SOBRE A TRIBUTAÇÃO NO BRASIL

O estudo da fiscalidade propicia um ângulo estratégico para se pensar a formação do Estado Moderno porque possibilita explorar a relação entre a dinâmica da vida material, a construção das instituições políticas e a pulsão conflitiva das forças sociais. As possibilidades abertas pelo estudo do fisco permitem olhar o Estado simultaneamente em relação ao conjunto de instituições que materializam a projeção do poder para fora do corpo social, e naquilo que é peculiar à história de cada Estado, como a interação específica que se estabeleceu entre a esfera política que se constitui como pública e os detentores privados de poder e riqueza[4].

Um excelente indicador da distribuição de poder em um sistema político são as contas do governo, uma vez que o poder de lançar tributos e as condições de legitimidade em que ele se exerce esteve no centro das lutas que fundaram o Estado moderno[5]

[4] COSTA, Wilma Peres. Do domínio à nação: os impasses da fiscalidade no processo de independência. *In* JANCSÓ, Istvan (Org.). **Brasil**: formação do Estado e da Nação. São Paulo: Hucitec, 2003. P. 143.
[5] CARVALHO, José Murilo de. **A construção da ordem**: a elite política imperial. Teatro de sombras: a política imperial. 7. ed. Rio de Janeiro: Civilização Brasileira, 2012. P. 263.

"A realidade histórica brasileira demonstrou a persistência secular da estrutura patrimonial, resistindo galhardamente, inviolavelmente, à repetição, em fase progressiva, da experiência capitalista"[6].

As práticas tributárias aplicadas no Brasil, desde o século XVI, acompanharam as diferentes estruturas políticas e administrativas utilizadas pela metrópole no processo de colonização. Além disso, tinham como pano de fundo os diferentes modos de exploração adotados e, principalmente, a diversidade das riquezas extraídas ao longo do tempo. O modelo tributário brasileiro possuía suas raízes no além-mar, pois "era organizado a partir de uma administração que vinha de fora, sem uma estrutura interna de gestão e controle"[7].

2.1.1 A Estrutura Tributária no Brasil Colonial

A tributação no período colonial era extremamente pesada, e havia interesse de que, ao menos parte dela, fosse paga in natura porque assim se poupava a moeda metálica, sempre rara na colônia[8]. À estrutura patrimonial portuguesa, somava-se o sistema colonial, apêndice de terras e bens a colher com pressa, para a riqueza rápida e a opulência da metrópole[9].

O aparelhamento de sucção do Estado, montado sobre o sistema colonial e mercantil de controle das exportações e do comércio, gerou consequências permanentes de dependência. O alvo visado pela atividade financeira era o pagamento de benefícios à nobreza, reduzida a pedinte de favores e rendas, ao funcionalismo e ao exército. O desenvolvimento da metrópole e das colônias não constava no plano de governo[10].

No período colonial, em regra, era muito escassa a receita local: nem a Coroa primava pelo comedimento fiscal, nem o sistema econômico do latifúndio escravista era favorável ao enriquecimento do erário das comunas, uma vez que os senhores de terra teriam que tributar a si mesmos[11]. Em uma visão de conjunto, pode-se afirmar que as finanças das câmaras coloniais eram insuficientes até mesmo para as reduzidas obras de que se incumbiam, isso porque um terço da receita por elas coletada pertencia à Coroa, a qual estava livre de qualquer despesa de arrecadação[12].

"O principal objetivo da administração fazendária atinha-se ao controle das atividades mercantis e à consequente transferência das rendas para os grupos dominantes do Estado"[13]. Nesta seara, Graça Salgado[14], em uma tentativa de facilitar o

[6] FAORO, Raymundo. **Os donos do poder**: formação do patronato político brasileiro. 5. ed. São Paulo: Globo, 2012. FAORO, 2012. P. 822.
[7] BARCELOS, Fábio Campos. Liberalismo, descentralização e déficit nas finanças **nacionais**. *In* CABRAL, Dilma (Org.). **Estado e administração**: a construção do Brasil independente. Rio de Janeiro: Arquivo Nacional, 2015. P. 95.
[8] COSTA, Wilma Peres. Do domínio à nação: os impasses da fiscalidade no processo de independência. *In* JANCSÓ, Istvan (Org.). **Brasil**: formação do Estado e da Nação. São Paulo: Hucitec, 2003. P. 158.
[9] FAORO, Raymundo. **Os donos do poder**: formação do patronato político brasileiro. 5. ed. São Paulo: Globo, 2012. FAORO, 2012. p. 260-262.
[10] Idem, ibidem.
[11] LEAL, Victor Nunes. **Coronelismo, enxada e voto**: o município e o regime representativo no Brasil. 7. ed. São Paulo: Companhia das Letras, 2012. P. 140-141.
[12] LEAL, Victor Nunes. **Coronelismo, enxada e voto**: o município e o regime representativo no Brasil. 7. ed. São Paulo: Companhia das Letras, 2012. P. 140-141.
[13] SALGADO, Graça (Coord.). **Fiscais e meirinhos**: a administração no Brasil colonial. Rio de Janeiro: Nova Fronteira, 1985. P. 83.
[14] Idem, ibidem. P. 84.

entendimento da prática política fiscal no período colonial brasileiro, busca esquematizar as características básicas que marcaram a administração fazendária em cada uma de suas fases e o processo desenvolvido pelas suas tendências ao longo do período.

Durante a primeira fase, que se deu no período de 1530 a 1548, não existia propriamente uma estrutura administrativa fazendária, mas apenas um funcionário régio em cada capitania, o feitor e almoxarife, que acumulava as funções de arrecadar as rendas reais e administrar as feitorias[15].

Na segunda fase, período compreendido entre os anos de 1548 a 1580, teve lugar a implantação do aparelho fiscal na colônia, a qual se estruturou paralelamente a administração fazendária, que operava em duas instâncias hierárquicas: a do provedor-mor, autoridade de maior graduação da Fazenda Colonial e que tinha como funções principais centralizar a arrecadação e a contabilidade colonial, promovendo a receita e controlando as despesas; e a do provedor, que atuava como juiz das alfândegas locais, encarregado da fiscalização e registro do movimento comercial e da cobrança dos direitos alfandegários[16].

Ambas as instâncias, de provedor e provedor-mor, foram incumbidas de instalar casas para o funcionamento da administração fazendária, assim como organizar livros para registro das normas, das contas e dos tributos pagos ou devidos. Empregava-se parte da renda arrecadada na manutenção e no pagamento de toda a administração colonial e os saldos eram enviados à Metrópole, entretanto a Coroa sempre procurou reduzir seus gastos na Colônia ao mínimo indispensável[17].

Na terceira fase, entre 1580 e 1640, foi estabelecido um segmento fazendário, a administração das minas, independente de qualquer outra instância fiscal na Colônia e subordinada aos órgãos fazendários metropolitanos. Já durante a quarta fase, ou seja, de 1640 a 1750, ocorreram mudanças relevantes e se acentuou o interesse português por sua colônia americana[18].

No fim do século XVII instituiu-se o Conselho de Fazenda, órgão deliberativo dos contratos da Fazenda Real no Estado do Brasil[19]. Além disso, foi criada a Superintendência do Tabaco, órgão alfandegário especial destinado a promover e controlar o comércio desse produto. Quanto à tributação, é possível dizer que entre 1700 e 1713 vigorou a cobrança do quinto, correspondente a 20% do ouro apurado[20].

Na quinta e última fase, que perdurou do ano de 1750 até 1808, vinha sendo buscado o aperfeiçoamento da administração da fazenda, o qual prosseguiu através da instalação de órgãos especializados. Adotou-se um novo esquema funcional na estrutura fazendária, e os novos órgãos possuíam atribuições mais específicas com atuação menos personalista e maior poder de fiscalização[21].

Em síntese, ao comparar o organograma da fase 1548-1580 com o da última fase apresentada, especialmente entre os anos 1770-1808, é possível observar o quanto

[15] Idem, ibidem. P. 84.
[16] Idem, ibidem. P. 85.
[17] SALGADO, Graça (Coord.). **Fiscais e meirinhos**: a administração no Brasil colonial. Rio de Janeiro: Nova Fronteira, 1985. Pp. 85-86.
[18] Idem, ibidem.
[19] Idem, ibidem.
[20] Idem, ibidem. Pp. 87-90.
[21] Idem, ibidem. Pp. 91-92.

mudou a administração fazendária colonial. Tais modificações foram gradativa, realizadas em um processo de desdobramento sucessivo da estrutura inicial organizada em 1548, sendo que todas se deram em decorrência de ajustamentos na relação fiscal Metrópole-Colônia, tendo em vista a importância crescente que assumia, para o Estado português, a sua colônia americana[22].

2.1.2 Arrecadação e Despesa Durante o Império

Em dez anos de residência da corte portuguesa no Brasil, as finanças do novo reino se achavam na mais desgraçada situação, drenado o tesouro e esgotados os expedientes e medidas[23]. "Dir-se-ia que a seriedade timbrava em não comparecer em um só domínio administrativo e em mostrar-se incompatível com essa política mesquinha, de pequenos embaraços e grandes dificuldades para tudo [...]"[24].

No século XIX, não era por culpa do contribuinte que a receita do Estado não era suficiente para as despesas, pois além do dízimo tradicional de todos os produtos agrícolas, pescarias e gado, dos direitos aduaneiros de exportação sobre todos os gêneros e dos direitos de importação sobre quaisquer mercadorias, tinha o contribuinte que pagar para o erário uma porção de impostos especiais[25].

Tais impostos compreendiam o subsídio real ou nacional, representado por direitos sobre a carne verde, couros crus ou curtidos, a aguardente de cana e as lãs grosseiras manufaturadas no país; o subsídio literário, para custeio dos mestres-escolares; o imposto em benefício do Banco do Brasil; a taxa suntuária, também em benefício do aludido Banco e que recaía sobre cada carruagem de quatro e duas rodas; a taxa sobre engenhos de açúcar e destilações; a décima do rendimento anual das casas e quaisquer imóveis urbanos; a sisa, imposto de 10% percebido sobre a venda de casas e outros imóveis urbanos; a meia sisa, que era o imposto de 5% sobre a venda de um escravo que já tivesse aprendido um ofício; e, por fim, os chamados novos direitos, representados por uma taxa de 10% cobrada, ou melhor, tirada dos salários dos empregados nos departamentos da Fazenda e Justiça[26].

Além destes impostos gerais e outros que abrangiam selos, foros de patente, direitos de chancelaria, taxas de correio, sal, sesmarias, ancoragens, etc., pesavam sobre o contribuinte os tributos particulares, que figuravam sob a forma de taxas municipais[27]. Os rendimentos não correspondiam aos gastos públicos, assim, o equilíbrio só poderia se dar com reformas radicais que privassem os nobres de comendas, pensões, bens da coroa e inúteis empregos lucrativos. Entretanto, não eram somente as despesas da Real Casa, as pensões dos fidalgos e os desperdícios que avolumavam e desconcertavam o orçamento do Estado, mas também as falcatruas e, sobretudo as incúrias administrativas que respondiam pela angústia financeira[28].

Com seu mecanismo obsoleto de produção de riqueza e seu aparelho de sucção da energia nacional em benefício das classes privilegiadas, a corte era o cancro roedor

[22] Idem, ibidem. P. 95.
[23] LIMA, Oliveira. **Dom João IV no Brasil**. 3. ed. Rio de Janeiro: Topbooks, 1996. P. 471.
[24] Idem, ibidem. P. 472.
[25] Idem, ibidem. P. 475.
[26] Idem, ibidem. P. 475-476.
[27] Idem, ibidem. P. 476.
[28] LIMA, Oliveira. **Dom João IV no Brasil**. 3. ed. Rio de Janeiro: Topbooks, 1996. P. 476.

da vitalidade econômica do país. Além disso, acudia seus dependentes imediatos não só com mesadas e cargos rendosos, mas até com rações diárias de víveres, as quais nem mesmo as pessoas bastante ricas desdenhavam[29]. "As despesas da ucharia de Dom João VI ficaram impressas na tradição popular e são ainda hoje citadas como simbólicas da imprevidência e prodigalidade da administração da Real Casa"[30].

O rendimento público, que subiu devido ao agravamento dos impostos e, sobretudo pelo desenvolvimento dos recursos e expansão da vida econômica, favoreceu os gastos[31]. Contudo, não havia dinheiro que chegasse, conforme expõe Oliveira Lima[32]:

> Os numerosos vícios da administração parecem-me constituir os primeiros motivos da penúria; por causa de uma infinidade de abusos os rendimentos públicos escoam-se em parte nos bolsos dos que o os percebem; a fraude outrossim provocada pela elevação dos direitos aduaneiros mais prejudica a cobrança; despesas na realidade módicas sobem a somas consideráveis graças à improbidade dos que se acham delas encarregados, a nobreza que acompanhou o Príncipe é pobre e vive do tesouro [...]

Durante o Império, o orçamento refletia o conflito entre a burocracia, a máquina do Estado, sempre em busca de maiores recursos, e os grupos dominantes na sociedade, aqueles de quem se podiam extrair estes recursos[33]. "Representava o conflito interno de uma elite política que hesitava entre as necessidades do governo, que ela dirigia, e os interesses dos proprietários que ela devia representar"[34].

Na perspectiva da receita, o orçamento indicava até onde se estendia a capacidade do governo de extrair recursos e de que setores da população estes eram extraídos e, pelo lado da despesa, detectavam-se quais eram as prioridades do governo e a quem elas beneficiavam[35]. No Brasil Imperial, os impostos de importação tinham, quase sempre, natureza fiscal, cuja razão maior provinha da necessidade do tesouro em aumentar seus recursos. No que se refere aos direitos de exportação, esta taxação atingia, muitas vezes, a marca de 10% e constituía grande parte da renda das províncias, o que era algo surpreendente, pois atingia diretamente os setores mais poderosos da agricultura[36].

Neste sentido, José Murilo de Carvalho[37], sustenta que houve intensos debates na Câmara e no Conselho de Estado a respeito da conveniência ou não da adoção da taxação das exportações, e que, por outro lado, havia o poderoso argumento de ser ele imposto fácil de coletar e de resultado imediato. A alternativa mais comum que se colocava era o imposto territorial rural, mas contra este se argumentava a dificuldade de arrecadação devido à falta de cadastramento rural, bem como o baixo nível de acumulação de riqueza na maioria das propriedades rurais[38].

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[29] Idem, ibidem. P. 478.
[30] Idem, ibidem.
[31] Idem, ibidem. P. 479.
[32] Idem, ibidem. P. 479.
[33] CARVALHO, José Murilo de. **A construção da ordem**: a elite política imperial. Teatro de sombras: a política imperial. 7. ed. Rio de Janeiro: Civilização Brasileira, 2012. P. 263.
[34] Idem, ibidem.
[35] CARVALHO, José Murilo de. **A construção da ordem**: a elite política imperial. Teatro de sombras: a política imperial. 7. ed. Rio de Janeiro: Civilização Brasileira, 2012. Pp. 264-268.
[36] Idem, ibidem.
[37] Idem, ibidem. P. 269.
[38] Idem, ibidem.

> O imposto territorial teria em tese atingido número muito maior de pessoas, isto é, todos os proprietários rurais, e seria muito mais difícil de arrecadar. A reação política também seria muito maior. E não havia nada que preocupasse tanto os conselheiros como a possibilidade de reação política da população[39].

O debate a respeito dos direitos de importação não foi menos intenso, embora os interesses envolvidos fossem outros. Poucos eram aqueles que acreditavam nos benefícios do livre comércio e as propostas de redução dos direitos de importação eram sempre adiadas. Além disso, a facilidade em cobrar o imposto era fator importante, uma vez que os resultados eram imediatos e o contribuinte não percebia que estava pagando, ao contrário, por exemplo, do imposto de renda[40].

Contra o imposto de renda as objeções eram ainda maiores, pois se considerava de difícil arrecadação por ser problemático avaliar a renda, estar sujeito a muita sonegação, e também por ser capaz de provocar uma reação negativa entre os contribuintes. Considerava-se que o imposto sobre o salário era imposto de revolta[41].

Ao final do período do Império, quatro tipos de impostos representavam 93% de toda a renda interna, sendo eles os impostos sobre indústrias e profissões, transmissão de propriedade, empresas estatais e selos. As rendas das empresas estatais representavam 56% do total. Já o rendimento do imposto de renda, por sua vez, era muito baixo, pois acabava atingindo mais os empregados públicos pela facilidade de verificar-se o valor dos salários[42].

Não restam dúvidas de que o governo estava muito menos aparelhado para cobrar impostos diretos, seja sobre a renda, seja sobre a propriedade. O único imposto que funcionava razoavelmente era sobre a propriedade imobiliária urbana, posto que nos outros casos haveria certamente muita sonegação e o custo da arrecadação seria alto[43].

De qualquer modo, quem mais se beneficiava da estrutura de impostos eram os produtores para o mercado interno, pois não pagavam o imposto de exportação e não eram onerados com imposto sobre a terra nem sobre a renda. Pagavam apenas a taxa sobre escravos, a qual era frequentemente sonegada[44]. Na falta de recursos fiscais, o governo se via forçado a recorrer a empréstimos, internos ou externos, sendo que boa parte do déficit foi gerada por gastos com revoltas, guerras e desastres naturais, além das indenizações pagas por muito tempo a Portugal, como consequência das negociações da independência[45].

O Estado preocupava-se fundamentalmente com sua própria organização e com o estabelecimento de um grau mínimo de controle sobre o país, inclusive pela supressão de rebeliões internas. Além disso, notava-se um aumento na legislação referente ao desenvolvimento econômico, acompanhado da correspondente redução da preocupação com administração, segurança e justiça, bem como do insignificante número de

[39] Idem, ibidem.
[40] Idem, ibidem.
[41] CARVALHO, José Murilo de. **A construção da ordem**: a elite política imperial. Teatro de sombras: a política imperial. 7. ed. Rio de Janeiro: Civilização Brasileira, 2012. Pp. 269-270.
[42] Idem, ibidem. Pp. 270-271.
[43] Idem, ibidem. P. 271.
[44] Idem, ibidem. P. 272.
[45] Idem, ibidem. P. 272.

decretos relacionados à agricultura, apesar de ser esta a atividade econômica básica do país, levando a conclusão de ser este um indicador das relações ambíguas da elite e da burocracia com os proprietários rurais[46].

No que se refere às despesas chamadas de econômicas, estas eram basicamente as despesas sociais de infraestrutura, concentradas em obras públicas variadas e, posteriormente, em investimentos nas estradas de ferro. Ademais, o apoio à imigração era uma das reivindicações mais constantes dos proprietários rurais, desde que o fim do tráfico colocou o problema da substituição da mão de obra escrava[47].

Com relação às chamadas despesas sociais, especialmente na área da educação, o governo central no Império cuidava apenas da educação superior, exceto na Corte, onde também se encarregava da educação primária e de algumas instituições de ensino secundárias, como o Colégio Pedro II e a Escola Normal. Embora fosse obrigação do Estado, definida pela Constituição de 1824, pouco foi feito pelas províncias no que se refere à educação, pois não interessava aos poderes provinciais e locais aumentar o número de cidadãos esclarecidos[48].

Os gastos com saúde pública apresentavam grandes variações, por dependerem de surtos de epidemias. Por sua vez, os gastos com assistência pública e previdência social possuíam variação irregular com algum crescimento, incluindo-se neste rol os gastos com assistência pública na Corte, como asilos, assistência à infância, etc.; os gastos com socorros públicos; pensões, montepios, aposentadorias; gastos com a assistência a ex-escravos, sobretudo com a manumissão e assistência a ingênuos[49].

O exame das receitas e despesas do governo mostrava um quadro de mudança de orientação do governo em busca de ação mais agressiva na direção do desenvolvimento econômico, afastando-se das tarefas de construir as bases do poder[50]. Além disso, o governo trabalhava sob vários constrangimentos. Em primeiro lugar, os limites da sua própria máquina burocrática, incapaz de criar condições que permitissem a arrecadação mais eficiente dos tributos. Em segundo lugar, a ação dos grupos econômicos, sobretudo dos proprietários rurais, que reagiam à decretação de certos impostos, ou pressionavam no sentido de serem beneficiados na alocação de recursos[51].

2.1.3 A Tributação no Brasil com o Advento da República

A Proclamação da República em 1889, assim como a opção por um regime federativo, não trouxe maiores mudanças na forma como os impostos eram cobrados e distribuídos[52].

[46] Idem, ibidem. Pp. 274-275.
[47] CARVALHO, José Murilo de. **A construção da ordem**: a elite política imperial. Teatro de sombras: a política imperial. 7. ed. Rio de Janeiro: Civilização Brasileira, 2012. Pp. 280-281.
[48] Idem, ibidem. P. 282.
[49] Idem, ibidem.
[50] Idem, ibidem. Pp. 285-286.
[51] Idem, ibidem.
[52] BARROS, Fernanda Monteleone. **A evolução das obrigações tributárias nas constituições brasileiras e os reflexos no atual regime tributário de energia elétrica**. Brasília: Instituto Brasiliense de Direito Público – IDP, 2012. Disponível em: <http://dspace.idp.edu.br:8080/xmlui/bitstream/handle/123456789/243/Monografia_Fernanda%20Monteleone%20Barros.pdf?sequence=1>. Acesso em: 06 out. 2019. P. 06.

Conforme expõe Ricardo Varsano[53]:

> A República brasileira herdou do Império boa parte da estrutura tributária que esteve em vigor até a década de 30. Sendo a economia eminentemente agrícola e extremamente aberta, a principal fonte de receitas públicas durante o Império era o comércio exterior, particularmente o imposto de importação que, em alguns exercícios, chegou a corresponder a cerca de 2/3 da receita pública. Às vésperas da proclamação da República este imposto era responsável por aproximadamente metade da receita total do governo.

Em contraste com a grande celeuma provocada pela divisão tributária entre a União e os Estados, os constituintes da Primeira República não se preocuparam com a receita municipal, pois, segundo a ideia dominante, a organização dos municípios era assunto da estrita competência das unidades federadas, cuja autonomia nessa matéria não devia ser limitada pela Constituição Federal[54]. No regime de 1891, diante do silêncio da Constituição, o poder tributário dos municípios era inteiramente derivado do estadual. Assim, durante a vigência da Constituição de 1891, as rendas municipais, de modo geral, foram ínfimas, pois era das fontes tributárias estaduais que tinha de sair a receita municipal[55].

Os Estados, por sua vez, também se queixavam da escassez de suas rendas relativamente aos encargos e, de fato, o déficit costumava ser a situação normal dos orçamentos estaduais. Esse resultado provinha, em grande parte, da desigual distribuição de rendas, além da má administração, uma vez que a União arrecadava no território de cada Estado renda quase igual, quando não superior à estadual, e nem sempre a aplicava da maneira mais criteriosa[56].

Na Constituição de 1934, foi vitoriosa a ideia de constar a discriminação da receita municipal. Tocaram, assim, aos municípios, o imposto de licenças; os impostos predial e territorial urbanos; o imposto sobre diversões públicas; o imposto cedular sobre a renda de imóveis rurais; metade do imposto de indústrias e profissões; 20% da arrecadação, em seu território, de impostos não especificados na Constituição e que viessem a ser criados pela União ou pelo Estado; as taxas sobre serviços municipais e qualquer outro imposto que lhes fosse transferido pelo Estado. Entretanto, todas essas rendas ficaram muito aquém das necessidades municipais[57].

A Constituição de 1937 reduziu a receita municipal, ao subtrair-lhe o imposto cedular sobre a renda de imóveis rurais e os 20% da arrecadação no território do Município, dos impostos federais e estaduais não especificados. Além disso, modificações que importaram na redução da competência tributária dos Estados aproveitaram apenas aos Estados e Municípios mais ricos e mais bem-dotados de rodovias, enquanto que os Municípios verdadeiramente necessitados de tudo, nada obtiveram e permaneceram estagnados[58].

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[53] VARSANO, Ricardo. **A evolução do sistema tributário ao longo do século**: anotações e reflexões para futuras reformas. Rio de Janeiro: IPEA, 1996. P. 02.
[54] LEAL, Victor Nunes. **Coronelismo, enxada e voto**: o município e o regime representativo no Brasil. 7. ed. São Paulo: Companhia das Letras, 2012. P. 149-151.
[55] Idem, ibidem.
[56] Idem, ibidem. P. 151.
[57] LEAL, Victor Nunes. **Coronelismo, enxada e voto**: o município e o regime representativo no Brasil. 7. ed. São Paulo: Companhia das Letras, 2012. P. 161.
[58] Idem, ibidem.

Por sua vez, a Constituição de 1946 ofereceu uma nova forma de discriminação das rendas tributárias, estruturando-se na coexistência de um sistema tributário autônomo para cada unidade da federação, ou seja, União, Estados e Municípios, e na aceitação legal de uma classificação jurídica dos impostos. Além disso, os valores a serem cobrados na forma de impostos passaram a ser calculados com base nos custos e despesas do ano fiscal anterior. Através da Constituição de 1946, também se consagrou o princípio da capacidade contributiva como um dos pilares de sustentação do direito tributário[59].

Em 1967, entrou em vigor a nova Constituição brasileira, preparada pelo Governo Militar que praticamente obrigou o Congresso a promulgá-la[60]. O texto constitucional de 1967 não trouxe alterações relevantes em relação aos tributos, uma vez que foi mantida a base prevista na Constituição de 1934[61]. À União, competia instituir dez impostos, além das taxas e contribuições de melhoria, enquanto que aos Estados e Municípios competia apenas dois impostos para cada um, afora as taxas e contribuições de melhoria, igualmente[62].

A Emenda Constitucional nº 1/1969 refletiu as mesmas tendências da Constituição de 1967, entretanto a doutrina constitucionalista brasileira a traz como uma nova Constituição. Dessa forma, com relação ao sistema tributário, tem-se que este sofreu algumas inovações, como, por exemplo, a previsão de incidência do imposto único sobre minerais e sua extração. Em suma, a Constituição editada em 1969 ratificou o Sistema Tributário de 1967 e consagrou seus princípios e regras, mantendo a mesma estrutura anterior[63].

2.1.4 Tributação a partir da Constituição Federal de 1988

O sentido ideológico do direito tributário é o de que este é capaz de proporcionar uma distribuição do ônus justa entre todas as pessoas, conforme os princípios constitucionais. No entanto, a verdade é que, nos termos identificados, o que proporciona é, na verdade, melhores condições para a acumulação do capital[64].

Sobre o tema, preceitua Humberto Pereira Vecchio[65]:

> No campo da tributação, os valores podem corresponder, na verdade, às teorias de Estado e de justiça que influenciam o legislador para a concessão de benefícios fiscais e redução de carga tributária, por exemplo, segundo os interesses do projeto neoliberal ou, ao contrário, da redistribuição e justiça fiscal ou segundo uma visão mais favorável seja à proteção do mercado interno, seja a sua liberalização. Esses valores corresponderão, na verdade, às

[59] BARROS, Fernanda Monteleone. **A evolução das obrigações tributárias nas constituições brasileiras e os reflexos no atual regime tributário de energia elétrica**. Brasília: Instituto Brasiliense de Direito Público – IDP, 2012. Disponível em: <http://dspace.idp.edu.br:8080/xmlui/bitstream/handle/123456789/243/Monografia Fernanda%20Monteleone%20Barros.pdf?sequence=1>. Acesso em: 06 out. 2019. P. 07.
[60] BALTHAZAR, Ubaldo Cesar. **História do tributo no Brasil**. Florianópolis: Fundação Boiteux, 2005. P. 159.
[61] BARROS, Fernanda Monteleone. **A evolução das obrigações tributárias nas constituições brasileiras e os reflexos no atual regime tributário de energia elétrica**. Brasília: Instituto Brasiliense de Direito Público – IDP, 2012. Disponível em: <http://dspace.idp.edu.br:8080/xmlui/bitstream/handle/123456789/243/Monografia Fernanda%20Monteleone%20Barros.pdf?sequence=1>. Acesso em: 06 out. 2019. P. 14.
[62] BALTHAZAR, Ubaldo Cesar. **História do tributo no Brasil**. Florianópolis: Fundação Boiteux, 2005. P. 163.
[63] Idem, ibidem. P. 172.
[64] VECCHIO, Humberto Pereira. **Justiça distributiva e tributação**. Universidade Federal de Santa Catarina, 2002. Disponível em: <https://repositorio.ufsc.br/handle/123456789/83722> Acesso em: 07 out. 2017. P. 203.
[65] Idem, ibidem. P. 198.

> correntes de filosofia política que podem defender as teses do Estado mínimo ou, ao contrário, de maior intervenção nas atividades econômicas, ou ainda de solução dos problemas sociais, e assim por diante.

Em síntese, o dinheiro público obtido através da tributação será gasto de acordo com uma visão filosófica e política determinada, e o resultado final destes gastos será favorável ou à acumulação do capital, ou à redistribuição de renda[66].

Nesta seara, a Constituição Federal de 1988 trouxe um capítulo dedicado exclusivamente ao sistema tributário nacional. Sustenta Renato Cesar Melo Vasconcelos[67] que os dispositivos constitucionais foram, na época, muito apreciados, sob o argumento de que estabeleceriam a justiça fiscal e reduziriam as desigualdades sociais, possibilitando que os entes federativos arrecadassem e canalizassem recursos para os serviços públicos essenciais.

Todavia, anos mais tarde a população já clamava por uma reforma que, entre outros objetivos, implicasse uma composição mais justa da carga tributária, pois esta sobrecarregava setores produtivos da economia e contribuía para a reduzida taxa de crescimento nacional[68]. Porém, pressões políticas, interesses de setores econômicos e o receio por parte dos entes federativos de uma queda da arrecadação tributária nacional, inviabilizaram a aprovação de uma reforma na tributação[69].

O sistema tributário vigente encontra sua base nos artigos 145 a 162 da Constituição Federal, em que ficaram definidos os princípios gerais da tributação nacional, as competências e limitações tributárias dos entes federativos, bem como a repartição das receitas tributárias arrecadadas[70].

Neste sentido:

> A Constituição de 1988 modernizou os impostos e descentralizou suas receitas, mas, nos outros títulos que não eram o das finanças públicas, abriu caminho para a formação de outro sistema, no qual ficou fácil aumentar a carga, explorar bases arcaicas e recentralizar as receitas. Recuperar e refletir melhor sobre esse processo histórico é uma boa fonte de inspiração para iniciarmos o que já passa da hora de ser mudado: ou a reforma do atual sistema ou, a opção de minha preferência, a construção de um novo sistema tributário no Brasil[71].

Sob o aspecto econômico, identifica-se a existência de tributos diretos e indiretos. No caso dos tributos diretos os contribuintes de fato, ou seja, aqueles que suportam o ônus fiscal, e de direito, os quais a lei designa para pagamento do tributo, são os mesmos; já nos indiretos, classicamente representados pelos impostos sobre o consumo, os

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[66] VECCHIO, Humberto Pereira. **Justiça distributiva e tributação**. Universidade Federal de Santa Catarina, 2002. Disponível em: <https://repositorio.ufsc.br/handle/123456789/83722> Acesso em: 07 out. 2017. P. 198.
[67] VASCONCELOS, Renato Cesar Melo. **O sistema tributário brasileiro e suas perspectivas face à iminente reforma tributária**. Rio de Janeiro: Fundação Getúlio Vargas, 2002. Disponível em: <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/3999/RenatoCesar.pdf?sequence=1>. Acesso em: 06 out. 2019. P. 02.
[68] Idem, ibidem.
[69] Idem, ibidem.
[70] Idem, ibidem. P. 13.
[71] DORNELLES, Francisco. **O sistema tributário na Constituição de 1988**. Rio de Janeiro. Disponível em: <https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/outras-publicacoes/volume-iv-constituicao-de-1988-o-brasil-20-anos-depois.-estado-e-economia-em-vinte-anos-de-mudancas/do-sistema-tributario-nacional-o-sistema-tributario-da-constituicao-de-1988>. Acesso em: 06 out. 2019. P. 01.

contribuintes de fato e de direito são representados por pessoas distintas. Assim, o contribuinte de direito tem a responsabilidade legal de recolher o tributo, cujo ônus financeiro é repassado para o contribuinte de fato, que é, em regra, representado pelo consumidor[72].

Para Francisco Dornelles[73], a Constituição promulgada em 1988 resultou de um grande equívoco, o que se explica pelo erro de se ter pretendido incluir no texto constitucional as posições de grupos, partidos, classes e demais setores da sociedade. O sistema tributário criado pela Constituição de 1988 foi fruto de um processo participativo em que os principais atores eram políticos, que conduziram o processo de criação com caráter eminentemente político[74].

A estrutura tributária brasileira está constituída de forma a gravar menos a renda e a propriedade do que o consumo, e a carga tributária é tão maior quanto pior é a distribuição de renda, assim, a tributação brasileira reflete uma realidade socialmente injusta e centralizada[75]. O sistema tributário brasileiro está baseado na regressividade, por força do peso dos impostos indiretos e dos benefícios fiscais, possui uma fiscalização insuficiente para alcançar o grande número de fraudadores e o orçamento proporciona uma redistribuição perversa[76].

Há muito tempo a sociedade brasileira questiona a elevada carga tributária, não sendo inédito afirmar-se que, no Brasil, há grande opressão da tributação sobre o cidadão comum e sobre as atividades produtivas[77]. A voracidade do sistema tributário, contudo, não demonstra equivalência quantitativa e qualitativa com as ações sociais do Poder Público, de forma a cumprir os direitos sociais previstos na Constituição de 1988[78].

Para Humberto Pereira Vecchio[79], o legislador, o intérprete e a administração devem garantir efetivamente o mínimo existencial e, ao mesmo tempo, combater os privilégios, que se manifestam tanto na tributação quanto no orçamento, através do desvio do dinheiro público.

No âmbito tributário, qualquer medida impositiva é capaz de interferir na capacidade competitiva dos contribuintes, possuindo relação direta com as relações de

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[72] VASCONCELOS, Renato Cesar Melo. **O sistema tributário brasileiro e suas perspectivas face à iminente reforma tributária**. Rio de Janeiro: Fundação Getúlio Vargas, 2002. Disponível em: <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/3999/RenatoCesar.pdf?sequence=1>. Acesso em: 06 out. 2019. P. 15.

[73] DORNELLES, Francisco. **O sistema tributário na Constituição de 1988**. Rio de Janeiro. Disponível em: <https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/outras-publicacoes/volume-iv-constituicao-de-1988-o-brasil-20-anos-depois.-estado-e-economia-em-vinte-anos-de-mudancas/do-sistema-tributario-nacional-o-sistema-tributario-da-constituicao-de-1988>. Acesso em: 06 out. 2019. P. 3.

[74] VARSANO, Ricardo. **A evolução do sistema tributário ao longo do século**: anotações e reflexões para futuras reformas. Rio de Janeiro: IPEA, 1996. P. 12.

[75] MARIA, Elizabeth de Jesus. LUCHIEZI JÚNIOR, Álvaro (Orgs.). **Tributação no Brasil:** em busca da justiça fiscal. Brasília: Sindifisco, 2010. P. 125.

[76] VECCHIO, Humberto Pereira. **Justiça distributiva e tributação**. Universidade Federal de Santa Catarina, 2002. Disponível em: <https://repositorio.ufsc.br/handle/123456789/83722> Acesso em: 07 out. 2017. P. 213.

[77] TORRES, Ana Kátia Barbosa. Justiça tributária como pressuposto da justiça social. **Revista jurídica da FA7**. Fortaleza, v. 9, 2012. Disponível em: <http://www.uni7setembro.edu.br/periodicos/index.php/revistajuridica/article/view/102/103>. Acesso em: 06 out. 2019. P. 87.

[78] TORRES, Ana Kátia Barbosa. Justiça tributária como pressuposto da justiça social. **Revista jurídica da FA7**. Fortaleza, v. 9, 2012. Disponível em: <http://www.uni7setembro.edu.br/periodicos/index.php/revistajuridica/article/view/102/103>. Acesso em: 06 out. 2019. P. 87.

[79] VECCHIO, Humberto Pereira. **Justiça distributiva e tributação**. Universidade Federal de Santa Catarina, 2002. Disponível em: <https://repositorio.ufsc.br/handle/123456789/83722> Acesso em: 07 out. 2017. P. 192.

concorrência entre empresas afetadas pela tributação, de modo com que esta favoreça ou desfavoreça umas em face de outras. Da mesma forma, uma tributação desigual entre contribuintes cidadãos afeta as relações sociais de um determinado indivíduo, ferindo, muitas vezes, sua esfera pessoal, desvalorizando o primado da dignidade da pessoa humana[80].

Aliomar Baleeiro (2005, p. 833) salienta que o sistema tributário não deve destruir riquezas, mas apenas filtrá-las, operando a redistribuição através da despesa pública. Mas, no fundo dos fatos, existe objetivo do intervencionismo estatal, que importa numa valoração ou eleição dos alvos a serem alcançados, e, portanto, trata-se de política[81].

Embora seja legítima a cobrança de tributos em um estado fiscal, a fúria arrecadatória empreendida pelo governo pode ser aniquiladora da propriedade privada e das riquezas a serem alcançadas pela tributação. A tributação excessiva e o aumento da carga fiscal são pejorativos e, em longo prazo, podem representar a aniquilação das riquezas tributáveis, pondo em risco tanto as atividades empreendidas pelo setor produtivo, quanto a própria existência do Estado e das comunidades organizadas[82].

> A cobrança de tributos excessiva, ou seja, além do que seria necessário para consecução dos propósitos estatais, tal qual ocorre no Brasil, tem ainda a imediata consequência de atuar em prejuízo da sociedade e do bem-estar social, na medida em que, a longo prazo, poderia representar o 'esgotamento' da riqueza tributável[83].

O sistema tributário pode e deve ser utilizado como instrumento de distribuição de renda, redução da pobreza e redistribuição de riqueza, uma vez que os recursos arrecadados devem ser revertidos em prol de benefícios sociais. A tributação deveria ser direta, de caráter pessoal e progressiva, no intuito de alcançar a justiça social por meio de tratamento tributário equânime. Todavia, esta é uma ideia que não se verifica em países como o Brasil, onde há séculos predomina a desigualdade distributiva e tributária[84].

A tributação deve ser orientada para o cumprimento do papel de instrumento da justiça fiscal e de diminuição das desigualdades regionais e nacionais, através da formulação e implementação de políticas públicas[85]. Ocorre que, o Estado Brasileiro é financiado pelos trabalhadores assalariados, que são chamados de classe média, bem

[80] VIEGAS, Viviane Nery. Justiça fiscal e igualdade tributária: a busca de um enfoque filosófico para a tensão entre poder de tributar e direito de tributar frente à modernidade tardia no Brasil. **Revista Direitos Fundamentais e Democracia**, Curitiba, v. 7. n. 7, 2010. Disponível em: <http://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/111> Acesso em: 06 out. 2019. P. 69.
[81] BALEEIRO, Aliomar. **Limitações constitucionais ao poder de tributar**. Rio de Janeiro: Forense, 2005. P. 833.
[82] GRUPENMACHER, Betina Treiger *et al*. **Novos horizontes da tributação**: um diálogo luso-brasileiro. Coimbra: Almedina S.A, 2012. P. 13.
[83] Idem, ibidem.
[84] MARIA, Elizabeth de Jesus. LUCHIEZI JÚNIOR, Álvaro (Orgs.). **Tributação no Brasil:** em busca da justiça fiscal. Brasília: Sindifisco, 2010. P. 127-128.
[85] VASCONCELOS, Renato Cesar Melo. **O sistema tributário brasileiro e suas perspectivas face à iminente reforma tributária**. Rio de Janeiro: Fundação Getúlio Vargas, 2002. Disponível em: <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/3999/RenatoCesar.pdf?sequence=1>. Acesso em: 06 out. 2019. P. 17.

como pelas classes de baixa renda, os quais respondem por grande parte das receitas no país[86].

Dessa forma, o peso da carga tributária atinge gravosamente as pessoas de menor poder aquisitivo, tendo em vista que a maior incidência da tributação é sobre o consumo, sendo bastante modesta em relação a lucros, rendas e patrimônio. "Por outro lado, a receita pública também tem um destino injusto, já que o gasto do Estado privilegia o cumprimento dos compromissos financeiros firmados com o grande capital, o que beneficia as camadas rentistas"[87].

Ao Poder Público, incumbe o dever de garantir uma justa tributação, impedindo que os contribuintes com menos recursos tenham de suportar tributos mais altos e, ao mesmo tempo, não recebam a prestação de serviços públicos de qualidade[88].

No entanto, a manutenção da regressividade na distribuição da carga tributária existe, no Brasil, como expressão dos interesses imediatistas das classes dominantes, não havendo outra justificação pretensamente racional[89]. Além disso, a regressividade do sistema tributário brasileiro demonstra a sobrecarga de tributos indiretos para compensar a concessão de benefícios fiscais para determinados grupos com melhores condições econômicas e, exatamente por isso, com maior influência sobre o controle do dinheiro público[90].

Ademais, cumpre salientar que a tributação não pode restringir os direitos fundamentais, e, ao tributar, o Estado também deve ter em mente sua obrigação de manter as atividades do contribuinte e não perturbar sua propriedade além do estritamente necessário, já que a função de tributar envolve o dever de se conservar, dentre outros, os direitos de propriedade, o exercício de qualquer profissão, a dignidade da pessoa humana e os direitos sociais[91].

Para que se possa promover a justiça fiscal, é preciso fortalecer os impostos diretos, ou seja, aqueles sobre a renda e propriedade, assim como reduzir os impostos sobre bens que são consumidos por todos, mas que pesam mais no orçamento dos contribuintes com pouca renda, como, por exemplo, os produtos da cesta básica. Mas isto não basta. É preciso também garantir que os impostos não sejam sonegados, bem como que os valores arrecadados sejam revertidos aos contribuintes na forma da prestação de serviços públicos de qualidade[92].

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[86] DAVI, Jordeana, *et. al*. **Carga tributária e política social**: considerações sobre o financiamento da Seguridade Social. 2. ed. Campina Grande: EDUEPB, 2011. Disponível em <http://books.scielo.org/id/zw25x/pdf/davi-9788578791933-05.pdf>. Acesso em 06 out. 2019. P. 67.

[87] DAVI, Jordeana, *et. al*. **Carga tributária e política social**: considerações sobre o financiamento da Seguridade Social. 2. ed. Campina Grande: EDUEPB, 2011. Disponível em <http://books.scielo.org/id/zw25x/pdf/davi-9788578791933-05.pdf>. Acesso em 06 out. 2019. P. 67.

[88] VECCHIO, Humberto Pereira. **Justiça distributiva e tributação**. Universidade Federal de Santa Catarina, 2002. Disponível em: <https://repositorio.ufsc.br/handle/123456789/83722> Acesso em: 07 out. 2017. Pp. 205-209.

[89] Idem, ibidem.

[90] Idem, ibidem.

[91] VALADÃO, Marcos Aurélio Pereira. MEIRA, Liziane Angelotti. BORGES, Antônio de Moura. **Direito tributário constitucional**: temas atuais relevantes. São Paulo: Almedina, 2015. P. 100.

[92] VASCONCELOS, Renato Cesar Melo. **O sistema tributário brasileiro e suas perspectivas face à iminente reforma tributária**. Rio de Janeiro: Fundação Getúlio Vargas, 2002. Disponível em: <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/3999/RenatoCesar.pdf?sequence=1>. Acesso em: 06 out. 2019. P. 71.

Além disso, cumpre salientar que a distribuição de renda tende a permanecer tão desigual quanto favorável à acumulação, e somente a implementação de políticas visando combater a injustiça real pode iniciar a abertura de caminhos para uma sociedade futura com mais igualdade e justiça. Logicamente, entre essas medidas políticas inclui-se a tributação justa, que não acompanhe exclusivamente os interesses da acumulação do capital, mas que efetivamente imponha que os tributos sejam exigidos com a finalidade de se construir uma sociedade mais justa socialmente, ou seja, uma tributação não imediatista, que esteja acima dos interesses de determinadas pessoas, e que seja obediente aos princípios constitucionais[93].

Seria risível afirmar que a justiça social no Brasil pode ser debelada, exclusivamente, por uma maior justiça tributária, uma vez que a injustiça social tem múltiplas e complexas causas. Todavia, o que se defende é que o Estado, ao atuar como gestor das riquezas nacionais e como ente político responsável pela concretização dos direitos e garantias constitucionais, deve usar o poder de tributar como meio para alcançar uma maior justiça no meio social, impulsionado por seu objetivo institucional de erradicar a pobreza e a marginalização e reduzir as desigualdades sociais e regionais[94].

O ideal de justiça social pressupõe que haja justiça tributária na sociedade, de sorte que os direitos socialmente assegurados na Constituição Federal de 1988 só podem ser implementados de forma eficaz se houver justiça tanto no processo de arrecadação quanto na destinação dos recursos tributários[95].

É necessário lutar por uma aplicação proba, transparente e eficaz dos recursos tributários obtidos pelo Estado, de forma a promover a efetivação dos direitos sociais da população, como saúde, educação e alimentação. Esta luta, porém, só será realmente enfrentada a partir da participação política dos cidadãos brasileiros na gerência das riquezas nacionais, ou seja, através da participação direta do povo na vida política e no controle dos orçamentos e dos gastos públicos[96].

3 CONSIDERAÇÕES FINAIS

O desenvolvimento deste artigo possibilitou uma melhor compreensão, ainda que breve, acerca das relações políticas e jurídicas no âmbito da tributação brasileira. Denota-se que o Fisco tem como fonte principal os tributos indiretos que incidem, principalmente, sobre o consumo, agravando assim a situação financeira dos contribuintes com menor rendimento. Por outro lado, aqueles com renda e patrimônio elevados não têm contribuído na mesma proporção, já que não sofrem com o fato de ter a maior parte da renda comprometida pela tributação.

Na realização deste estudo, pôde-se constatar que a história do Brasil demonstra uma tributação baseada em relações políticas, com base em favorecimentos a pessoas ou grupos de interesse dos governantes, através de uma arrecadação eminentemente

[93] VECCHIO, Humberto Pereira. **Justiça distributiva e tributação**. Universidade Federal de Santa Catarina, 2002. Disponível em: <https://repositorio.ufsc.br/handle/123456789/83722> Acesso em: 07 out. 2017. P. 261.
[94] TORRES, Ana Kátia Barbosa. Justiça tributária como pressuposto da justiça social. **Revista jurídica da FA7**. Fortaleza, v. 9, 2012. Disponível em: <http://www.uni7setembro.edu.br/periodicos/index.php/revistajuridica/article/view/102/103>. Acesso em: 06 out. 2019. P. 92.
[95] Idem, ibidem. P. 95.
[96] Idem, ibidem.

indireta, no intuito de que os cidadãos não percebam claramente a tributação a que estão submetidos e mantenham-se sob o controle do Estado.

Da mesma forma, a distribuição dos valores arrecadados na forma da prestação de serviços públicos tem sido realizada de forma deficiente, com enorme descaso pelos direitos fundamentais dos contribuintes. Sendo assim, para que se possa experimentar a justiça fiscal no Brasil, é necessário que haja uma tributação direta e equilibrada, bem como uma melhor redistribuição de recursos públicos, a fim de propiciar a satisfação das necessidades dos contribuintes e a garantia dos direitos fundamentais.

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DORNELLES, Francisco. **O sistema tributário na Constituição de 1988**. Rio de Janeiro. Disponível em: <https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/outras-publicacoes/volume-iv-constituicao-de-1988-o-brasil-20-anos-depois.-estado-e-economia-em-vinte-anos-de-mudancas/do-sistema-tributario-nacional-o-sistema-tributario-da-constituicao-de-1988>. Acesso em: 06 out. 2019.

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VALADÃO, Marcos Aurélio Pereira. MEIRA, Liziane Angelotti. BORGES, Antônio de Moura. **Direito tributário constitucional**: temas atuais relevantes. São Paulo: Almedina, 2015.

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VECCHIO, Humberto Pereira. **Justiça distributiva e tributação**. Universidade Federal de Santa Catarina, 2002. Disponível em: <https://repositorio.ufsc.br/handle/123456789/83722> Acesso em: 07 out. 2017.

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<http://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/111> Acesso em: 06 out. 2019.

THE SOCIAL VULNERABILITY OF THE PLATFORM WORKER FACING THE COVID-19 PANDEMIC: A NEW READING OF WORKING RELATIONS FROM THE PRECARIAT CONCEPT

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Ana Virgínia Porto de Freitas[3]

ABSTRACT

This article discusses the worsening of the vulnerability of workers inserted into the economy of digital platforms during the pandemic. It is investigated the impacts of the pandemic on the fundamental rights of these workers, discussing the challenges of law in the face of the virtualization of labor relations, based on the concepts of vulnerability and social disaffiliation found in Robert Castel. It starts from a critical view of law, using a transdisciplinary approach, through a deductive methodology of qualitative nature, from a bibliographic review of foreign and domestic literature. It concludes that the COVID-19 pandemic has shown that work in the 21st century faces a structural challenge, due to the intensification of the precariat, placing the mission of union organizations to reorganize their mechanisms of action.

Keywords: Pandemic, Platform Work, Social Vulnerability.

MOLDANDO A LEGISLAÇÃO ANTIMONOPÓLIO? O LOBBY DAS ELITES EMPRESARIAIS NO BRASIL

RESUMO

Discute-se neste artigo o agravamento da vulnerabilidade do trabalhador inserido na economia de plataformas digitais durante a pandemia. Investiga-se os impactos da pandemia sobre os direitos fundamentais desses trabalhadores, discutindo-se os desafios do Direito diante da virtualização das relações de trabalho, com aporte nos conceitos de vulnerabilidade e desfiliação social encontrados em Robert Castel. Parte-se de uma visão crítica do direito, utilizando-se de

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uma abordagem transdisciplinar, por uma metodologia dedutiva de caráter qualitativo, a partir de revisão bibliográfica de literatura estrangeira e nacional. Conclui-se que a pandemia da COVID-19 evidenciou que o trabalho no século XXI passa por um desafio estrutural, pela intensificação do precariado, colocando para as organizações sindicais a missão de reorganizarem seus mecanismos de ação.

Palavras-chave: Pandemia. Trabalho PLATFORMizado. Vulnerabilidade Social.

INTRODUCTION

The globalized world was challenged in the XXI century, with humanity facing a new obstacle: the fast spread of a virus that, due to its specific characteristics regarding contamination speed, incubation period and intensity of symptoms, fit into the pandemic concept. The *Coronavirus Disease 2019*, more known as Coronavirus or COVID-19, set a great challenge for the international scientific Community, for the States and communities under several aspects. One of these aspects, which is certainly at the top of the list, is the social distancing policy, adopted by most governments, with the United Nations support.

Social isolation, aside from the impacts in family relations, generated significant economic effects in the market, most importantly in the work relations, which had to be reinvented due to the vulnerability conditions to which workers are submitted to. Without intending to conform all diverse forms of urban work, it can be affirmed that the pandemic crisis created a working market with four corners.

There are people, on one of the corners, that can work in remote regime. Teleworking in this period of social isolation appears not only as a possibility of health assurance, but also to avoid dismissals and reduction in business finances. COVID-19 worked as a catalyzer for the insertion processes of different businesses and activities in virtual reality, also reaching the public sector with promising results in some cases.

The population in the second corner is composed by workers that, due to the essentiality of their activities, could not have access to telework and still are at their workplaces, such as the health professionals, public transportation, energy, and communication area, among others. On these two corners, some levels of institutional protection in labor activity are verified, despite the explicit threats that the speech about economic crisis affects workers.

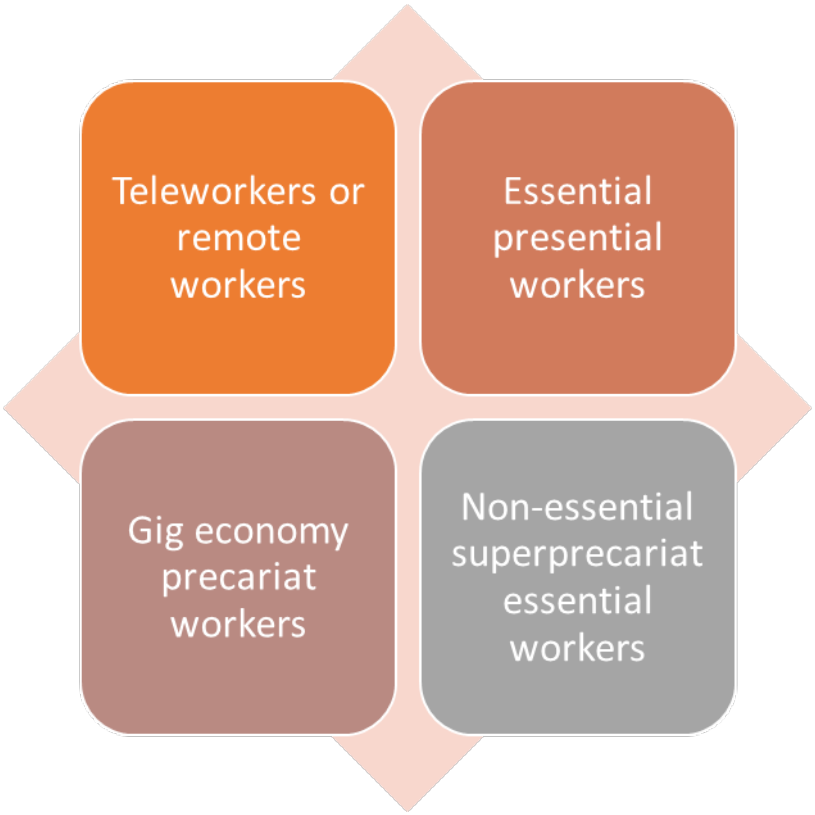
On the third corner are the precariat workers, inserted in the new forms of platform work, outsourced and exposed to social and environmental risks, increased by the pandemic and the lack of protective public policies compatible to the economic retraction context. Concerning this group, the work relation is put at highlight/eminence with the proliferation of different labor organization forms.

On the fourth and last corner it is verified the essence of super-precariat people removed from work and the possibility of any income such as artists, workers with reduced qualification and the ones with no access to technology for platform work. It is important to consider the case of the automakers' industrial sector, which is one of

the great economic pillars of the country and generator of a significant number of direct and indirect jobs, considering the entire economic chain of parts and dealers[4].

In the same scope are the small businesses, which are responsible for a major part of job generation, many of them in the presential sales sector. In this same group there are those without access to technology adapted to platform work. Figure 1 summarizes this quarticity:

Figure 1 – Workers impacted by the pandemic effects scheme



Last one: Non-essential super precariat essential workers

On the upper side are the workers that did not have high precariat impacts in their jobs. In the lower side are the precariat workers due to the social isolation effects. On the right side, presential workers. On the left side, remote workers (or susceptible to virtualization) or app dependent.

In Brazil, just like in other parts of the world, the pandemic exhibits the adverse social consequences due to the inexistence of an effective institutional system for protection and for smooth social risks.

There is now a reflection about the labor world in the pandemic context, when several tensions are consolidated before the new work forms that dismantle formatted

[4] Ewing, Jack. A pandemia mudará para sempre o setor automotivo. **Estadão**, São Paulo, Economia & Negócios, 14 maio 2020. Available at: https://economia.estadao.com.br/noticias/geral,a-pandemia-mudara-para-sempre-o-setor-automotivo,70003302590. Accessed at: 15 sept. 2020.

and regulated labor work standards of the last two centuries. For the purposes of this study, from a methodological point of view, this is the so-called platform or on-demand work, a result of the gig economy. Gig economy is the terminology which is indicated to refer to a kind of labor activity characterized (1) by the independent or temporary nature regarding the employer and (2) by the supplementary or secondary purpose concerning other activities and from the financial point of view.

Platform workers were determinant for the essential services to society during the pandemic but at the same time remained unseen for public policies[5].

These workers are in the center of a problematic that can be affirmed as one of the main characteristics of the current crisis, the lack of a consolidated institutional system to promote the social protection of these workers[6].

The advance in the adherence of unemployed people to platform work deposits the existence of a social portion that receives and assumes all the risks involved in the work process, which increases their social vulnerability and reduces their capacity to reflect and act about reality.

The iFood platform had an exponential growth in the registration of new employees. In March 2020, 175.000 new workers joined the platform when compared to the number in February[7]. At the same time, the income of registered drivers at Uber had a significant reduction impact on its demand[8].

Therefore, due to social isolation to contain the pandemic, part of the platform workers was submitted to explicit risks, despite the social security standards destined to this category, while others subsisted without income perception. The emerging tensions of new work forms were inflated by the pandemic, expressing a concerning vulnerability level of these workers in the face of social rights' inefficiency.

It is sought to investigate the pandemic impacts upon platform worker´s fundamental rights and discuss which challenges are imposed to Law by bonding virtualization in work relations for the implementation of work´s social value and human dignity, as constitutional vectors.

From a Law´s critical view, aside from the complaints about contradictions inherent to the capitalist society that uses law to maintain privilege structures, which understands law implementation as a space of struggle and as a possible autonomy creation instrument for individuals and of society emancipation[9]. Through these struggles and

[5] Bonis, Gabriel. Pandemia precariza ainda mais o trabalho de entregadores de aplicativos. **Deutsche Welle**, Bonn, Notícias, Economia, 10 jul. 2020. Available at: https://p.dw.com/p/3f5Rd. Accessed at: 8 dec. 2020.

[6] Uchoa, Flávia Manuela. Saúde do trabalhador e o aprofundamento da uberização do trabalho em tempos de pandemia. **Rev. bras. saúde ocup.**, São Paulo, v. 45, n. 22, 2020. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0303-76572020000101501&lng=pt&nrm=iso. Accessed at: 8 dec. 2020.

[7] Mello, Gabriela. Candidatos a entregador do iFood mais que dobram após coronavírus. **Reuters**, São Paulo, Notícias de Tecnologia, 1 abr. 2020. Available at: https://br.reuters.com/article/idBRKBN21J6N4-OBRIN. Accessed at: 8 dec. 2020.

[8] Braun, Daniela. Uber viaja 80% menos devido à crise. **Valor Econômico**, São Paulo, Empresas, 7 out. 2020. Available at: https://valor.globo.com/empresas/noticia/2020/10/07/uber-viaja-80-menos-devido-a-crise.ghtml. Accessed at: 8 dec. 2020.

[9] Coelho, Luiz Fernando. **Teoria crítica do direito**. 5ª ed. Curitiba: Bonijuris, 2019.

the doctrinal support around them, it will be possible to envision innovative and proper juridical solutions to attend current needs.

Consequently, a transdisciplinary approach is used, and the study follows a deductive methodology of qualitative character, having as input the bibliographic review of foreign and national literature.

In the first part, it is exposed the platform work context, from the precariat concept. On the second one, it is discussed the social vulnerability issue implemented in contemporary society by the metamorphosis of the labor world, aggravated during the pandemic due to the COVID-19 spread. At last, the impacts of platform workers´ social vulnerability on their fundamental rights are analyzed, as well as the consequent juridical challenges for this scenario's confrontation.

1. THE PLATFORM WORKER AND THE PRECARIAT AFFIRMATION

The XXI century is highlighted, when compared to the previous century, by the evolution of techniques used in the development of daily activities, techniques based mainly on technological advances. With accessibility expansion, technology began an important rupture in forms of organizing activities and models in social relations[10].

It is a habit to designate this platform work model as a disruptive process, or as a technological improvement process that promotes innovations which represent a break from the ancient production models without a continuous and comfortable transition[11].

A new standard is created in the market, and consequently, in consumption and labor relations[12]. Work forms have been going through a deep restructuring, such as it occurred in the industrial revolution, as well as from the phenomenon brought by Taylorism and Fordism. Therefore, the gig economy (or freelance) practiced with shared economy is also denominated as activity on demand.

It is a form of labor, structured by the use of people's service who have temporary occupations, or perform their tasks without a formal contract to a service taker, or also formally bind themselves as partners or collaborators, receiving the consideration for the work in a fluctuating manner, according to the demand[13].

Service provision is established on an individualized, temporary, and autonomous basis in face of digital platforms that are fed by countless unemployed or underemployed workers. This scenario of labor market flexibility gains relevance in the context of the speed and competence required by the digital age[14].

This model of labor work use is instrumentalized by the management of digital platforms that register and organize the distribution of these services based on customer demand. These platforms are developed and maintained by companies that call

[10] AGUIAR, Antônio Carlos. Eu, o robô e o trabalho em mutação: antes, agora e depois. In: _____. **Direito do trabalho 2.0**: digital e disruptivo. São Paulo, SP: LTr, 2018. p. 67-104.
[11] Aguiar, Antônio Carlos op. cit. p. 82.
[12] Slee, Tom. **Uberização**: a nova onda do trabalho precarizado. São Paulo: Editora Elefante, 2017.
[13] Aguiar, Aguiar, Antônio Carlos op. cit. p. 83.
[14] Slee, Tom. **Uberização**: a nova onda do trabalho precarizado. São Paulo: Editora Elefante, 2017.

themselves technological entrepreneurs, with the goal of promoting connectivity between people through the so-called sharing economy[15].

This connectivity of people, services, and products would be based on intersubjective collaboration that finds in the platform its form of viability. The diversity and scope of this collaboration gain global dimensions since technology is not bound to territorial limits and reconfigures space and time in a revolutionary way. The sharing economy would, in this way, be the most accessible, ecological, and distributive type of global economy model[16].

The digital platforms propagating the collaborative economy enable people to share anything, anywhere, with anyone, including their labor power, without establishing solid or durable ties. This practice creates the image that the worker's flexibility and autonomy define his workload, his schedule, and his goals[17].

The sharing economy is based on the possibility of community integration for the supply of everyday needs. From a trivial idea of sharing economy, there is the false impression that this sharing would be guided by non-profit organizations[18]. However, the collaborative economy has been invaded by large commercial organizations that sell and reproduce the collaborative discourse as a business opportunity and placement of idle and non-idle labor, the result of unemployment, underemployment, informality, and economic precariousness of formal jobs, ultimately subverting the original ideal of sharing[19].

This means that the capitalist pattern of the economic organization applies to the collaborative speech and appropriates, with a typically capitalist contribution, the communication platforms that have emerged from the collaborative or sharing economy ideal.

The platforms generate extremely competitive markets, and, among other reasons, because all the service professionals are, in a current context, inserted in a pressured conditioned economy induced by globalization and by the imposition of expenditure control, in the search for low cost[20].

This sector expresses very well, in fact, how services are contracted at a time when the commodification of human labor is reaching another phase, in units of increasingly reduced time and that can be developed in totally diversified spaces. This phenomenon begins in the service sector, produced by the incentive to entrepreneurship, based on the initial idea that work is developed on its own and without control, whose flexibility is its greatest characteristic.

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[15] Slee, Tom. **Uberização**: a nova onda do trabalho precarizado. São Paulo: Editora Elefante, 2017.
[16] Rifkin, Jeremy. **O fim dos empregos**: o declínio inevitável dos níveis dos empregos e a redução da força global de trabalho. São Paulo: Makron Books, 1995.
[17] Aguiar, Antônio Carlos. Eu, o robô e o trabalho em mutação: antes, agora e depois. In: _____. **Direito do trabalho 2.0**: digital e disruptivo. São Paulo, SP: LTr, 2018. p. 67-104.
[18] ECKHARDT, Giana M.; BARDHI, Fleura. The sharing economy isn't about sharing at all. **Harvard Business Review**, Cambridge, Economy, 28 jan. 2015. Available at: https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all. Accessed at: 8 dec. 2020.
[19] SLEE, Tom. **Uberização**: a nova onda do trabalho precarizado. São Paulo: Editora Elefante, 2017.
[20] CAVALCANTE, Jouberto de Quadros Pessoa. O sistema de proteção jurídica do emprego frente às inovações tecnológicas: uma proposta de proteção sistêmica. In: **Sociedade, tecnologia e a luta pelo emprego**. São Paulo, SP: LTr, 2018 p. 99-124.

This trend in search of transaction cost reduction or, more specifically, the search for bargaining these costs, tends to promote a formal work metamorphosis into exceptional jobs, which is translated into several contract models such as shift work, project work, crowd work, on-demand hiring etc.[21].

The objective of avoiding "idle resources" in companies is not restricted to material resources. This manifestation is expanded for human resources, through models that aim to minimize the availability of personnel for work, controlling more strictly the expenses of the productive organizations. Platform technology is the ideal mean to manage an on-demand job, maximally adjusted to the needs of the people who hire, with ease on hiring and disengagement[22].

Technologies foster the worldwide corporate trend of transferring to the employee or subordinate the management responsibility of the activity, transforming him into an entrepreneur of his own activity, through the creation of increasingly simplified corporate figure, such as, in Brazilian legislation, the unipersonal society and the individual limited liability company, in addition to the promotion of outsourcing of activities that involve human resources[23]. Situations like these come close to the tensions present in work-related harassment contexts.

On-demand hiring is combined with other economic low-costs mechanisms, formatting a work market characterized by intense stress which generates low-quality jobs without social benefits, with the possibility of hiring qualified professional services through auctions and dynamic pricing systems[24].

The characterization of contemporary service markets, therefore, continues to be marked by the transfer of risks from enterprises to workers. The worker supports the cost in terms of precariousness and insufficient income. The company presents itself as a mere manager or intermediary, through the platforms.

Affirming worker´s legal autonomy means to transfer all social and economic risk, making void any institutional possibility of sharing the responsibility arising from these risks[25].

The platform worker is the faithful representation of the new precarious class. The precariat worker subjects himself to pressures and experiences disqualifying his dignity that lead to an insufficient present life existence without the possibility of developing a secure identity or a sense of community. The precariat workers are not

[21] RODRIGUEZ-PIÑERO ROYO, Miguel. La agenda reguladora de la economía colaborativa: aspectos laborales y de seguridad social. In: Temas laborales: **Revista andaluza de trabajo y bienestar social**, ISSN 0213-0750, Nº 138, 2017, p.125-161. Available at: https://dialnet.unirioja.es/servlet/articulo?codigo=6552391. Accessed at: 23 aug. 2020.

[22] RODRIGUEZ-PIÑERO ROYO, Miguel. op. cit., p. 125-161.

[23] ANDRADE, Everaldo Gaspar Lopes de. O direito do trabalho na filosofia e na teoria social crítica. Os sentidos do trabalho subordinado na cultura e no poder das organizações. **Revista do TST**, Brasília, v. 78, n. 3, jul./set. 2012. Available at: https://juslaboris.tst.jus.br/handle/20.500.12178/34299. Accessed at: 8 dec. 2020.

[24] RODRIGUEZ-PIÑERO ROYO, Miguel. La agenda reguladora de la economía colaborativa: aspectos laborales y de seguridad social. In: Temas laborales: **Revista andaluza de trabajo y bienestar social**, ISSN 0213-0750, Nº 138, 2017, p.125-161. Available at: https://dialnet.unirioja.es/servlet/articulo?codigo=6552391. Accessed at: 23 aug. 2020.

[25] RODRIGUEZ-PIÑERO ROYO, Miguel. op. cit., p. 125-161.

entitled to, by his individual and social condition, the development that could be reached by work or by an emancipating lifestyle[26].

In fact, in addition to the technological increase and globalization, the scenario of platform labor finds special conditions of fluidity and flourishing in the neoliberal political field. Without specific legislative treatment, platform work continues to be regulated by the contractual laws of Civil Law, which presupposes equality between the contracting parties; sometimes, depending on the argumentative and factual-probative construction, labor courts bring up the Consolidation of Labor Laws (CLT), although this is also not at all adequate for the regulation of the activity[27].

All this process experienced in the labor world has one common denominator: the reduction of the State´s role, deregulation, overexploitation, and precarious working conditions[28]. In 1989, the Washington Consensus consolidated the idea of market as center of development. Essential reforms in the public-private relationship were designed to reduce public spending and open up the world to private intervention.

The focus of this reformulation was on deregulating social protections and guaranteeing a single right, namely, the right to property. Consequently, the precariat is not destined to social security, but only the social risk for the supposedly autonomous labor[29].

This recipe has been built since the 1970s, with the emergence of neoliberalism as an ideology of economic policy for development[30]. The current pandemic clearly reveals the failure of these policies that defend State reduction and market predominance.

The absence of specific security and health rules for platform work imposes insalubrious work and with no individual protection equipment to thousands of deliverers workers, exposed to the dissemination of the virus. On the other hand, the lack of a social security system and minimum wage has resulted in thousands of workers entering the poverty line[31].

This issue cannot be treated as a lack of capacity or market aptitude to relocate resources. Although the construction of the market involves an institutionalization whose objective is to bring closer producers and consumers, reducing transaction costs, the main agent in this market are the companies, which have the goal of profit maximization with cost reduction[32].

In contrast, public and non-governmental institutions must act to guarantee market sustainability; it occurs, however, that a government guided by a capitalist agenda

[26] THEMUDO, Tiago Seixas; DE FREITAS, Ana Virgínia Porto. Reflections on the organization of the Brazilian union in the age of the precariat. **Revista Direito e Práxis**, [S.l.], v. 11, n. 4, p. 2420-2439, dez. 2020. ISSN 2179-8966. Available at: https://www.e-publicacoes.uerj.br/index.php/revistaceaju/article/view/44613. Accessed at: 07 jan. 2021.
[27] THEMUDO, Tiago Seixas; DE FREITAS, Ana Virgínia Porto, op. cit., p. p. 420-439.
[28] RODRIGUEZ-PIÑERO ROYO, Miguel. La agenda reguladora de la economía colaborativa: aspectos laborales y de seguridad social. In: Temas laborales: **Revista andaluza de trabajo y bienestar social**, ISSN 0213-0750, Nº 138, 2017, p.125-161. Available at: https://dialnet.unirioja.es/servlet/articulo?codigo=6552391. Accessed at: 23 aug. 2020.
[29] STANDING, Guy. **O Precariado**: a nova classe perigosa. São Paulo: Autêntica Editora, 2014.
[30] STANDING, Guy. **O Precariado**: a nova classe perigosa. São Paulo: Autêntica Editora, 2014.
[31] DOWBOR, Ladislau. **A era do capital improdutivo**: Por que oito famílias tem mais riqueza do que a metade da população do mundo? 2 ed. São Paulo: Outras Palavras & Autonomia Literária, 2018.
[32] COASE, Ronald H. **A firma, o mercado e o direito**. 2. ed. Rio de Janeiro: Forense, 2017.

tends to drive the market towards the concentration of income of the capital holders, who directly and intensely influence public decision-making. It does so in this scenario, through the widespread use of technological tools. This leads to a first observation about a paradoxical and contradictory problem: the development of a new technological pattern, coexisting with terrible forms of injustice and exploitation[33]. Therefore, one needs to reflect about the dimension of this social vulnerability in which the working class is inserted, in order to proceed to the analysis of possible institutional answers.

2. PLATFORM WORK IN THE PANDEMIC CONTEXT: THE EXACERBATION OF SOCIAL VULNERABILITY

The imposition of the western modernity project, in its economicist version, ended up directly attacking one of its main creations: the wage society. However, this is only a part of the story. What currently happens to societies regarding job precariousness cannot be attributed just to technical changes. The factors are rooted mainly in the logics of profit maximization via wage depreciation and by redefining production relations[34].

The global increasing of communication and production, as well as the expropriation of rights, are vectors that run side by side. Capital is concentrated and accumulated, at the same time that there is a greater wear and tear on workers with intense social impact. This process affects not only the productive moment, with a smaller capacity of worker recovery, but also the reproduction capacity, generating exclusion, loss of social rights and exposure of worker´s life and health[35].

Observing the emergence and consolidation of the gig economy, one notices a process in which the speed of economic-financial flows increases the pace of production and reproduction of capital, tending to speed up the growth of the economy. However, parallel to this acceleration of the economy, there is an evident process of withdrawal and denial of fundamental rights[36].

This social context, inaugurated with digital work´s metamorphosis, demands an expanded view that is not restricted to specific confrontations in face of social inequalities, without having an efficient and transforming prospection of the problematics resulting from job precariousness[37].

According to Castel[38], this new social issue derives from a general vulnerability situation. Inequality implies a differentiated access to resources and opportunities, where the achievement of these objectives is limited, while vulnerability implies a risk situation that, in different levels, affects all. This has been becoming evident during the pandemic regarding platform work.

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[33] HARVEY, David. **O Novo Imperialismo**. 8. ed. São Paulo: Edições Loyola, 2014.
[34] CASTEL, Robert. **As metamorfoses da questão social**: uma crônica do salário. Petrópolis: Vozes, 1998.
[35] HARVEY, David. **O Novo Imperialismo**. 8. ed. São Paulo: Edições Loyola, 2014.
[36] ANTUNES, Ricardo. A explosão do novo proletariado de serviços. In: _____. **O privilégio da servidão:** o novo proletariado de serviços na era digital. 1. ed., 1. reimpr. São Paulo: Boitempo, 2018. P. 325.
[37] RODRIGUEZ-PIÑERO ROYO, Miguel. La agenda reguladora de la economía colaborativa: aspectos laborales y de seguridad social. In: Temas laborales: **Revista andaluza de trabajo y bienestar social**, ISSN 0213-0750, Nº 138, 2017, p.125-161. Available at: https://dialnet.unirioja.es/servlet/articulo?codigo=6552391. Accessed at: 23 aug. 2020.
[38] CASTEL, Robert. **As metamorfoses da questão social**: uma crônica do salário. Petrópolis: Vozes, 1998.

In the social-occupational vulnerability analysis field, the groups associated to this condition are described as those with lower educational or qualification levels for a task. Other groups, apparently better protected in case of contingency, composed by more instructed workers, or with formal and specific qualifications, are also affected by the predominant job market instability[39].

However, the difference between them lies in responsiveness, where the relational capital generally held by the last group can act as a buffer against the impact of losing a job or its deterioration. So that, given the generated risks, physical or natural, typical of advanced modernity, although they potentially reach all groups, the capacity to minimize or inhibit their impact is different, according to the socioeconomic condition[40].

With the pandemic crisis, this phenomenon emerged with greater visibility. The categories reached by legal statutes and organized in unions had possibilities of minimally remedial responses, while the categories without collective aggregation suffer in a more overwhelming way the effects of the pandemic[41]. Regarding this social mediation sphere, it is verified that neo-liberal policy also drives a disarticulation vector of collective movements. Standing[42] observes that one of the social marks of the precariat consists in the non-existence of organization and collective identification.

For Castel[43], the new social issue in the labor world "can be characterized by the concern with the capacity of maintaining cohesion in a society". The author introduces the concept of social disaffiliation to explain how vulnerability occupies a dangerous place in the crisis of the wage society. Work starts to be considered as an element that promotes the creation of bonds and social networks that integrate the individual to community.

Vulnerability would be a broader concept than social exclusion because it is in a traffic zone between a stable insertion and a social withdrawal. This zone would be characterized by a turbulence caused by job precariousness and by the fragility of relational supports, which would contribute to the decomposition of the base that sustains strategies and action that could be implemented for life improvement in society[44].

In this position, social vulnerability constitutes a concept strictly related to the deterioration of the integrating work capacity. Therefore, it is a dynamic state that does not refer only to a material deficiency situation, but to the latent possibility of people losing their bonds with the social body, not just in its material dimension, but also symbolic, when the minimum well-being boundaries accepted by the community in which they belong are lost. That is why subjective dimension has a fundamental role, because it directly affects the capacity of collective organization[45].

[39] CASTEL, Robert. **As metamorfoses da questão social**: uma crônica do salário. Petrópolis: Vozes, 1998.
[40] CASTEL, Robert. **As metamorfoses da questão social**: uma crônica do salário. Petrópolis: Vozes, 1998.
[41] FRAMIL FILHO, Ricardo e MELLO E SILVA, Leonardo. Trabalho, sindicatos e proteção social na pandemia de 2020: notas sobre o caso brasileiro. In: Ciências Sociais Unisinos, São Leopoldo, Vol. 56, N. 2, p. 177-188, mai/ago 2020. Available at: http://revistas.unisinos.br/index.php/ciencias_sociais/article/view/csu.2020.56.2.06. Accessed at: 26 dec. 2020.
[42] STANDING, Guy. **O Precariado**: a nova classe perigosa. São Paulo: Autêntica Editora, 2014.
[43] CASTEL, Robert. **As metamorfoses da questão social**: uma crônica do salário. Petrópolis: Vozes, 1998, p. 29.
[44] CASTEL, Robert. **As metamorfoses da questão social**: uma crônica do salário. Petrópolis: Vozes, 1998.
[45] CASTEL, Robert. **As metamorfoses da questão social**: uma crônica do salário. Petrópolis: Vozes, 1998.

The institutionalization of unemployment promotes resignation, conformity and acceptance of precarious working conditions and undignified living. This situation produces an immobilization of social strata, stimulates disruptive competition, and reduces the possibility of direct and authentic social response.

Faced with this observation, Castel[46] proposes the resurgence of a more protective State, not so interventionist, but a state action that manages the risks of a sickening individualism, capable of promoting the reconstruction of the social fabric. A strategist State that directs its actions to neutralize the points of tension and avoid ruptures, to reconcile the subjects that are exposed to the same vulnerabilities, does it because "without protection there is no social coercion".

This conclusion, however, requires us to remember that the historical role of the State and, consequently, of Law, has been to subsidize the market in the face of cyclical capitalism crises[47]. In April 2020, the Central Bank of Brazil passed on to financial institutions about R$ 1.2 trillion[48], while the total expense with the amounts paid as emergency aid to the population sums, in three months of the pandemic, to an expense of about R$ 154 billion to the public coffers in Brazil[49].

This data shows, without a sophistication in the analysis, that the acting of the State, in this case, had as focus the financial market, for the equating of the economy, which has not generated – as it should – the circulation of essential goods, nor access to indispensable services, since the money remains in private coffers to make financing possible. This direction marks the subjection of the political system to the neoliberal economic system

Platform workers were also excluded from the profile for the perception of emergency aid during the pandemic, due to the veto given to the future article 2nd, § 2nd-A, of Law 13.982, of April 2nd, 2020, which would be included by Law 13.998, of May 14, 2020, for alleged offense to the principle of isonomy[50].

For Santos[51], the pandemic only emphasized the problems of the neo-liberal capitalist economy that, oriented for privatization and by the market law, reveals that the countries which privatized health and protected less the worker are the ones that operated with more difficulty when confronting the pandemic.

In this sense, as long as the globalized world continues to reproduce a trend to de-bureaucratization and decrease the income of the working mass in favor of a profit rate, compacts with the monopolistic concentration and continues under the reign of

[46] CASTEL, Robert. **As metamorfoses da questão social**: uma crônica do salário. Petrópolis: Vozes, 1998, P. 610.
[47] HARVEY, David. **O Novo Imperialismo**. 8. ed. São Paulo: Edições Loyola, 2014.
[48] CASTRO, Fabrício de; GAYER, Eduardo; SILVA, Regina. Recursos liberados a bancos estão empoçados no sistema financeiro, diz Guedes. **Estadão**, São Paulo, Economia & Negócios, 4 abr. 2020. Available at: https://economia.estadao.com.br/noticias/geral,recursos-liberados-a-bancos-estao-empocados-no-sistema-financeiro-diz-guedes,70003260593. Accessed at: 8 dec. 2020.
[49] CASTRO, Augusto. Gastos com auxílio emergencial podem chegar a R$ 154 bilhões em três meses. **Agência Senado**, Brasília, 7 maio 2020. Available at: https://www12.senado.leg.br/noticias/materias/2020/05/07/gastos-com-auxilio-emergencial-podem-chegar-a-r-154-bilhoes-em-tres-meses. Accessed at: 8 dec. 2020.
[50] BRASIL. Presidência da República. **Mensagem nº 268, de 14 de maio de 2020**. Veto ao Projeto de Lei nº 873, de 2020. Brasília, DF: Presidência da República, 2020. Available at: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/Msg/VEP/VEP-268.htm. Accessed at: 8 dec. 2020.
[51] SANTOS, Boaventura de Sousa. **A cruel pedagogia do vírus**. Coimbra: Almedina; 2020.

the speculation of financial capital[52], any discussion about the social issue that suggests the State as a central mediator must pay attention to a new theoretical paradigm, which guides a legal regulation able to produce in reality the realization of fundamental rights.

It is hoped that a post-neoliberal law that fosters a truly social and cooperative economy to reaffirm social rights will emerge, facilitating the distribution of wealth and the abolition of inequality. Therefore, we analyze, by way of conclusion, the challenges for the construction of this possible legal paradigm, starting from the recognition that the social vulnerability of platform workers leads to serious ineffectiveness of fundamental rights.

CONCLUSION

Traditional legal science takes as true the statement that the legitimacy of the legal system is justified by the normative production from representatives elected by free vote. Therefore, the legitimacy of the Rule of Law would be linked to the rationality of the laws and the legal order. However, from the critical theory of law, it is realized that "these connections are imaginary, since freedom is illusory, and the authentic connection must be between legitimacy and conscience"[53].

This critical conception therefore unveils the myths used as premises of the dogmatic principles, denouncing concealment of reality by the normative treatment given to the facts. In this perspective, the first challenge to Law for confronting precariat platform work concerns the identification and removal of the myths that rest in the imaginary of this social relation, covering up its true face: the myths of sharing and entrepreneurship.

Rifkin[54]optimistically believes that sharing economy will gradually impregnate capitalist economy in such a way that both systems will coexist in partnership. This sharing model will establish a global regime of collaborative common goods increasingly independent, almost free. The author is based on the revolutionary possibilities arising from hyper-connectivity (internet of things) and the use of renewable energy, which would imply the establishment of an economy with zero marginal cost.

However, there is a center point that cannot be left out of this debate. It is about the technological development process that does not possess democratic potentiality. Consequently, network society is a society that feeds the accumulation process and does not generate substantial access to the foundation of technological knowledge, but only to the technological product that captures the worker, automating him[55].

This finding does not characterize any connotation of sharing between the worker and the company that maintains the platform, which also manages, supervises, and controls all the activity. The myth of sharing also crumbles when subjected to the test of altruism and generosity as these digital platforms are designed and maintained

[52] HARVEY, David. **O Novo Imperialismo**. 8. ed. São Paulo: Edições Loyola, 2014.
[53] COELHO, Luiz Fernando. **Teoria crítica do direito**. 5ª ed. Curitiba: Bonijuris, 2019, p. 511.
[54] RIFKIN, Jeremy. **O fim dos empregos**: o declínio inevitável dos níveis dos empregos e a redução da força global de trabalho. São Paulo: Makron Books, 1995.
[55] DUPAS, Gilberto. **Ética e poder na sociedade da informação**: de como a autonomia das novas tecnologias obriga a rever o mito do progresso. 3. ed. São Paulo: Unesp, 2011.

by billion-dollar corporations. Slee[56]highlights that "corporations from California withheld more than 85% of the obtained profit by the shared economy companies".

On the other hand, the entrepreneurship myth, implemented by the neo-liberal logic, consumes itself in the same way that the political system does not immediately direct in face of the pandemic crisis, considerable efforts, and support as they direct to the financial market. The stimulation of entrepreneurship generates self-employment, notably within the context of the digital economy, only serves to feed the platform labor chains.

As a result, this pandemic crisis reveals the structural character of labor problems, inviting us to reflect on work relations that are inserted in a complex context of social change; with the increasing of precariousness living conditions, in consequence of the urgency of adopting preventive policies and policies to protect the working class.

In conclusion, the observation about the importance of the unions for the equation of emergency issues during the pandemic indicates that these public policies should consider the organized popular participation to neutralize the feeling of disaffiliation and individualization that contributes to the fraying of the social bonds of solidarity and increases the social vulnerability of precarious workers.

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JURISDICTION AGREEMENTS AND COMPARATIVE INTERPRETATIONS BETWEEN ENGLAND AND US COURTS. THE ROLE OF PRIVATE INTERNATIONAL LAW OF EUROPEAN UNION

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ABSTRACT

The present survey aims to focus on the delimitation of some definitive findings. The simple choice of terminology is charged with consequences on the conceptual level: "agreements on the forum", "clauses derogating from jurisdiction" or "agreements on the extension of jurisdiction" ? While when we talk about agreements on jurisdiction we have in mind especially the phenomenon in its civil and commercial declension, in the sense in which these expressions are traditionally used in international instruments as we see in a comparative manner with our research.

Key words: choice of agreement, conflict of law, international private law, European Union law, english private law.

1. INTRODUCTION

Where in the civil law area jurisdiction is based on rules that bind the judge about the choice of whether to exercise its power or not, the scenario changes across the Channel and the Atlantic. Both in England and in the United States, a characteristic feature is the degree of discretion enjoyed by the judge in deciding whether or not to know of a dispute. Despite the common descent from a conception of jurisdiction as an expression of the principle of territorial sovereignty based on the physical presence of the defendant in the forum, however, there are profound differences between the two anglophone systems.

In England, discretion plays, in fact, a key role in limiting the exorbitant nature of the connection criterion based on the mere presence of the defendant and in granting permission to quote a defendant who is not resident in the forum. States Lawrence Collins: "(...) in english law discretion plays a vital role in three areas (...): first, the English court is always called upon to exercise its discretion before permitting service abroad on a foreign defendant of process originating in England (...); secondly, the court has a discretion to enjoin the continuance of foreign proceedings in cases of vexation; thirdly, the court has a discretion to stay proceedings which have been

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commenced in England, which it will exercise most sparingly and only in cases of clear oppression of the defendant (...)"[2].

In the United States, on the contrary, jurisdiction is strongly influenced by constitutional precepts, taken from the principle of the two process of law and gradually shaped by the Supreme Court. Significant in this sense is the adoption, from the middle of the last century, of a criterion of international jurisdiction articulated on the canon of the minimum contacts of the defendant with the forum[3], as a guarantee of constitutional fairness[4] of the exercise of power by the judge against the agreed party. The connotation in a constitutional way does not prevent, however, that even in the United States the doctrine of the forum non conveniens[5] develops, as a discretionary power that allows the judge not to exercise jurisdiction on the basis of an assessment of the appropriateness of the forum. Both in England and in the United States, discretion is considered an inherent feature of the jurisdictional function, an inherent power[6], not an octroyée faculty by the legislator. Given the different way of conceiving the jurisdiction, it is not surprising that the English and American approach to the issue of derogation from jurisdiction, and the subject of the agreements on the forum in general, is far from what happens in European Union law. In civil law systems the profile that assumes fundamental importance is that of the validity of the agreement and in particular the question of formal validity. We have therefore spent a long time in describing the forms by which a pact on jurisdiction can be stipulated, noting that a greater flexibility of the formal container corresponds to a lower protection of the effective consent of the parties. As for the effects of the agreement, if the requirements are met, the extension or derogation of jurisdiction is almost automatic for the judge.

Common law does not neglect the profile of validity[7], but this is not the only moment of verification and by far not the most important. The judge's attention is focused, in fact, on the profile of enforceability[8], ie on the decision whether or not to give effect to the stipulation made between the parties. In both jurisdictions considered, the starting point is that the parties can not, by agreement, deprive (oust) the judge of their

[2]L. COLLINS, Choice of forum and the exercise of judicial discretion: The resolution of an anglo-american conflict, in International & Comparative Law Quarterly, 22 (2), 1973, pp. 333, which the author stated that: "Forum selection clauses provide a fourth category (or perhaps an illustration of all three categories)".

[3]International Shoe Co. v. Washington, 326 U.S. 310 (1945). For details see: R.W. BOURNE, J.A. LYNCH, Modern maryland civil procedure, ed. LexisNexis, New York, 2018.

[4]Mauritius Commercial Bank Limited v. Hestia Holdings Limited and Sujana Universal Industries Limited [2013] EWHC 1328 (Comm), [43] (Popplewell J). OT Africa Line Ltd v. Hijazy (The Kribi) (No 1) [2001] 1 Lloyd's Rep 76, [4] [2].

[5]See in argument: D. GLASS, Freight forwarding and multi modal transport contracts, ed. Routledge, London & New York, 2013. M. DANOV, Jurisdiction and judgments in relation to EU competition law claims, Hart Publishing, Oxford & Oregon, Portland, 2010, pp. 137ss. J. ILL, M. NÍ SCHÜLLEABHÁIN, Clarkson & Hill's conflict of laws, Oxford University Press, Oxford, 2016, pp. 128ss.

[6]A. BRIGGS, Agreements on jurisdiction and choice of law, in Oxford University Press, Oxford, 2007, pp. 52ss. E.T. LEAR, Congress, the Federal Courts, and forum non conveniens: Friction on the frontier of the inherent power, in Iowa Law Review, 91, 2006, pp. 1147ss. R. PUSHAW, The inherent powers of Federal Courts and the structural constitution, in Iowa Law Review, 86, 2001, pp. 736ss.

[7]Continental Bank NA v. Aeakos Compania Naviera SA [1994] 1 WLR 588, 592F-594G (CA) (Steyn LJ) (delivering the judgment of the Court of Appeal) Mauritius Commercial Bank Limited v. Hestia Holdings Limited and Sujana Universal Industries Limited [2013] EWHC 1328 (Comm), [43] (Popplewell J).

[8]See in argument: K.M. CLEMONT, Governing law on forum-selection agreements, in Hastings Law Journal, 66, 2015, pp. 667, according to the author: "(...) the law of the chosen court should normally govern interpretation of the forum-selection clause even in the absence of a choice-of-law clause. One could defend this rule by interpreting the forum-selection clause as an implicit choice-of-law clause for matters relating to the forum-selection clause itself or as the best way to conform to the parties' expectations. Additionally, one could defend the rule as a way to avoid the conflicts process's difficulty and uncertainty on the preliminary question of the appropriate forum or as the only way to achieve a universal reading of the forum-selection clause (...)".

jurisdiction. That is to say, the direct operation of the pact, as such, over jurisdiction is excluded. On the other hand, the judge has the discretionary power that is proper to him to decide whether or not to give his approval to the commitments that the parties have signed to each other, that is to the choice of the forum made. In this assessment, moreover, the English judge and the American colleague follow very different paths.

2. INTERNATIONAL JURISDICTION IN ENGLAND

The modern English approach to international jurisdiction is the result of a set of positive rules and principles developed by jurisprudence. Its underlying character is effectively explained by James Fawcett: "theoretical analyses are unsupported in english private international law. They are alien to the common law tradition and if offered in argument would be a matter of surprise to an English judge (...) is nothing if not an empiricist and a pragmatist (...) there is no sacred principle that pervades all decisions (...) neither justice nor convenience is promoted by rigid adherence to any one principle (...) the presumptions are rebuttable and weight is given to all the factors (...) private international law is no more an exact science than is any other part of the law of England; it is not scientifically founded on the reasoning of jurists, but it is beaten out of the anvil of experience (...)"[9].

Certainly there is no lack of refined mechanisms of determination and delimitation of international jurisdiction in English law. The surprising fact, however, is that the reconstruction of the jurisdiction of the courts of London is closely linked to the institute of service of process, that is to the notification of the quotation, so that it is possible to affirm that "*ubi service, ibi iurisdictio*".

This circumstance is the symptomatic manifestation of a continued adherence, even if only formal today, to a conception dating back to the jurisdiction in a strongly territorial sense understood as the physical presence of the defendant on the sovereign territory that has historically developed in England. In the words of Lord Russel of Killowen in the *Carrick v. Hancock* case of 1895: "the jurisdiction of a court was based on the principle of territorial dominion, and (...) all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its courts (...)"[10]. At common law, that is according to traditional

[9] J.J. FAWCETT, J. CARRUTHERS, Cheshire, North & Fawcett. Private International Law, Oxford University Press, Oxford, 2008, pp. 36-37. J. HARRIS, L. COLLINS, Dicey, Morris & Collins, The conflict of laws, Sweet & Maxwell, London, 2017, pp. 13ss: "(...) the general principle (is) that in England service of process is the foundation of the court's jurisdiction to entertain a claim in personam. ... When process cannot legally be served upon a defendant, the court can exercise no jurisdiction over him[. T]he converse of this statement holds good, and whenever a defendant can be legally served with process, then the court, on service being effected, has jurisdiction to entertain a claim against him. Hence in proceedings in personam (...) the rules as to service define the limits of the court's jurisdiction (...) in continental countries (...) service of process is often required to give the defendant notice of proceedings, but it does not create jurisdiction; jurisdiction must exist already before a writ can be served (the most common basis of jurisdiction being the habitual residence of the defendant) (...)". M. AKEHURST, Jurisdiction in international law, in British Yearbook of International Law, 46, 1972-1973, pp. 171ss. The service of process is regulated from Rule 6 of Civil Procedure Rules (CPR) and in particular of the jurisdiction dalla Pratice Direction 6B, par. 3.1. J.J. FAWCETT, J. CARRUTHERS, Private international law, op. cit., pag. 353 stated that "(...) the most striking feature of the English common law rules relating to competence in actions in personam is their purely procedural character. Anyone may invoke or become amenable to the jurisdiction, provided only that the defendant has been served with a claim form (...)".

[10] J.H. BEALE, The jurisdiction of courts over foreigners, in Harvard Law Review, 26, 1913, pp. 284ss: "(...) in England (...) the law of the king's courts, common to the whole territory of England, became the sole law of the land. The centralizing policy of the Plantagenets was completely effective in arousing the feeling of territorial

law, jurisdiction could be exercised only against the defendant who was present, even transient[11], on English territory and provided that a proper service was carried out. All the controversies in which the defendant was not present in the territory escaped the knowledge of English courts: "(...) at common law, the mere agreement of the parties that the court was to have jurisdiction to determine disputes arising out of a contract between them was insufficient by itself to give the court jurisdiction, because the defendant could not be legally served with process if he was out of England. But if one party to the contract nominated an agent resident in England to accept service of process on his behalf, he was deemed to submit to the jurisdiction, and service could be effected on the agent in accordance with the contract (...)'[12]. Joseph Beale explains: "Since the jurisdiction of the court does not extend into the foreign country, and its writ is waste paper there, service of process, or what is service in form, on the foreigner in his own country is ineffective, and does not help the case"[13]. A jurisdiction that was both exorbitant and too restricted: there were some controversies that were only tenuously connected and others escaped because of the non-presence of the defendant on English territory. To overcome some of the drawbacks of a sometimes too limited scope of action, the judges did not fail to elaborate fictions aimed at extending the scope of their jurisdictional power[14]. The solution to the problem came with the Common Law

nationality, and in bringing about the recognition of the king as a territorial rather than a feudal sovereign. It was natural, therefore, that territorial principles should lie at the basis of the jurisdiction of the king's courts. This natural feeling was emphasized by the historical development of the king's courts. Apart from real actions (including debt, which was real in origin) the king's jurisdiction was originally confined to trespass, which he brought within the jurisdiction of his own judges by alleging it to be an act in breach of his peace. Personal actions in the king's courts were therefore in their origin violations of public order; and even the most extreme advocates of the theory of personal jurisdiction admit that questions of public order are reserved solely for the jurisdiction of the territorial sovereign. This original jurisdiction in personal actions was extended by the Statute of Westminster II to cover all actions in same cases, and the whole modern law of personal actions is derived from this statute. With these political and historical reasons for its adoption we shall not be surprised to find the principle of territorial jurisdiction accepted in all states where the common law prevails (...)". In the same spirit see also: It is not for the CJEU to define the content of the public policy of the Contracting State but the CJEU has adopted the view that the limits of public policy are a question of interpretation of the Brussels Convention and are therefore a matter which must be determined by it: C-7/98 Krombach v. Bamberski of 28 March 2000, ECLI:EU:C:2000:164, I-01935, parr. 22-23; C-38/98 Renault v. Maxicar of 11 May 2000, ECLI:EU:C:2000:225, I-02973, parr. 27-28; C-394/07 Marco Gambazzi v. Daimler Chrysler Canada Inc of 2 April 2009, ECLI:EU:C:2009:219, I-02563, parr. 26-28; C-420/07 Meletis Apostolides v. David Charles Orams of 28 April 2009, ECLI:EU:C:2009:271, I-03571, parr. 56-57; C-619/10 Trade Agency Ltd v. Seramico Investments Ltd of 6 September 2012, ECLI:EU:C:2012:531, published in the electronic Reports of the cases, par. 49; C-302/13, flyLAL-Lithunanian Airlines of 23 October 2014, ECLI:EU:C:2014:2319, published in the electronic Reports of the cases, par. 47.

[11] M. AKEHURST, Jurisdiction in international law, op. cit., pp. 170: writ. Watkins v. North American Land and Timber Co. (Ltd.), [1904] 20 TLR 534. See also: Colt Industries Inc. v. Sarlie, [1966] 1 All ER 673, 676 (per Lyell J) "In my judgment (...) in the absence of fraud inducing the defendant to come into the country so that he (...) is tricked to come within the jurisdiction for the sole purpose of serving him with a writ, jurisdiction [is] well founded by serving a writ on a foreigner who was here merely casually, and that accords entirely with the rule stated in Dicey for over forty years (...)".

[12] The principle is effectively affirmed by the english judge on the occasion of the request for recognition of a sentence issued by the court of the island of Tobago. The court of Tobago had ordered the defendant to appear in the action, performing the service of process by simply nailing a copy of the summons to the court door, a procedure allowed and used on the island. The defendant, however, had never been to Tobago, nor had he appeared through a lawyer. In denying validity to the sentence, Lord Ellenborough states: "Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?". Buchanan v. Rucker, 9 East 192 (1808). For more details see: E.M. BLANCO, B. PONTIN, Litigating extraterritorial nuisances under english common law and UIL statute, in Transnational Environmental Law, 6 (2), 2017, pp. 286ss. G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.,

[13] J.H. BEALE, The jurisdiction of courts over foreigners, op. cit.

[14] Par. 90: "(...) the difficulty caused by the form of allegation in the pleadings was finally surmounted by a fiction: namely, by laying a fictitious venue at some place within the kingdom; and this fictitious allegation of venue was not allowed to be disputed. In the first reported case of action for a foreign tort the wrong was committed in the island of Minorca; and the venue was laid 'at Minorca, to wit at London aforesaid in the Parish of

Procedure Act of 1852 and 1860[15] which at par. 18 and 19 finally allowed to carry out service outside the jurisdiction[16]. This regulatory authorization was then merged into the Supreme Court Order 11 and is now crystallized in the Civil Procedure Rules (CPR)[17]. Despite the extension by legislative means, there remains a profound difference depending on whether the defendant is present in English territory or not. When the defendant is on English territory, that is to say it is service within the jurisdiction, the jurisdiction is exercised at common law and the plaintiff is in a position, so to speak, of law because the jurisdiction is exercised as of right. In the case of service out, however, the exercise of jurisdiction is, in principle, discretionary. The actor who intends to notify a quote abroad, in fact, must first obtain a permit (leave) from the judge.

The distinction between service within "as of right" and service out subjected to the discretion of the judge must be completed with the role played by the forum doctrine not conveniens in limiting English jurisdiction. The Latin expression describes the power of the judge to suspend or refuse the exercise of his jurisdiction, otherwise existing, on the basis of an assessment of the appropriateness of the choice made by the actor. The doctrine in question is traced back to the experience of the Scottish courts of nineteenth century, from which it then migrated, albeit in different forms, to England, the United States and in general in the countries pertaining to the tradition of common law[18].

The first appearance in England, at the beginning of the 20th century, is limited to the prevention of the abuse of process, i.e. the "vexatious, oppressive or unjust"

St. Mary le Bow in the Ward of Cheap (...) from this time it became possible to sue in England for a foreign tort or breach of contract (...)", according to the case: Mostyn v. Fabrigas, Cowp. 161 (1774). See in argument also: C. VAN DAM, European tort law, Oxford University Press, Oxford, 2013. N. WALKER, Intimations of global law, Cambridge University Press, Cambridge, 2015.

[15]See for analysis: M. DEL MAR, W. TWINING, Legal fictions in theory and practice, ed. Springer, New York, 2015, pp. 288ss.

[16]See in particular from the english civil procedure system: Part 6 and Practice Direction 6B of the Civil Procedure Rules (England and Wales). Part 24 and Practice Direction 24 of the Civil Procedure Rules (England and Wales). Section 1(2)(a) of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (Applicable in England and Wales, Scotland and Northern Ireland for judgments from countries including Australia, Canada (except Quebec), India, Pakistan and Israel). Section 37(1) of the Senior Courts Act 1981 (England and Wales). Section 50 of the Senior Courts Act 1981 (England and Wales) (The power to grant damages in lieu of an injunction was originally granted to the Court of Chancery by Section 2 of the Chancery Amendment Act 1858 commonly known as Lord Cairns' Act). Sections 32, 33 and 34 of the Civil Jurisdiction and Judgments Act 1982 (England and Wales, Scotland and Northern Ireland). Contracts (Applicable Law) Act 1990 (England and Wales, Scotland and Northern Ireland). Sections 11(1) and 12(1) of the Private International Law (Miscellaneous Provisions) Act 1995 (England and Wales, Scotland and Northern Ireland). Section 2 of the Human Rights Act 1998 (England and Wales, Scotland and Northern Ireland). Constitutional Reform Act 2005, pp. 59, 148ss, Sch. 11 para. 1(1); SI 2009/1604, art. 2(d) (England and Wales, Scotland and Northern Ireland) renamed the Supreme Court Act 1981 as the Senior Courts Act 1981 (1.10.2009). Section 5(1) of the Arbitration (Scotland) Act 2010 (Scotland). The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) Regulations 2015, SI 2015/1644 (England and Wales, Scotland and Northern Ireland).

[17]J.J. FAWCETT, J. CARRUTHERS, Private international law, cit., pp. 354 and 372. A. BRIGGS, Agreements on jurisdiction and choice of law, op. cit., pp. 51ss.

[18]See for the forum non conveniens in Scotland: Clements v. Macaulay, 4 M. 583 (1866) and Sim v. Robinow, 19 R. 655 (1892). In argument: R.T. ABBOT, The emerging doctrine of forum non conveniens: A comparison of the Scottish, English and United States application, in Vanderbilt Journal of Transnational Law, 18, 1985, pp. 111, 114-125. G. ANDRIEUX, Declining jurisdiction in a future international convention on jurisdiction and judgments-How can we benefit from past experiences in conciliating the two doctrines of forum non conveniens and lis pendens?, in Loyola Law Angeles International & Comparative Law Review, 27, 2005, pp. 324, 336-348.

actions[19] against the defendant, on the assumption of the actor's bad faith[20]. In cases of abuse, therefore, the judge can refrain from exercising his own jurisdiction, otherwise existing. The modern and wider version of the doctrine develops instead, starting from the decision in the Atlantic Star of 1973[21]. On that occasion, the House of Lords files the requirement of bad faith and indicates some of the requisites to evaluate the oppressive nature of the action[22]. There are two intermediate steps leading to the leading case. In *MacShannon v. Rockware Glass Ltd.*[23] Lord Diplock elaborates a bi-phase test, stating that "(...) in order to justify a stay, two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court"[24]. Also Lord Diplock takes a further step in the Abidin Daver[25]: "the balancing of advantage and disadvantage to plaintiff and defendant of permitting litigation to proceed in England rather than, or as well as, in a foreign forum is to be based upon objective standards supported by evidence (...) the essential change in the attitude of the English Courts to pending or prospective litigation in foreign jurisdictions that has been achieved step-by-step as a result of the successive decisions of this House (...) is that judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now ripe to acknowledge frankly is, in the field of law with which this appeal is concerned, indistinguishable from the Scottish legal doctrine of forum non conveniens (...)"[26].

The complete affirmation of the English non conveniens forum is reached just over a decade later, in the formulation adopted by Lord Goff of Chieveley in the *Spiliada Maritime* case[27], still today the reference point in the matter. Spiliada reiterates,

[19]Expressive used in cases: Logan v. Bank of Scotland, [1906] 1 K.B. 141, 150-151; St. Pierre v. S. Am. Stores, [1936] 1 K.B. 382, 390. A. BURROWS, A restatement of the english law of unjust enrichment, Oxford University Press, 2012.

[20]Logan v. Bank of Scotland, [1906] 1 K.B. 141, 150-151; St. Pierre v. S. Am. Stores, [1936] 1 K.B. 382, 390. For details see: J. HILL, A. CHONG, International commercial disputes: Commercial conflict of laws in English courts, Hart Publishing, Oxford & Oregon, Portland, 2014. M. HARDING, Conflict of laws, ed. Routledge, London & New York, 2013. J.J. KUIPERS, The right to a fair trial and the free movement of civil judgments, in Croatian Yearbook of European Law and Policy, 6 (1), 2010, pp. 24ss.

[21]The Atlantic Star, [1973] 2 All ER 175, [1974] A.C. 436.

[22]The Atlantic Star [1974] A.C. 436 at p. 454 (per Reid LJ): "(...) in the end it must be left to the discretion of the court in each case where a stay is sought, and the question would be whether the defendants have clearly shown that to allow the case to proceed in England would in a reasonable sense be oppressive looking to all the circumstances including the personal position of the defendant (...)".

[23][1978] A.C. 795, p. 812.

[24][1984] 1 All E.R. 470, 343 and 344.

[25][1984] 1 All E.R. 470, 343 and 344.

[26]O. KAHN-FREUND, Jurisdiction agreements: Some reflections, in International & Comparative Law Quarterly, 26 (4), 1977, pp. 851: "(...) the Scottish and American general doctrine of forum non conveniens does not exist in England. That is, it does not exist as a general doctrine compelling or enabling the court to refrain from adjudicating on the merits only because adjudication abroad would be more convenient (...)". R. SCHUZ, Controlling forum shopping: The impact of MacShannon v. Rockware Glass Ltd, in International & Comparative Law Quarterly, 35 1986, pp. 374, 383-384. R.G. FENTIMAN, Jurisdiction, discretion and the Brussels Convention, 26 in Cornell International Law Journal, 26, 1993, pp. 59, 73ss. See also the case: The Abidin Daver, [1984] A.C. 398. In argument see also: D. GLASS, Freight forwarding and multi modal transport contracts, op. çit., M. DANOV, Jurisdiction and judgments in relation to EU competition law claims, op. cit., J. ILL, M. NÍ SCHÜLLEABHÁIN, Clarkson & Hill's conflict of laws, op. cit., E.B. CRAWFORD, J.M. CARRUTHERS, International private law: A Scots perspective, ed. W. Green, Edinburgh 2015. S. DEAKIN, A. JOHNSTON, Markesinis and Deakin's tort law, Oxford University Press, Oxford 2013

[27]Spiliada Maritime Corp. v. Cansulex Ltd., [1987] 1 A.C. 460. J. HILL, A. CHONG, International commercial disputes: Commercial conflict of laws in English courts, op. cit.

preliminarily, that "conveniens" stands for "appropriate" and not for "convenient"[28]. In light of this characterization, the judge is asked to assess whether there is a suitable forum which is clearly more appropriate, that is to say if the dispute could be better decided in another order[29]. If the outcome of this investigation is negative, the judge can exercise his jurisdiction without delay. On the other hand, if there is a clearly more appropriate forum, the English court is called upon to abstain, unless the requirements of justice in the specific case require it to know the dispute in any case[30]. The analysis of the judge is therefore articulated on two levels, one relating to the appropriateness of the forum and the other to considerations of justice. Returning to the profile of service within or out[31], the mechanism developed by Lord Goff in Spiliada is able to bring together in a substantially similar analysis the two hypotheses, which must also be kept separate on the conceptual level, of the stay of a procedure in which the jurisdiction has been exercised as of right and of the evaluation about the grant, or the revocation, of the leave for the service outside the jurisdiction. In both cases, in fact, the judge is asked to check the choice of the English photo made by the plaintiff as the venue for the resolution of the dispute, and more in general to determine which is the most appropriate forum for this operation[32]. To mark the difference between service within and service out, the burden of proof remains. If jurisdiction is exercised as of right, it is up to the defendant to prove that England is a forum not conveniens and to convince the judge to suspend the English action in favor of the foreign forum clearly more appropriate. The plaintiff, besides being able to oppose the reconstruction offered by the defendant, has the possibility to show the judge that the justice of the concrete case requires the exercise, in any case, of English jurisdiction. In the case of jurisdiction exercised on the basis of a leave, on the other hand, the burden is on the burden of proving that England represents the most appropriate forum in order to obtain permission to cite the defendant who is abroad.

The court does not grant leave unless the plaintiff fulfills its charge under CPR 6.36 and 6.37: (civil procedure rules)[33] must be present one of the ground identified in the Practice Direction 6B[34], the plaintiff must prove to have a reasonable prospect of

[28]Spiliada Maritime Corp., [1987] 1 A.C. p. 474-75.

[29]The factors that make a hole clearly more appropriate are varied, even if they all belong to the area that the Americans would call 'private factor', ie the relationship between the court and the dispute. There are no considerations relating to the "public factor", such as the interest of the court in judging the dispute or the overcrowding of the judge's docket. Relevant factors are the lex causae, the concentration of the dispute, the object of the contract, the place where the tort took place and the location of witnesses and evidence.

[30]Spiliada Maritime, p. 478 (per Lord Goff LJ): "If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction (...)". J. HILL, A. CHONG, International commercial disputes: Commercial conflict of laws in English courts, op. cit. C. VAN DAM, European tort law, op. cit., N. WALKER, Intimations of global law, op. cit.

[31]Spiliada Maritime, p. 480.

[32]Spiliada Maritime, p. 480: "It seems to me inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinnear in Sim v. Robinow, 19 R. 665, 668, viz. to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice (...)". J . HILL, A. CHONG, International commercial disputes: Commercial conflict of laws in English courts, op. cit.

[33]For more details see. S. SIME, A practical approach to civil procedure, Oxford University Press, Oxford, 2017, pp. 77ss.

[34]See Practice Direction 6B: "(...) service out of the jurisdiction where permission is required-The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where-General

success and the Court must be persuaded that England is the most appropriate forum[35] in which to resolve the dispute[36]. Once permission is granted, the plan moves to the request, which can be advanced by the defendant, by set aside the service. The European regulations in point of jurisdiction dictated by Regulation 44/2001[37] are binding for the English judge. In all cases covered by European law, the plaintiff can perform the service outside the jurisdiction as of right, without the need to request leave of the court, and no discretionary assessment by the English court is allowed on the forum point (not) conveniens[38]. In other words, through the European procedural law the

Grounds (1) A claim is made for a remedy against a person domiciled within the jurisdiction. (2) A claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction. (3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and-(a) there is between the claimant and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim (...) claims in relation to contracts (6) A claim is made in respect of a contract where the contract- (a) was made within the jurisdiction; (b) was made by or through an agent trading or residing within the jurisdiction; (c) is governed by English law; or (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract. (7) A claim is made in respect of a breach of contract committed within the jurisdiction. (8) A claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6). Claims in tort (9) A claim is made in tort where (a) damage was sustained within the jurisdiction; or (b) the damage sustained resulted from an act committed within the jurisdiction. Enforcement (10) A claim is made to enforce any judgment or arbitral award. Claims about property within the jurisdiction (11) The whole subject matter of a claim relates to property located within the jurisdiction (...)". J. HILL, A. CHONG, International commercial disputes: Commercial conflict of laws in English courts, op. cit. M. AHMED, The enforcement of settlement and jurisdiction agreements and parallel proceedings in the European Union: The Alexandros T litigation in the English courts, in Journal of Private International Law, 11, 2015, pp. 407ss. M. AHMED, The legal regulation and enforcement of asymmetric jurisdiction agreements in the European Union, in European Business Law Review, 28 (2), 2017. A. DINELLI, The limits on the remedy of damages for breach of jurisdiction agreements: The law of contract meets private international law, in Melbourne University Law Review, 38, 2015, pp. 1024ss.

[35] A. BRIGGS, Agreements on jurisdiction and choice of law, op. cit., pp. 53-54:" the requirement is that England be the proper place. It is not enough to show that England is a proper place (...) there is a court overseas, to the jurisdiction of which he is amenable, which is clearly more appropriate than England for the trial of the claim against him (...)". See also for more details: G.A. BERMANN, Parallel litigation: Is convergence possible?, in K. BOELE-WOELKI, T. EINHORN, D. GRISBERGER, S. SYMEONIDES (eds), Convergence and divergence in private international law-Liber Amicorum Kurt Siehr, Eleven International Publishing, The Hague, 2010, pp. 580ss. G.A. BERMANN, Parallel litigation: Is convergence possible?, in Yearbook of Private International Law, 13, 2011, pp. 22ss.

[36] J.J. FAWCETT, J. CARRUTHERS, Private international law, op. cit., pp. 372-373.

[37] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. See the next cases from the CJEU: C-433/16, Bayerische Motoren Werke v. Acacia Srl of 1st August 2017, ECL:EU:C:2017:550; C-368/15, Assens Havn v. Navigators Management (UK) limited of 13 July 2017, ECLI:EU:C:2017:462; joined cases C-168/16 and C-169/16, S. Nogueira and others v. Crewlink Ireland Ltd of 27 April 2017, ECLI:EU:C:2017:688; C-185/15, M. Kostanjevel v. F & S Leasing GmbH of 25 November 2016, ECLI:EU:C:2016:763; C-441/13, He Jduk v. Energie Agentur NRW GmbH of 13 March 2015, ECLI:EU:C:2015:28; C-45/13, A. Kainz v. Pantherwerke AG of 16 January 2014, ECLI:EU:C:2014:7; C-325/18 PPU, C.E. and N.E. of 19 September 2018, ECLI:EU:C:2018:739; C-308/17, Kuhn of 4 July 2018, ECLI:EU:C:2018:528; C-88/17, Zurich Insurance and Metso Minerals of 11 July 2018, ECLI:EU:C:2018:558. All the cited cases was published in the electronic Reports of the cases. For more details see: C. KESSEDJIAN, Commentaire de la refonte du règlement nº 44/2001, in Revue Trimestrielle De Droit Europèen, 2011, pp. 128ss. P.A. NIELSEN, The new Brussels I Regulation, in Common Market Law Review, 50 (4), 2013, pp. 524. A. NUYTS, La refonte du règlement Bruxelles I bis, Revue Critique de Droit International Privé, 102, 2013, 24ss. P. STONE, Stone on private international law in the European Union, Edward Elgar Publishers, Cheltenham, 2018.

[38] CJEU, C-281/02, Andrew Owusu v. N. B. Jackson and others of 1st March 2005, ECLI:EU:C:2005:120, I-01383. Article. 6.33 of the CPR has under the heading Service of the claim form where the permission of the court is not required -out of the United Kingdom: "The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the Judgments Regulation and -(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Member State; and (b) (i) the defendant is domiciled in the United Kingdom or in any Member State; (ii) the proceedings are within article 22 of the Judgments Regulation; or (iii) the defendant is a party to an agreement conferring jurisdiction, within article 23 of the Judgments Regulation (...)". J. HILL, A. CHONG, International commercial disputes: Commercial conflict of laws in English courts, op. cit. D. CHALMERS, A. ARNULL, The oxford handbook of European Union law, Oxford University Press, Oxford, 2015. D. CHALMERS, G. DAVIES, G. MONTI, European Union law, Cambridge University Press, Cambridge, 2014.

English judge is exposed to formal rules similar to those that characterize the activity of civil law colleagues and is bound to exercise his power only to verify the correspondence of the concrete case to the normative paradigm.

3. THE AGREEMENTS ON THE FORUM IN THE ENGLISH COMMON LAW

English law, like what happens in other state systems, regulates in a different way the aspects of derogation and extension of the jurisdiction[39] of civil law. The Brussels Convention of 1968 was implemented internally by the Civil Jurisdiction and Judgments Act (1982)[40]. Regulation[41] is, however, binding following the English opt-in decision "in accordance with article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community (...)"[42]. It is also recalled that the 1968 Brussels Convention, as amended on the occasion of the United Kingdom's accession in 1978, explicitly described as exorbitant "in the United Kingdom jurisdiction provisions based (...) on a notified or communicated to the defendant during his temporary stay in the United Kingdom (...)"[43]. The English system based on physical presence and forum non conveniens, far from having fallen into disuse due to European influences, is still the fundamental canon of jurisdiction in cases where European Union law does not apply.

As for the attributive effect, the story is very simple. In fact, there are no particular resistance on the part of the British judges who, on the contrary, consider their own efficient and quality forum[44]. The contractual agreement in favor of the London courts is considered as a valid submission to the English jurisdiction[45], even if not in case of

[39] A. BRIGGS, Agreements on jurisdiction and choice of law, op. cit., pag. 195, "an English court (...) takes precisely the same view where the nominated court is English as where it is foreign: it admits no distinction of principle and will enforce jurisdiction agreements which prorogate and derogate with the same degree of determination. There is no room for chauvinism, but also, no real awareness that a court in another country might see the arguments in a different way. Contracts are made to be performed, and the fact that they may be contracts about the jurisdiction of courts is nothing to the point (...)".

[40] For more details see: P. STONE, Stone on private international law in the European Union, op. cit.,

[41] CJEU, C-536/13 Gazprom OAO of 13 May 2015, ECLI:EU:C:2415:316, published in the electronic reports o the cases. B. DEMIRKOL, Ordering cessation of court proceedings to protect the integrity of arbitration agreements under the Brussels I regime, in International & Comparative Law Quarterly, 65, 2016, pp. 379, 401.

[42] Ex multis see: A. HARTKAMP, C. SIBURGH, W. DEVROE, Cases, materials and text on European Union law and private law, hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss. K. LENAERTS, I. MASELIS, K. GUTMAN, European Union procedural law, Oxford University Press, Oxford, 2014, pp. 133ss. M. WIERZBOWSKI, A. GUBRYNOWICZ, International investment law for the 21st century, Oxford University Press, Oxford, 2015. A.H. TÜRK, Judicial review in European Union law, Edward Elgar Publishers, Cheltenham, 2010. L. WOODS, P. WATSON, Steiner & Woods European Union law, Oxford University Press, Oxford, 2017, pp. 37ss C. BARNARD, S. PEERS, European Union law, Oxford University Press, Oxford, 2017, pp. 788ss. E. BERRY, M.Y. HOMEWOOD, B. BOGUSZ, Complete European Union law. Texts, cases and materials, Oxford University Press, Oxford, 2013. G. CONWAY, European Union law, ed. Routledge, London & New York, 2015. F. NICOLA, B. DAVIES, European Union law stories, Cambridge University Press, Cambridge, 2017.J.USHERWOOD, S. PINDER, The European Union. A very short introduction, Oxford University Press, Oxford, 2018. J.L. DA CRUZ VILAÇA, European Union law and integration. Twenty years of judicial application of European Union law, Hart Publishing, Oxford & Oregon, Portland, 2014.

[43] Art. 3 of Bruxelles Convention of 1968. B. DEMIRKOL, Ordering cessation of court proceedings to protect the integrity of arbitration agreements under the Brussels I regime,

[44] See the opinion of Lord Denning, MR, in The Atlantic Star, [1972] 2 Lloyd's Rep. 446, pag. 451: "No one who comes to these courts asking for justice should come in vain (...) this right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England it is a good place to shop in, both for quality of goods and the speed of service (...)".

[45] The T.S. Havprins, [1983] 2 Lloyd's L.R. 356 (Q.B.); Unterweser Reederei GmbH v. Zapata Off-Shore Co., [1968] 2 Lloyd's L.R. 158 (C.A.). see, J. CHITTY, Chitty on contracts: general principles, Sweet & Maxwell, London, 2012, pp. 1140ss. Z.S. TANG, Jurisdiction and arbitration agreements in international commercial law, ed. Routledge, 2014, pp. 42ss. A. BRIGGS, Arbitration and the Brussels Regulation again, in Lloyd's

an extension the judge is bound to exercise his power. With respect to the system outlined in terms of service and leave, the extension agreement implies a lower charge for the actor in requesting the "leave to serve outside the jurisdiction"[46]. It is up to the defendant, if anything, to prove that the English court is clearly not appropriate and that therefore the chosen forum represents a forum non conveniens. In the case of service within, therefore carried out as a right by the plaintiff, the burden on the defendant is even more demanding, having to prove that England is an inappropriate wholly forum. The route on the subject of derogation from jurisdiction is more articulated, even if the English approach to foreign jurisdiction clauses matures in a liberal sense much earlier than in the countries of continental Europe and the United States[47]. The starting point is the principle, consolidated in the English common law, according to which private individuals can not contractually oust the jurisdiction of the English courts. Two authors note: "At common law, parties could not by contract oust or lessen the jurisdiction of courts, and stipulations which purported to do so were characterised as void, illegal, invalid, or unembraceable; they were said to be contrary to the general policy of the law and against public policy (...)"[48].

In the face of the continuation of this warning, the discretionary power of the judge is gradually asserted to give effect to the contractual stipulation between the parties in favor of a foreign forum and, consequently, to suspend or prevent the establishment of an English action in violation of the agreement. In the face of such power, the principle of non-ouster ends up losing its fundamental meaning. One of the first decisions favorable to the possibility of the parties to derogate from the English jurisdiction, often cited in the literature, is dated in 1796[49]. The case in question, *Gienar v. Meyer*, concerns Dutch sailors employed on a Dutch boat who, in Holland, sign a contract agreeing not to take action against the captain of the ship in a foreign country and agreeing to settle any dispute in the Dutch courts, in accordance with the laws of the place. When the ship docks in an English port, however, one of the sailors decides to act for the payment of unrewarded wages. The British court, while reiterating at the outset the principle of the non-ouster Convention of English jurisdiction, considers it necessary to give thought to the contractual stipulation between the parties and appraises it more reasonable in the concrete case to invite the parties to fight in the agreed forum. It is certainly a first recognition of private autonomy which, however, must be

Maritime and Commercial Law Quarterly, 2015, pp. 284ss. A. DICKINSON, E. LEIN (eds.), The Brussels I Regulation Recast, Oxford University Press, 2015.

[46]Unterweser Reederei GmbH v. Zapata Off-Shore Co., [1968] 2 Lloyd's L.R. 158, 163 (C.A.): "(...) the 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 (...)". Z.S. TANG, Jurisdiction and arbitration agreements in international commercial law, op. cit.

[47]A. BISSETT-JOHNSON, The efficacy of choice of jurisdiction clauses in international contracts in english and australian law, in International & Comparative Law Quarterly, 19, 1970, pp. 542ss. S. COWEN, M. DA COSTA, The contractual forum: Situation in England and the British Commonwealth, in American Journal of Comparative Law, 13, 1964, pp. 179ss.

[48]See, Czarnikow v. Roth Schmidt & Co [1922] 2 KB 478: "(...) it is contrary to public policy to oust the jurisdiction of the courts by private agreement" a The Fehmarn, [1958] 1 WeeklyL.R. 159 (C.A.). See, M.P. FURMSTON, Cheshire, Fifout and Furmston's law of conctract, Oxford University Press, Oxford, 2017, pp. 497ss.

[49]Gienar v. Meyer, 2 H.Bl. 603, 126 Eng. Rep. 728 (C.P. 1796). E. MCKENDRICK, Contract law, Palgrave Macmillan, London, 2011. H. MUIR WATT, D.P. FERNANDEZ ARROYO (eds.), Private international law and global governance, Oxford University Press, Oxford, 2014, pp. 55ss. A. MILLS, Rethinking jurisdiction in international law, in British Yearbook of International Law, 84, 2014, pp. 188ss.

contextualised in the context of a controversy that had nothing to do with the courts of London and in which the outcome is almost a natural consequence of the case.

A step forward, however, takes place when, in 1854, the Common Law Procedure Act is approved, which in Section XI confers on the English court the power to suspend a procedure initiated in violation of an arbitration agreement, which was then confirmed by section 4 of the Arbitration Act (1889)[50]. Twenty years later, this power was extended by the jurisprudence to the choice clause of the forum, by virtue of the analogy that exists between an arbitration clause and an agreement on the forum[51].

The legal *ratio* changes around the middle of the twentieth century with the decision in Racecourse Betting Control *Board v. Secretary* for Air[52], when MacKinnon LJ observes that "(...) it is rather unfortunate that the power of the court to stay was said to be under section 4 of the Arbitration Act 1889. In truth that power arose under a wider general 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 (...)"[53]. The focus of the judge's reasoning thus becomes the question of the agreement between the parties. Lord Denning effectively explains this in the Fehmarn case, in the face of an agreement in favor of the Soviet Union courts: "I do not regard this provision as equal to an arbitration clause, but I do say that the English courts are in charge of their own proceedings: and one of the rules they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them (...) Is this dispute a matter which properly belongs to the courts of this country? (...) there seems to me to be no doubt that such a dispute is one that properly belongs for its determination to the courts of this country. But still the question remains: Ought these courts in their discretion to stay this action?"[54].

Once again the principle of non-ouster is reaffirmed, but it is a matter of a ritual, a little more than a formal value. The plan around which the analysis conducted by Lord Denning revolves, however, is the power of the judge to suspend the proceedings

[50]G.B.BORN, International commercial arbitration, Kluwer Law International, The Hague, 2014, pp. 1253ss. H. SERIKI, Injunctive relief and international arbitration, ed. Routledge, London & New York, 2014, pp. 134ss. In Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp. Ltd ([1981] AC 909; [1981] 1 Lloyd's Rep 253), it was clearly accepted that the primary obligations contained within an arbitration agreement can be discharged by frustration or breach. If so, the arbitration agreement comes to an end the arbitrator will no longer be seised of any power over the resolution of the dispute. Can this also be said of jurisdiction agreements? Although it may be possible for an English jurisdiction agreement to cease to have effect due to frustration, can a party to an English jurisdiction agreement ever perform his part of the bargain in so defective a manner as to entitle the other party to elect to discharge the jurisdiction agreement so as to relieve the English courts of their jurisdiction over the dispute in relation to the main contract? Surely such a breach is a theoretical impossibility? This helps to point out the fundamental difference between the jurisdiction of arbitrators and that of the courts: the former derive their jurisdiction solely from the arbitration agreement between the parties, whereas the latter derive their jurisdiction from a multiplicity of factors centred on the concept of connection with the forum (one of which is the presence of an English choice of court agreement).

[51]Law v. Garrett, 8 Ch. D. 26 (1878).

[52]Racecourse Betting Control Board v. Secretary for Air [1944] 1 Ch. 114 (C.A.)

[53]Law v. Garret, 8 Ch. D. 26 (1878). Ivi, p. 182, p. 146.

[54]The Fehmarn, [1958] 1 Weekly O.R. 159 (C.A.): "(...) the result which seems to follow is that the parties' choice of jurisdiction is more easily upset than their choice of law (...)". A. BRIGGS, Civil jurisdiction and judgments, ed. Routledge, London & New York, 2015.

to honor the stipulation made between the parties. This power does not need a normative basis, but is perceived as an inherent characteristic of the jurisdictional function, a consequence of the fact that the English courts are in charge of their own proceedings[55]. If the *Fehmarn* case now manifests the question in its modern contours, it is necessary to wait another ten years for the decision to decide Eleftheria[56], in 1969, the leading case that, even today, instructs the English judge in matters of jurisdictional agreements. Eleftheria is the name of a Greek ship carrying timber destined for England and Holland[57]. The decision pronounced by Brandon J is a real instruction manual on foreign jurisdiction clauses that indicates to the English court the way to follow in the event of a formal waiver of its jurisdiction: "(...) (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 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 (...)"[58].

If we compare the analysis that Brandon J proposes, and the English courts follow, on the subject of agreements on the forum, we immediately realize that there is a difference compared to the test that Lord Goff elaborates on non-convenience forum: always weighs on the actor the burden of proving that there is a strong cause to proceed in England in violation of the agreement on the foreign forum, even in the case of service within. This burden is understood to be even more burdensome when the leave to carry out service outside the jurisdiction[59] is required to take action in England. Eleftheria goes on to indicate some of the elements that the judge can consider to guide his decision: "(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-

[55]E. PEEL, Exclusive jurisdiction agreements: Purity and pragmatism in the conflict of laws, in Lloyd's Maritime and Commercial Law Quarterly, 1998, pp. 188-189. "Courts possess jurisdiction by the operation of law. One of the powers which jurisdiction confers is the power to decide whether or not to exercise their jurisdiction by hearing a case (...) prevents the courts from holding that foreign jurisdiction agreements are absolutely binding (...).

[56]The Eleftheria, [1970] P. 94, [1969] 2 All E.R. 64. L. COLLINS, Arbitration clauses and forum selecting clauses in the conflict of laws: Some recent developments in England, in Journal of Maritime Law & Commerce, 2, 1970-1871, pp. 372ss. T.C. HARTLEY, International commercial litigation. Text, cases and materials on private international law, Cambridge University Press, Cambridge, 2015.

[57]"(...) 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 (...)".

[58]The Eleftheria, [1970] P. 94, [1969] 2 All E.R. 64.

[59]Evans Marshall & Co. v. Bertola SA, [1973] 1 W.L.R. 349, 362. See also: E. PEEL, Exclusive jurisdiction agreements, op. cit., pp. 189ss.

bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial"[60].

Applied to the complex test, Brandon J. decides in favor of the defendants and pronounces a stay of the English procedure in favor of the Hellenic courts elected in the clause on the forum. To suggest this solution two circumstances contribute: the proof offered by the defendants that the application of the Greek law would lead to different results compared to the English law; the availability of the same to provide suitable guarantees to protect the reasons of the actors[61]. The "Eleftheria principles" were reaffirmed in a similar form by the Court of Appeal in the *El Amria* case[62] by Brandon himself, who became Lord Justice of the Court of Appeal, and still represent the reference point to which the English judge it refers to deciding whether or not to give effect to a derogation clause in English jurisdiction[63]. England represents a particular way of conceiving the discipline of the agreements on jurisdiction that arises, in some ways, at odds with respect to the european formalism. The starting point is not the jurisdiction, but the contractual stipulation between the parties that, although not binding it to a given outcome, calls the judge to a discretionary assessment on a case-by-case basis. The reference to discretion should not give the impression that the English courts do not seriously consider an agreement on the forum, a conclusion that would prove to be incorrect. The parties, however, can not, in principle, bind the English court to exercise or not to exercise (oust) its power. In other words, while on the continent a valid agreement produces the automatic effect of derogation and extension provided for by law, in England we distinguish between validity and enforceability, between validity and implementation. The validity is the subject of a less careful scrutiny than that operated by the civil law judge, while the second profile is the one on which the English judge focuses his attention. The enforceability, always subject to the discretionary scrutiny of the judge, thus constitutes the main investigation plan of the discipline of the jurisdiction agreements in England[64].

4. VALIDITY AND ENFORCEABILITY.

Validity and enforceability represent the two checks that an agreement on the forum must overcome in order to explain its effects in England. The judgment in point of validity, to be understood in the sense of substantial/contractual validity, takes place

[60]The Eleftheria, [1970] P. 94, [1969] 2 All E.R. 64. E. TORRALBA-MENDIOLA, E. RODRIGUEZ-PINEAU, Two's company, three's a crowd: Jurisdiction, recognition and res judicata in the European Union, in Journal of Private International Law, 10, 2014, pp. 404ss. G. VAN CALSTER, European private international law, Hart Publishing, Oxford & Oregon, Portland, 2013.

[61]L. COLLINS, Arbitration clauses and forum selecting clauses, op. cit., pp. 374ss. E. MCKENDRICK, Contract law, Palgrave Macmillan, London, 2013.

[62]Aratra Potato Co. Ltd. v. Egyptian Navigation Co.; The El Amria, [1981] 2 Lloyd's Rep. 119 and pp. 123-24 (C.A.). J. HILL, A. CHONG, International commercial disputes: Commercial conflict of laws in English courts, op. cit.

[63]Donohue v. Armco Inc., [2002] 1 All ER 749, p. 759 (H.L. for Lord Bingham).

[64]J. HARRIS, L. COLLINS, Dicey, Morris e Collins, The conflict of laws, op. cit., 12R–086 in the matter of conflict of jurisdiction states that: "(1) Where a contract provides that all disputes between the parties are to be referred to the jurisdiction of the English courts, the court normally has jurisdiction to hear and determine proceedings in respect thereof. (2) (...) where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign tribunal, the English court will stay proceedings instituted in England in breach of such agreement (or, as the case may be, refuse to give permission to serve process out of the jurisdiction) unless the claimant proves that it is just and proper to allow them to continue (...) (4) An English court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court in breach of contract to refer disputes to an English (or another foreign) court (...)".

at an earlier stage, also on a logical level, with respect to the judge's discretional assessment of the effectiveness of the content of the agreement. The assessment focuses on the profile of the law applicable to the forum clause, ie on an eminently issue of conflict of laws. From the principle of autonomy of the agreement on the forum with respect to the contract, a profile that we will analyze later on, it follows that it is not possible to automatically extend the law applicable to the contract to the clause on the forum. The judge must therefore carry out an analysis dedicated to the agreement on the forum as such. The proper law of contract that governs the question of the validity of the agreement is determined, in the absence of agreement of the parties, with reference to the conditions existing at the time the contract is formed. The applicable law, therefore, can not remain floating and be determined at a later time[65]. This does not prevent, however, that the parties expressly agree to postpone their determination at the time the dispute arises, entrusting the task to the arbitrator or the court seised.

Once the lex causes have been determined, the judge is called upon to assess, once again in compliance with the principle of autonomy of the clause on the forum with respect to the contract, the existence of any defects specifically referring to the clause or contract in its entirety. This is a substantive-contractual investigation, aimed at verifying the correct formation of the agreement between the parties[66]. The examination includes a judgment regarding the correspondence of the agreement to English imperative rules, so much so that an agreement, valid under the applicable law, but that "offends against a rule of mandatory english law"[67] is considered invalid. For example, reduced or even excluded is the possibility of entering into agreements on the court in matters such as subordinate employment[68] or the consumption *ratio*[69]. In the *Morvike* case[70], believing that the Carriage of Goods by Sea Act (1992) prohibited the use of liability waiver clauses in the bills of lading, the House of Lords found it invalid an agreement on the forum that would have the consequence of evading said restriction. Since the decision of *British South Africa Co. v. Companhia de Mogambique*[71], excludes that the English courts may know of real disputes regarding the ownership of real estate sites abroad, even in the presence of clauses of choice of jurisdiction in favor of the courts of London. The mere disparity in bargaining power between the parties,

[65]A. BRIGGS, Agreements on jurisdiction and choice of law, op. cit., pp. 85ss. The Iran Vodjan [1984] 2 Lloyd's Rep 380, 385 (per Bingham J) "(...) the proper law is something so fundamental to questions relating to the formation, validity, interpretation and performance of a contract that it must (...) be built into the fabric of the contract from the start and cannot float in an indeterminate way until finally determined at the option of one party (...)".

[66]W. CUTLER, Comparative conflicts of law: Effectiveness of contractual choice of forum, in Texas International Law Journal, 20, 1985, pp. 126: "(...) as in the United States and France, overreaching, lack of agreement, and fraud are clearly defenses (...)".

[67]J. HARRIS, L. COLLINS, Dicey, Morris e Collins, The conflict of laws, op. cit., pp. 522, 12-097.

[68]Employment Rights Act (1996), s. 203.

[69]Consumer Credit Act (1974), s. 141.

[70]The Morviken [1981] 2 Lloyd's L.R. 61, 64-65 (Q.B. 1980).

[71]British South Africa Co. v. Companhia de Mogambique [1893] A.C. 602. Contractual claims: C-29/76, LTU v. Eurocontrol of 14 October 1976, ECLI:EU:C:1976:137, I-01541, par. 4; C-172/91, Sonntag v. Waidmann of 21 April 1993, ECLI:EU:C:1993:144, I-01963, par. 20; C-814/79, Netherlands v. Reinhard Ruffer of 16 December 1980, ECLI:EU:C:1980:291, I-03807 par. 9. The Rome II Regulation applies only in "situations involving a conflict of laws". This qualification to the applicability of Rome II Regulation is unnecessary and superfluous as the need to refer to the Regulation does not arise in a dispute with connections to only one State. Secondly, the term "conflict of laws" is potentially misleading as the term covers the entire discipline of private international law in common law jurisdictions. See also: M.J. WHINCOP, M. KEYES, R.A. POSNER, Policy and pragmatism in the conflict of laws, ed. Routledge, London & New York, 2018. A. DICKINSON, The Rome II Regulation. The law applicable to non-contractual obligations. Updating supplement, Oxford University Press, Oxford, 2010.

on the other hand, is not generally considered sufficient to threaten the validity of the jurisdiction clause. From the formal point of view, a less explored aspect of what is happening on the continent, the written form is required as an element guaranteeing the existence of an agreement6[72]. The courts of London, however, do not allow the contractor in bad faith to evade an agreement otherwise desired and valid simply for the existence of a formal defect. If the clause is valid, or if the validity is not a matter of dispute, the English judge makes a discretionary assessment of the enforceability of the agreement on the basis of the path indicated in Eleftheria and in *El Amria* cases. The first element that must be taken into consideration is the place where the evidence is found, in accordance with the principle of procedural economy. This aspect may concern the excessive costs that the parties would be called to support in the foreign forum, including those charged to the plaintiff[73] even if the voluntary signing of the forum agreement by the plaintiff seems to diminish the importance of this criterion[74]. Always within the first element should be considered the inconvenience that witnesses may have to support if forced to move to remote places. The inconvenience connected to the possible interruption of employment[75], or the impossibility for the foreign judge to oblige the witness to declare also takes on importance[76]. Finally, he also notes the concrete availability of the tests in the systems considered. In this regard, it is Brandon J himself who invites his colleagues to be cautious, in order to avoid that the location of evidence in England represents the way to make sense, by virtue of a regularization of the exceptional regime, the general principle according to which agreements on the forum must be enforced[77]. The fact that certain technical inspections have already been conducted in England[78] may sometimes be relevant, although the House of Lords notes "experts can travel, or be replaced by other experts"[79] and therefore the importance of this element appears to be contained.

[72]"(...) the formal validity of a jurisdiction agreement is probably subject to the rule locus regit actum in its optional version: if a choice of jurisdiction clause has, by its proper law, to be in writing, it would presumably nevertheless be valid if concluded orally in a country not requiring the written form (...)". O. KAHN-FREUND, Jurisdiction agreements, op. cit., pp. 828ss.

[73]The Panseptos, [1981] 1 Lloyd's Rep. 152, p. 154; The Eleftheria, [1970] P. 94, p. 104. see the critics of S. Peel, Exclusive jurisdiction agreements, op. cit., pp. 191-192. T.C. HARTLEY, International commercial litigation. Text, cases and materials on private international law, op. cit.

[74]The Kislovodsk, [1980] 1 Lloyd's L.R. 183, 186 (Q.B. 1979): "(...) i seems to me that it does not lie in the mouth of a party who has agreed to such a clause to say, when the clause is invoked, that the cost of proceeding in Russia is expensive (...)".

[75]The Sidi Bishr, [1987] 1 Lloyd's Rep. 42, 43

[76]According to the judge in the case: Citi-March Ltd v. Neptune Orient Lines Ltd, [1996] 2 All ER 545, p. 553: "(...) the English witnesses would be unlikely to attend voluntarily and could not be compelled to attend the trial and to give evidence and even if they were called by the plaintiffs, they could not be cross-examined unless they could be treated as hostile (...) the preponderance of the oral evidence is likely to come from English witnesses and to be based on discovery of documents in England and a trial in Singapore would therefore involve more movement of witnesses and documents and therefore probably greater administrative costs than a trial in London (...)". For more details see. M.A. CLARKE, D. YATES, Contracts of carriage by land and air, ed. Routledge, London & New York, 2013, par. 3.41. Y. BAATZ, Maritime law, ed. Routledge, London & New York, 2017. S. BAUGHEN, Shipping law, ed. Routledge, London & New York, 2017.

[77]"(...) much of the evidence on the relevant facts is likely to be found in the country of discharge. 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 exception would be so frequent as to undermine the generality of the rule (to stay proceedings commenced in breach of foreign jurisdiction agreement)". The Makefjell, [1975] 1 Lloyd's Rep. 528, p. 535.

[78]The Athenee, (1922) 11 Ll.L.Rep. 6; The Fehmarn, [1958] 1 W.L.R. 159; The Adolf Warski, [1976], 1 Lloyd's Rep. 107. F. SPARKA, Jurisdiction and arbitration clauses in maritime transport, ed. Springer, London, 2010, pp. 135ss.

[79]Spiliada Maritime Corp. v. Cansulex Ltd. (16 November 1984), per Staughton J, cited also in the decision of the House of Lords, [1987] A.C. 460. For further details see: C. RYNGAERT, Jurisdiction in international law, Oxford University Press, Oxford, 2015. M. HOOK, The choice of law agreement as a reason for exercising jurisdiction, in The International & Comparative Law Quarterly, 63 (4), 2014, pp. 966ss.

The second factor indicated in Eleftheria relates to the applicable law and suggests to the judge the opportunity that the forum and the law applicable to the dispute coincide. In the event that the parties have, expressly or implicitly, chosen forum and law in a consistent manner, it is therefore very probable that the English proceeding initiated in violation of the agreement is not permitted to continue[80]. The conclusion may be different if the chosen forum is foreign, but the contract indicates English law as lex cause[81]. Another factor that courts can take into consideration is the possible link between the forum and parties, such as the connection of one or both parties with the involved systems[82], the nationality of parties and witnesses[83], or the identification of countries with which the dispute appears to be more connected[84]. Lord Diplock, for example, shows that he prefers the search for the country with which "the dispute (is) most closely concerned"[85]. If parties' connection with England is tenuous or non-existent and the jurisdiction clause indicates the jurisdiction of the foreign judge, it is probable that the judges will honor parties' choice even without a complex balancing of the "Eleftheria principles", preventing the prosecution of the English action[86]. The profile of the link between the dispute, the parties and the forum should not, however, play any role if it is clear that the parties have agreed to attribute the competence to a neutral forum, by definition without such contacts[87]. The next element suggested by Brandon J, the fourth in the order of exposure in Eleftheria, relates to whether the defendant seeking the implementation of the "genuinely desires"[88] jurisdiction to settle the dispute in the chosen forum, or just looking for a procedural advantage. Such an assessment, which should not extend until a judgment on the quality of the elected system was given[89], was, in any case, interpreted restrictively by the English courts. Lord Goff noted in this regard: “if the parties have chosen to submit their disputes to the exclusive

[80]Trendtex Trading Corp. v. Credit Suisse, [1981] 3 W.L.R. 766, 773 (H.L.); The Eleftheria, 1970 P. 94, 101-02 (1969). In The Fehmarn, [1958] 1 W.L.R. 159, 162 (C.A. 1957). T.C. HARTLEY, International commercial litigation. Text, cases and materials on private international law, op. cit.

[81]S. PEEL, Exclusive jurisdiction agreements, op. cit., pp. 193-194.

[82]The Atlantic Song, [1983] 2 Lloyd's L.R. 394, 399 (Q.B.).

[83]Trendtex Trading Corp. v. Credit Suisse, [1981] 3 W.L.R. 766, 773 (H.L.).

[84]The El Amria, [1981] 2 Lloyd's L.R. 119, 124 (C.A.). For more analysis see: D. JACKSON, Enforcement of maritime claims, ed. Routledge, London & New York, 2013. A. MANDARAKA-SHEPPARD, Modern maritime law. Jurisdiction and risks, ed. Routledge, London & New York, 2013.

[85]The Fehmarn [1958] 1W.L.R. 159, 162 (C.A. 1957).

[86]The Sennar (DSV Silo-und Verwaltungsgesellschaft mbH v. Owners of the Sennar and thirteen other ships) [1985] 2 All ER 104, p. 112: (for Brandon LJ): “(...) the simple fact is that the appellants' claim against the respondents, while having connections with both Holland and the Sudan, has no connection whatever with England, save only that, because of the presence of a sister ship of the Sennar in an English port, the appellants were able to arrest her and found jurisdiction here. In these circumstances this is not a case where a careful and meticulous weighing of the factors for and against a stay of the action is necessary. Rather it is a case in which only a perverse exercise by a court of its discretion could have led it to refuse the respondents the stay for which they asked. The appellants elected to have one good long bite at the cherry before the Dutch courts between 1975 and 1980. They lost before those courts and there is no possible justification for allowing them to harass the respondents by taking a further long bite at the same cherry in the action which they have brought in the Admiralty Court here (...)”. See also: J. VAN DE VELDE, The "cautious lex fori" apporach to foreign judgments and preclusion, in The International & Comparative Law Quarterly, 61 (2), 2012, pp. 522ss.

[87]Attock Cement v. Romanian Bank for Foreign Trade, [1989] W.L.R. 1147, p. 1161; Akai Pty v. People's Insurance Co. Ltd., [197] C.L.C. 1508. For details see: N. ENONCONG, The law applicable to demand guarantees and counter-guarantees, in Lloyd's Maritime & Commercial Law Quarterly, 2015, pp. 194-215. I. CARR, P. STONE, International trade law, ed. Routledge, London & New York, 2017.

[88]In The Star of Luxor, [1981] 1 Lloyd’s L.R. 139, 140-41 (Q.B. 1980) and The Kislovodsk, [1980] 1 Lloyd’s L.R. 183, 186 (Q.B. 1979), Egypt and Russia were judged by order as: non unfair. In The El Amria, [1981] 2 Lloyd’s L.R. 119, 127 (C.A.), e The Fehmarn, [1958] 1 WeeklyL.R. 159 (C.A.)

[89]The english courts adopted a difference orientation: in particular see: The Star of Luxor, [1981] 1 Lloyd's L.R. 139, 140-41 (Q.B. 1980) and The Kislovodsk, [1980] 1 Lloyd's L.R. 183, 186 (Q.B. 1979); The El Amria, [1981] 2 Lloyd's L.R. 119, 127 (C.A.), and The Fehmarn, [1958] 1 WeeklyL.R. 159 (C.A.). A. BRIGGS, Civil jurisdiction and judgments, op. cit.

jurisdiction of a foreign court it is difficult to see how either can in the circumstances complain of the procedure of the court"[90], typical declension of the pacta sunt servanda principle. It is added that: "(...) it is arguable (...) 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"[91]. According to the interpretation given by Sheen J in *Vishva Prabha* case, the criterion in question acquires a specific weight only when the outcome of the dispute is discounted and the defendant only seeks to gain time[92].

Four other hypotheses are brought together by Brandon J under the category of prejudice that would come to the actor if he were forced to act in the chosen forum. The first relates to the possible loss of guarantees (securities) in the event of suspension of the english share. Such prejudice can easily be neutralized by the English court by imposing on the defendant the obligation to provide equivalent guarantees in the foreign proceeding, under penalty of refusal or revocation of the stay of the English action[93]. The second concerns the prospect of circulation of the decision issued by the judge elected, but, as also underlined by a careful commentator, the speculative character of this defense is such that English courts pay little attention to it. The third factor to bear in mind is whether, by effect of the agreement on jurisdiction, the plaintiff in the English proceedings would be subject to a limitation period which is not reflected in English law and is therefore deprived of any remedy. This is a circumstance that is not unimportant for the English court. In order for such an argument to prevail, the plaintiff, who, let us remember, acts in violation of an agreement on the court, must prove that he has not acted unreasonably or negligently, for example by letting the prescriptive term expire without reason in the chosen forum[94]. The last factor suggested by Brandon J is related to the possibility that for the actor it was not possible to obtain justice (rectius, a fair trial) in the chosen forum for political, racial, religious reasons or for other reasons[95]. A further element, not listed in Eleftheria, which however seems to be carefully considered by the English courts is the pragmatic preference for the concentration of disputes in the case of disputes with multiple parties. So that if only some of them are bound by the jurisdiction agreement, the judge can decide not to give it

[90]Trendtex Trading Corp. v. Credit Suisse, [1980] 3 All ER 721, p. 735.
[91]The Morviken, [1981] 2 Lloyd's L.R. 61, 64-65 (Q.B. 1980), reformed later by [1983] 1 Lloyd's L.R. I (H.L. 1982): "(...) it seems to me that I should not be influenced by the probable result of the litigation in considering whether or not to grant a stay of the action (...)".
[92]The Vishva Prabha, [1979] 2 Lloyd's Reo. 286; The Atlantic Song, [1983] Lloyd's Rep.394; The Pia Vesta, [1984] 1 Lloyd's Rep. 169.
[93]S. PEEL, Exclusive jurisdiction agreements, op. cit., pp. 197ss.
[94]Baghlaf Al Safer Factory Co. v. Pakistan National Shipping Co., [1997] All ER (D) 107: "(...) where a plaintiff had acted reasonably in commencing proceedings in England and in allowing time to expire in the agreed foreign jurisdiction, a stay of the English proceedings should only be granted on terms that the defendant waived the time bar in the foreign jurisdiction". In the same spirit see also the case: The Pioneer Container, [1994] 2 A.C. 324, 348-349.
[95]Ellinger v. Guiness, Mahon & Co., [1939] 4 All E. R. 16 (Ch.); Oppenheimer v. Louis Rosenthal & Co., [1937] 1 All E.R. 23; Carvalho v. Hull Blyth Ltd., [1979] 1 W.L.R. 1228, [1979] All ER 280. Dor analysis see: S. BAUGHEN, Human rights and corporate wrongs: Closing the governance gap, Edward Elgar Publishers, 2015, pp. 43ss. D. FAIRGRIEVE, E. LEIN (eds.), Extraterritoriality and collective redress, Oxford University Press, Oxford, 2012, par. 3.05.

effect in order to privilege the simultaneus processus[96]. In conclusion, the British courts, while not feeling bound by a clause on the forum that, as such, continues to be subject to the principle of non-ouster, are ready to exercise their discretionary power to bind the parties to the (valid) agreement who have stipulated[97], unless special needs[98] discourage enforcement in the concrete case[99].

5. INTERNATIONAL JURISDICTION IN THE UNITED STATES

The United States represents an "exceptional" case[100] from many points of view, and thus also in the way of conceiving international jurisdiction[101]. The most significant datum that we can underline is the constitutional limit to the exercise of power by the judge that has been modulated by the jurisprudence of the Supreme Court starting from the clause two process contained in the Vº and XIVº amendment of the Constitution[102]. Another characteristic derives from the federal nature of the country, in fact, most of the institutes and doctrines applied in cases of international litigation, were born or are strongly influenced by the developed intra-State jurisdictional experience,

[96]See the decisions in: Donohue v. Armco Inc., [2001] UKHL 64, par. 34, [2001] 1 All ER 749, p. 764 (per Bingham of Cornhill LJ): "(...) it seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue"; Bouygues Offshore SA v Caspian Shipping Co [1998] 2 Lloyd's Rep 461; Mahavir Minerals Ltd v Cho Yang Shipping Co Ltd (The M C Pearl), [1997] 1 Lloyd's Rep 566; Citi-March Ltd v. Neptune Orient Lines Ltd, [1996] 2 All ER 545; The El Amria, [1981] 2 Lloyd's L.R. 119, 124 (C.A.). In Crédit Suisse First Boston (Europe) Ltd v. MLC (Bermuda) Ltd [1999] 1 All ER (Comm) 237, according to judge Rix J.: '(...) I enforce (the exclusive jurisdiction clause) or not, I cannot ensure that all litigation between [A] and [B, C and D] is carried forward in one jurisdiction, (thus) the continuation of the proceedings in England is inevitable (...)". In the same spirit see from the CJEU: CJEU, C-25/76, Galeries Segoura SPRL v. Societá Rahim Bonakdarian of 14 December 1076, ECLI:EU:C:1976:178, I-01851, par. 6; C-24/76, Estasis Salotti di Colzani Aimo and Gianmario Colzani snc v. Rüwa Polstereimaschinen GmbH of 14 December 1976, ECLI:EU:C:1976:177, I-0831, par. 7; C-23/78, Nikolaus Meeth v. Glacetal of 9 November 1978, ECLI:EU:C.1978:198, I-02133, par. 5, in which the CJEU, dealing with the case of the extensions c.d. 'Mutual', has the opportunity to state that 'the art. 17 (...) has as a consequence to exclude, in relations between the parties, other powers of optional competence, as set out in articles 56 of the Convention '. Where it deems it appropriate, the judge of the extended court has the power to suspend the proceedings pending the determination of the reference for a preliminary ruling or otherwise connected. For analysis see: P. ROBERSON, Collier's conflict of laws, Cambridge University Press, Cambridge, 2013, pp. 230ss. A. BRIGGS, Civil jurisdiction and judgments, op. cit., Y. BAATZ, Maritime law, ed. Routledge, London & New York, 2017.

[97]See, Mackender v. Feldia AG, [1967] 2 QB 590, [1966] 3 All ER 847; Unterweser Reederei GmbH v. Zapata Off-Shore Co (The Chaparral), [1968] 2 Lloyd's Rep 158; The Eleftheria, [1970] P 94, [1969] 2 All ER 641; DSV Silo-und Verwaltungsgesellschaft mbH v. Owners of the Sennar and 13 Other Ships (The Sennar (No 2)), [1985] 2 All ER 104, [1985] 1 WLR 490; British Aerospace Plc v. Dee Howard Co, [1993] 1 Lloyd's Rep 368; Continental Bank NA v. Aeakos Compania Naviera SA and Others, [1994] 2 All ER 540, [1994] 1 WLR 588; Aggeliki Charis Compania Maritima SA v. Pagnan SpA (The Angelic Grace), [1995] 1 Lloyd's Rep 87; Akai Pty Ltd v. People's Insurance Co Ltd, [1998] 1 Lloyd's Rep 90.

[98]Donohue v. Armco Inc., [2001] UKHL 64, [2001] 1 All ER 749; The El Amria, [1981] 2 Lloyd's L.R. 119 (C.A.).

[99]O. KAHN-FREUND, Jurisdiction agreements, op. cit., pag. 828: "(...) to take a practical example: under the federal maritime laws of the United States, i.e. under the Carriage of Goods by Sea Act 1970, choice of jurisdiction clauses in bills of lading subject to the Act are invalid. An English court would have to refuse to exercise jurisdiction in a dispute arising from such an American bill of lading containing an invalid agreement for English jurisdiction (...)". The above example was superated from the american supreme court in the case: Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U.S. 528 (1995) which affirmed the clauses of forum in this case, too. See in argument: J. HARRIS, L. COLLINS, Dicey, Morris and Collins, The conflict of laws, cit., pp. 521-422.

[100]The expression: "American exceptionalism" is used from O.G. CHASE, American 'exceptionalism' and comparative procedure, in Americal Journal of Comparative Law, 50, 2002, pp. 277ss, to describe not only the particular cultural and legal attitude of the American jurist, but also to describe the peculiarities of the trial experience of the country, characterized by institutions such as pre-trial discovery, jury, punitive damages and class action.

[101]G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, ed. Wolters Kluwer, Alphen aan den Rijn, 2011, pp. 3-4. F. JUENGER, Judicial jurisdiction in the United States and in the European Communities: A comparison, in Michigan Law Review, 82, 1984, pp. 1210ss.

[102]"(...) no state (...) shall any state deprive any person of life, liberty, or property, without due process of law".

among the various states of the union. The sphere of American jurisdiction is subdivided into personal and subject matter jurisdiction. In order for an American judge to exercise jurisdiction over a dispute, it is necessary to verify that both requirements are met. The notion of subject-matter jurisdiction is similar to that of the division between different jurisdictions[103], but complicated by the additional difficulties represented by the coexistence of state courts with general jurisdiction with an order of federal courts which has a more limited scope[104]. Within the limits defined in the abstract by art. III of the American Constitution, the Congress gave effective jurisdiction to the federal courts in cases of federal question[105], diversity/alienation and other more specific hypotheses[106].

Personal jurisdiction[107], on the other hand, pertains to the power of the judge against the defendant, ie the connection that exists between the party to a dispute, or its assets, and the forum. Also in the United States, as in England, originally a strictly territorial conception of 'jurisdiction as physical power'[108] develops. In this light, the physical presence of the defendant in the sovereign territory, and therefore the possibility of notifying him of the summons within the jurisdiction, is "a necessary and

[103]G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit., "(...) subject matter jurisdiction deals with a court's power to hear a class of disputes without necessary regard to the substantive rules that are applied (...)".

[104]This is the projection in the judicial seat of the presence of competences enumerated by the federal legislative power pursuant to art. I of the Constitution. Thus, par. 7 combine the plenary State subject-matter and legislative jurisdiction with the Federal Federal limited and subject-matter jurisdiction. The relationship between state courts and federal courts is not immediately understandable. In summary, we can state that jurisdiction is not shared between the federal and the state, but is usually of a concurrent nature. This means that, in the presence of the aforementioned requirements, the same action can be introduced both before the federal judge and before the state judge. In the second case the defendant may request that the case be removed from the state court to the Federal court, under 28 U.S.C. par. 1441. There are various reasons for requesting removal in favor of a Federal court. First of all a different set of procedural rules is applied, i.e. the Federal Rules of Civil Procedure. Furthermore, the federal judge should represent a more neutral forum for disputes with a diversity of citizenship. It is then a question of courts with high levels of expertise and specialization, capable of handling complex legal and political disputes. Finally, the removal is the tool that allows to escape the local juries (but not always to the jury tout court), often considered much more sympathetic with the reasons of the actor than with those of the defendant. Other times, removal is an intermediate phase of an international litigation strategy, aimed at moving the case to another Federal court or obtaining its rejection on the basis of doctrines, sometimes not used by the State courts, such as the forum non conveniens. Ivi, pp. 9-10. It should be noted a particular technique of reverse forum shopping implemented by the defendant, which consists in requesting the removal of a case incardinated in a state jurisdiction in the corresponding federal district court, and then obtain a change of venue thanks to 28 U.S.C. par. 1404 allowing the party to demonstrate that the federal forum is not the most appropriate and that there is another more convenient. The articulated arsenal of procedural tools through which actors can try to prevent the removal and the defendants try to realize it is described in R.J. WEINTRAUB, International litigation and forum non conveniens, in Texas International Law Journal, 29, 1994, pp. 342-343.

[105]28 U.S.C. par. 1331: "(...) the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States". 10628 U.S.C. par. 1332 (a): "(...) the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state (...); (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties (...)".

[106]From example the cases from: Alien Tort Statute, 28 U.S.C. par. 1350, or from Foreign Sovereign Immunities Act, 28 U.S.C. par. 1330.

[107]A.T. VON MEHREN, D.T. TRAUTMAN, Jurisdiction to adjudicate: A suggested analysis, in Harvard Law Review, 79 (6), 1966, pp. 1136ss. The jurisdiction of the judge was traditionally divided into the three typical categories of the common law, in personam, in rem and almost in rem, which still maintain a certain value. The second category includes the hypotheses of jurisdiction exercised on the basis of the presence on the territory of assets belonging to the defendant or on the precautionary side. The third, in rem, relates not only to actions that we would define erga omnes as regards property, but also to actions of status. All three categories are, after all, subject to the constitutional limits of the two trials. For an application of the two process relative to the jurisdiction almost in rem, see also in argument the next case: Shaffer v. Heitner, 433 U.S. 186 (1977). R. CASAD, Shaffer v. Heitner: An end to ambivalence in jurisdiction theory?, in University Kansas Law Review, 26, 1977-1978, pp. 61ss.

[108]Justice Holmes in case: McDonald v. Mabee: "(...) the foundation of jurisdiction is physical power (...)". 243 U.S. 90, 91 (1917).

sufficient condition for the exercise of the jurisdiction"[109]. The American Supreme Court sanctions this principle in the epoch dating back to the Pennoyer v. Neff decision of 1877, stating that "due process of law would require appearance or personal service before thedefendant could be personally bound by any judgment rendered"[110].

The obstacle is greater since Pennoyer leads the conclusion directly from the principle of the two process, conferring to the limitation expressed by the notion of physical presence a constitutional character, as such not modifiable by ordinary means and valid both for the Federal courts for the state ones. The rigidity of the territorial criterion proposes in a short time problems similar to what we have seen in England with reference to the exercise of jurisdiction over defendants not present in the forum. This leads to a certain exasperation of the procedural mechanisms and the jurisdictional criteria in order to consider the defendant subject to the physical power of the forum. A typical example is the tag jurisdiction obtained through the execution of the service of process on board an airplane during the flight of the defendant on the territory of the State[111] or the elaboration of a series of presumptions of "presence" of the absent defendant on which it would not have been possible otherwise to exercise jurisdiction

The strictly territorial concept thus inaugurated is overcome only thanks to a change in the jurisprudence of the Supreme Court which starts with the International *Shoe* decision[112]. On that occasion, which, like Pennoyer, concerns an intra-state and non-international dispute, the Supreme Court considerably broadens the confines of the constitutionally permitted exercise of American jurisdiction, stating that "due process requires only that, in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice (...)"[113].

The adoption of the concept of minimum contacts thus puts an end to the exclusivity of the territorial criterion of jurisdiction in favor of a broader conception of the power of courts to know disputes about non-resident that is still in force and characterizes the US jurisdiction both in its internal role and internationally. Once again, the constitutional nature of the precept expressed by the Supreme Court ensures that the criterion of the minimum contacts becomes the new constitutional parameter of reference for any judge, State or Federal, that exercises its jurisdiction in personam in the United States to the previous criteria, applied with rigid formalism, we now prefer a solution that if on the one hand offers less guarantees in terms of certainty, on the other it certainly appears more correct, because based on an analysis of the specific elements of the case, the interests involved, the consequences of individual choices.

[109]McDonald v. Mabee: "the foundation of jurisdiction is physical power". 243 U.S. 90, 91 (1917).
[110]Pennoyer v. Neff, 95 U.S. 714, 734 (1877), decision inspirated from the work of Joseph Story and his Commentaries on the Conflict of Laws. G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 84-85.
[111]Grace v. MacArthur, 170 F. Supp. 442, (E.D. Ark. 1959): the service it was carried out: "(...) by personally delivering to him a copy of this writ, together with a copy of the Complaint, on the Braniff Airplane, Flight No. 337, non-stop flight from Memphis, Tenn. to Dallas, Texas, said copy being delivered to him at 5:16 P.M. at which time the said airplane was in the Eastern District of Arkansas and directly above Pine Bluff, Arkansas, in said District (...)". For more details see: D. EPSTEIN, C. BALDWIN, International litigation, ed. Brill, The Hague, 2010, par. 6.04. D. CRUMP, W.V. DORSANEO III, R.R. PERSCHBACHER, Cases and materials on civil procedure, LexisNexis, New York, 2012.
[112]International Shoe Co. v. Washington, 326 U.S. 310 (1945).
[113]International Shoe, 326 U.S. op. cit., p. 316.

However, the extension of constitutional limits by international Shoe does not automatically entail the enlargement of the jurisdictional scope of the States (and of the Federation) beyond the territorial boundary. The jurisprudence of the minimum contacts represents, in fact, the external limit placed on the exercise of American jurisdiction, which, however, requires a normative basis for its exercise. The season following the ruling of the Supreme Court, therefore, saw the flourishing of a legislative production aimed at extending the jurisdiction over non-resident through the adoption of the so-called long-arm statute. Some states have chosen to expand the power of their courts as much as possible, until they reach the remotest limits of the new constitutional notion of two trials, by issuing statutes that allow judges to exercise their jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States"[114]. Others, like the State of New York, have opted for a different solution, specifying a detailed catalog of hypotheses in which the judges of the State can exercise their power over defendants not subject to physical power[115]. On the federal level, however, Congress has not conferred a general power on the courts: they can exercise their jurisdiction on the basis of a long-arm statute of the State in which the federal court sits or by virtue of a specific authorization contained in a law federal, as in the antitrust matter[116].

A well-known example of jurisdiction based on the presence of defendant's assets is represented by par. 23 of the German Zivilprocessordnung[117], which, however, gives the judge a power that the Americans would call unlimited general jurisdiction. On the other hand, the specific jurisdiction represents the link of the one who, although not resident or present in Linda Silberman, notes that "(...) one key aspect of the constitutional due process jurisdiction jurisprudence as developed in the United States (...) is the emphasis on the connection between the forum and the defendant. Because it is the defendant's relationship with the forum that is the "touchstone" of the U.S. constitutional analysis, there is already a built-in concern for the defendant"[118]. And again

[114]For example the long-arm statute of California. CA CIV PRO par. 410.10 (2003).
[115]N.Y. C.P.L.R. par. 302 (2003).
[116]See the Rule 4(k) FRCP. See also: G.B. BORN, P.B. RUTLEDGE, International civil litigation, cit., pp. 82-83."(...) If these contacts are 'continuous and systematic' (as in the case of intensive business activities in the forum state), then the foreign defendant is amenable to general jurisdiction, i.e., suitable even on unrelated causes of action. But if the defendant's relationship to the forum is more attenuated, he may still be subject to limited personal jurisdiction with respect to causes of action that arise from certain local contacts, such as the commission of a tort within the state". The concepts of limited and unlimited general jurisdiction are further distinguished. The first is typical of quasi-in-rem jurisdiction cases, such as the presence of defendant assets within the territorial jurisdiction of the court. The combination of general and limited means that the court may know of any dispute relating to the defendant, but only within the limits represented by the economic value of the defendant's assets that form the basis of the jurisdiction of the judge himself. See also the next cases: World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286 (1980); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987); Goodyear Dunlop Tires Operations, S.A. v. Brown. For more analysis see: R.W. BOURNE, J.A. LYNCH, Modern maryland civil procedure, op. cit.
[117]BGH [1968] Neue Juristische Wochenschrift (NJW), 1233. BGH [1972] NJW, 1622. BGH [1989] NJW 1431. BGH [1997] NJW, 2885. Phillip Alexander Securities and Futures Limited v Bamberger [1997] ILPr 73. Re the Enforcement of an English Anti-Suit Injunction (Case 3 VA 11/95) (Oberlandesgericht, Dusseldorf) [1997] ILPr 320. M. AHMED, The nature and enforcement of choice of court agreement. A comparative study, Hart Publishing, Oxford & Oregon, Portland, 2017. C. CUNIBERTI, Conflict of laws: A comparative approach. Text and cases, Edward Elgar Publishers, 2017, pp. 189ss.
[118]R. CASAD, Jurisdiction in civil action at the end of the twentieth century: Forum conveniens and forum non conveniens, in Tulane Journal of International & Comparative Law, 7, 1999, pp. 93ss, "(...) instead of thinking about jursdiction over the action, we think primarily about jurisdiction over the defendant (...) is traceable to the theory of the nature of jurisdiction that we received from the old English common law (...)".

"(...) in the United States, it is the affiliation between the defendant and the forum that is critical, and this is true for the interstate as well as the transnational case (...)"[119].

6. THE NON CONVENIENS FORUM

Even the American judge, like the English one, is deemed to have a discretionary inherent power in choosing whether to exercise jurisdiction over a dispute when this does not appear to be in accordance with justice or there is another forum considered more appropriate[120]. The doctrine, which is also a forum, is connected to it, for example because it has concluded a contract or trades some of the assets. In such cases, in principle, the constitutional exercise of jurisdiction is allowed only in relation to a cause of action that has some connection with the criterion of connection considered. The basic idea is that the judge possesses a discretionary power, inherent in the jurisdictional function itself, according to which it is possible to unify the opportunity of the choice of the forum made by the actor. This is a prerogative of the judge and not a right of the parties[121]. The use of term "discretionary" should not lead to the conclusion that the judge is free in the choice whether or not to decide a controversy, nor to consider that the common law judge in the United States takes the name of forum non conveniens, is go back to the famous decision of the Supreme Court in the *Gilbert* case[122] pronounced in the middle of the last century. If even earlier some US courts had given the opportunity to refuse the exercise of their jurisdictional power on a discretionary basis[123] as Blair states: "(...) for the doctrine in question every court of justice"[124]. Twenty years later the Supreme Court seems to pick up Blair's suggestion by pronouncing the decision in the *Gilbert* case, still the starting point that indicates the fundamental

[119]L.G. SILBERMAN, Goodyear, Nicastro, Observations from a transnational and comparative perspective, in in New York University Public Law and Legal Theory working paper n. 333, 2012, pp. 602ss.

[120]J.J. FAWCETT, Declining jurisdiction in private international law, Oxford University Press, Oxford, 2005. A. REUS, Judicial discretion: A comparative view on the doctrine of forum non conveniens in the United States, the United Kingdom, and Germany, in Loyola Los Angeles International & Comparative Law Journal, 16, 1993-1994, pp. 455ss. G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 522-539. L.G. SILBERMAN, The impact of jurisdictional rules and recognition practice on international business transactions: The U.S. Regime, 26 in Houston Journal of International Law, 26, 2003-2004, pp. 327, 339ss. M.H. REDISH, Abstention, separation of powers, and the limits of judicial function, in Yale Law Journal, 94, 1984-1985, pp. 71ss. D.L. SHAPIRO, Jurisdiction and discretion, in New York University Law Review. 60, 1985, pp. 543ss. B. WORKMAN, Deference to the plaintiff in forum non conveniens cases, in Fordham Law Review, 86 (4), 2017, pp. 874ss. R.A. BRAND, Challenges to forum non conveniens, in New York University of Journal of International Law & Politics, 46, 2013-2014, pp. 1005ss. C.A. WHYTOCK, Some cautionary notes on the "chevronization" of transnational litigation, in Stanford Journal of Complex Litigation, 2013, pp. 468ss. B.J. SPRINGER, An inconvenient truth: How forum non conveniens doctrine allows defendants to escape State Court jurisdiction, in University of Pennsylvania Law Review, 163, 2014-2015, pp. 618ss. O. FRISHMAN, Should Courts fear transnational engagement?, in Vanderbilt Journal of Transnational Law, 49 (1), 2016, pp. 102ss.

[121]American Dredging Co. v. Miller, 510 U.S. 443 (1996). For more details see: F. SPARKA, Jurisdiction and arbitration clauses in maritime transport, op. cit., G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit., D. DE LA RUE, B. ANDERSON, Shipping and the environment, ed. Routledge, London & New York, 2015, pp. 434ss.

[122]Gulf Oil Co. v. Gilbert, 330 U.S. 501 (1947). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[123]See, inter alia, The Bengeland, 114 U.S. 355, 365–66 (1885), a case in admiralty; and Rogers v. Guaranty Trust Co. of N.Y., 288 U.S. 123, 130-131 (1933), in which the judge refused to: "interfere with (...) the internal affairs of a corporation organized under the laws of another state (...)". L. HOFMANN, K.A. ROWLEY, Forum non conveniens in Federal Statutory Cases, in Emory Law Journal, 49, 2000, pp. 1138ss. B.J. SPRINGER, An inconvenient truth: How forum non conveniens doctrine allows defendants to escape State Court jurisdiction,op. cit., O. FRISHMAN, Should Courts fear transnational engagement?, op. cit.

[124]P. BLAIR, The doctrine of forum non conveniens in anglo-american law, in Columbia Law Review, 29, 1929, pp. 4ss.

coordinates of the analysis that the American judge makes to evaluate whether or not to exercise its jurisdiction.

The test, in its American version, is divided into a private interest factor, which concerns the opportunity for litigating parties, a case that is discussed in the forum chosen by the actor[125], and a public interest factor, which instead takes into consideration the interest of the American judicial system in deciding the particular controversy[126]. The balance of the two factors should indicate lightness the choice made by an actor to bring his own court.

Here we note an important difference with the English version that, on the contrary, focuses exclusively on 'private' elements, excluding the relevance of reasons of public interest in the assessment of the appropriateness of the forum chosen by the actor. Since Gilbert was concerned with an intra-State controversy, the actual precedent in the field of international litigation that establishes the applicability of the doctrine in cases where the most appropriate forum is abroad is another famous decision, *Piper Aircraft Co. v. Reyno*[127]. The controversy in *Piper Aircraft Co* case concerns a claim for damages following an air crash in the skies of Scotland, promoted in California by the heirs of the victims against the American aircraft manufacturer. Notwithstanding that Gilbert had signaled the exceptional nature of the non-conveniens forum doctrine, connoting it as a sort of extrema *ratio*, Piper greatly expanded its scope in international matters. Whereas Gilbert asserts that in principle "the plaintiff's choice of forum should rarely be disturbed"[128], Piper instructs the judge to consider the choice of the forum by a foreign actor as less deserving of deference and not to evaluate the potential change of the applicable law as an obstacle to the dismissal. Thanks to the expedient in question the use of doctrine in the American courts has rapidly surpassed the character of exceptionality and acquired an importance often fundamental in transnational disputes, becoming constant presence in the defensive memoirs of every defendant in cases of litigations promoted by foreign actors[129].

The dismissal of the case is often subjected to certain conditions by the judge, for example to the promise of the defendants not to challenge the jurisdiction of the ad quem or to not object certain provisions or lapses[130]. Nevertheless, the removal of the controversy from the courtrooms is often hailed as a victory for the defendant: the foreign forum, wherever the site is, can hardly guarantee to the actors a procedural paraphernalia: "(...) in cases which touch the affairs of many persons, there is reason for

[125]Gilbert, 330 U.S. p. 508: "(...) an interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action, and all other practical problems that make trial of a case easy, expeditious, and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex", "harass", or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy (...)".

[126]Gilbert, 330 U.S. p. 508-09: "(...) factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation (...)".

[127]454 U.S. 235 (1981).

[128]Gilbert, 330 U.S. a p. 508. see also: W.W. HEISER, California civil procedure, LexisNexis, New York, 2012.

[129]Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422 (2007). For a comment see: M.D. GREENBERG, The forum non conveniens motion and the death of the moth: A defense perspective in the post-Sinochem era, in Alberta Law Review, 72, 2009, pp. 322ss.

[130]R.J. WEINTRAUB, International litigation and forum non conveniens, op. cit., pp. 330–332.

holding the trial in their view and reach, rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself (...)"[131].

7. AGREEMENTS ON THE FORUM: "THE OUST JURISDICTION"

In the matter of jurisdictional agreements, the orientation of the American courts has long been that of the conventional indefeasibility of its jurisdiction. There were no particular problems, however, as regards the effect of extension: the election of a forum could be considered as a valid consent to the jurisdiction of the State and, therefore, a constitutionally allowed exercise of the jurisdiction[132]. The problem was represented, once again, by the effect of an exemption, that is by the attempt to remove the controversy from the knowledge of US courts[133]. Some judges ratified that "(...) nothing is better settled than that agreement of this character are void (...)"[134], while others emphasized the "(...) 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 (...)"[135]. Among the causes of this restrictive attitude, which was also addressed to the compromise clauses, the circumstance that in a certain historical phase the judges perceived their compensation in relation to the number of cases decided, is often highlighted, and therefore the prospect of the auction would have caused a reduction in the salary of the judge. In *Home Insurance Co. v. Morse* case[136] is proposed, however, a different reconstruction of this prohibition, more anchored to assessments of a legal nature: "(...) 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

[131]D.W. ROBERTSON, Forum non conveniens in America and England:"A rather fantastic eiction", in Law Quarterly Review, 103, 1987. pp. 398ss. Per un eclatante e recente caso di boomerang v. la saga internazionale nel caso Chevron v. Ecuador nel quale dopo il dismissal della lite negli Stati Uniti, gli attori hanno proseguito la causa in Ecuador ottenendo un verdetto miliardario. See, inter alia, Chevron Corp. v. Donziger, 768 F.Supp. 2d 581 a pp. 620-621 (S.D.N.Y., Mar. 7, 2011). See also: R.V. PERCIVAL, Liability for environmental harm and emerging global environmental law, in Maryland Journal of International Law, 23, 2010, pp. 37ss. K. KIMERLING, Indigenous people and the oil frontier in Amazonia: The case of Ecuador, Chevrontexaco, and Aguinda v. Texaco, in International Law & Politics, 38, 2006, pp. 414ss.

[132]W.L.M. REESE, The contractual forum: Situation in the United States, in American Journal of Comparative Law, 13, 1964, pp. 187ss.

[133]A. LENHOFF, The parties' choice of forum: 'Prorogation agreements', in Rutgers Law Review, 15, 1960-1961, pp. 430ss. A.K. ABALLI, Comparative developments in the law of choice of forum, in New York University Journal of International Law & Politics, 1, 1968, pp. 184ss: "(...) it is difficult to find early cases in the United States which considered 'choice of forum clauses' in international contracts (...) the reason is that compared to Great Britain and other European nations, the volume of international trade carried out by the younger nations of the Western Hemisphere during their early years was small (...)". M. GRUSON, Forum selection clauses in international and interstate commercial agreements, in University of Illinois Law Review, 133, 1982, pp. 138ss. See also: Benson v. Eastern Bldg. & Loan Ass'n, 174 N.Y. 83, 86 (1903). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[134]W.L.M. REESE, The contractual forum, op. cit., pp. 189: "(...) judge Learned Hand once told the writer that it was his guess that this judicial aversion dates from the time when, according to him, judges were paid by the case and accordingly viewed arbitration and choice of forum provisions as devices that were likely to curtail their income (...)".

[135]Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958).

[136]87 U.S. 445 (1874).

afford him. A man may not barter away his life or his freedom, or his substantial rights"[137].

Unlike England which, while sharing the principle of non-ouster, we have seen a favorable orientation towards the clauses on the forum already developed during the '800, in America it is necessary to wait for 1972 and the decision of the Supreme Court in the *Motor vessel* case, Bremen to witness a change in a more liberal sense. This important ruling represents the point of arrival of a journey of about fifty years which ties, to a certain extent, the destinies of the clause on jurisdiction to the arbitration agreement. While the prohibition to derogate from the jurisdiction of the courts remains consolidated during the nineteenth and early twentieth century, in fact, a first crack in the monolithic jurisprudence of the non-ousters came with the approval in 1925 of the Federal Arbitration Act, adopted with the purpose of overcoming the traditional hostility of the judges with regard to the compromise clauses[138]. In the wake of this innovation, during the 1940s some lower courts began to question the iron rule of non-enforceability of court agreements, at least where the agreement does not seem unreasonable[139]. The Supreme Court itself approaches the turning point made in *Bremen* case in 1964 with the Szukhent[140] decision in which it affirms, en passant, the power of the parties to a contract to agree on the point of competent jurisdiction, even if with reference to a hypothesis of extension and not by way of derogation. For the Court: "(...) it is settled (...) that parties to a contract may agree in advance to submit to the jurisdiction of a given court"[141]. Two other important steps on the path to change in jurisprudence are represented by the approval of the Model Choice of Forum Act of 1968 and the Restatement (Second) Conflict of Laws approved in 1971 represent the conceptual framework on which the Supreme Court decision will be modeled . In Section 3 of Model Act, in fact, there is a general obligation for a court to implement an agreement on the forum, except for the use of exceptions that are not very different from what we will see in the pages that follow[142]. As for the Restatement, the relevant proposition is par. 80, according to which "(...) the parties' agreement as to the place of the action cannot oust a State of judicial jurisdiction, but such an agreement will be

[137]W.E. SYKE, Agreements in advance conferring exclusive jurisdiction on foreign courts, in Louisiana Law Review, 10, 1949-1950, pp. 293ss.

[138]Federal Arbitration Act (1925) 9 U.S.C. par. 1. G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[139]WM. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806 (2d Cir. 1955), pp. 465-66. W.M. REESE, The contractual forum, op. cit., pp. 190-191. Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958). The decision in Carbon Black will play an important role in The Bremen's case discussed in the next paragraph, since it is the decision on which the first and second rulings are based, hostile to the exception of American jurisdiction.

[140]National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964). For comments see: A. IDES, C.N. MAY, S. GROSSI, Civil procedure and problems, Wolters Kluwer, New York, 2016.

[141]W.M. REESE, A proposed uniform choice of forum act, in Columbia Journal of Transnational Law, 5, 1966, pp. 193ss. W.M. REESE, The model choice of forum act, in American Journal of Comparative Law, 17 (2), 1969, pp. 292ss. R. LEFLAR, The Bremen and the model choice of forum act, in Vanderbilt Journal of Transnational Law, 6, 1972-1973, pp. 375ss.

[142]Section 3: "(Action in Another Place by Agreement.) If the parties have agreed in writing that an action shall on a controversy be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless: (1) the court is required by statute to entertain the action; (2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action; (3) the other state would be a substantially less convenient place for the trial of the action than this state; (4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or (5) it would for some other reason be unfair or unreasonable to enforce the agreement (...)'.

given effect unless it is unfair or unreasonable (...)"[143]. We will find these elements in the decision of *Bremen* case.

8. THE BREMEN V. ZAPATA CASE

In 1972, was finally decided the *Bremen v. Zapata* case[144]. Unterweser, the German ship owner of M/S Bremen, and the Zapata Offshore Drilling agree for the towing of an oil drilling rig (the Chaparral) to the Adriatic Sea in Italy. A storm damaged the plant and forced Bremen, on instructions from Zapata, to find refuge in the port of Tampa in Florida. There the ship is seized by a U.S. Marshall sued Zapata as a guarantee for damages and released only with the provision of a substantial guarantee by Unterweser ($ 3,200,000). The navigation contract between Unterweser and Zapata provides for an exclusive jurisdiction clause of English courts[145] and, therefore, while Zapata begins an action in the state of New York for damages, Unterweser acts in England under the agreement on the forum[146]. The determination of the jurisdictional forum appears strategically fundamental since the English courts are much more likely to give effect to the two exemption clauses from the responsibility of the shipowner provided by the contract which, on the contrary, are usually considered null and void by the American jurisprudence. Since the New York court is late in deciding the motion to dismiss based on the jurisdiction clause, Unterweser resolves to propose an action to limit his responsibility before the court of Tampa. It is a typical admiralty action of a competition nature that allows the owner of a boat to contain claims for compensation and within which the judge issues ritual injunction to concentrate the proceedings for damages in that forum. The choice of Unterweser to act in Tampa will not, subsequently, be censured by the Supreme Court, either by way of consent or by way of submission to jurisdiction, since the limitation period of only six months provided for the action of limitation of liability it was expiring and this made the choice to act in Florida a strategically almost obligatory defensive trial behavior[147]. The Tampa District Court responds negatively to Unterweser's request to reject Zapata's requests because of the existence of a clause for the choice of London court, citing in particular the Carbon Black decision of the Fifth Circuit and considering not having to give weight to the pre-litem agreement between the parties[148]. The judge then chooses to frame the defense of Unterweser as a normal instance of forum non conveniens in favor of the English judge. Conducting the analysis on the basis of Gilbert[149] the district court concludes that "(...) the balance of

[143]G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 467ss.
[144]The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). F.K. JUENGER, Supreme Court validation of forum-selection clauses, in Wayne Law Review, 19, 1972-1973, pp. 49ss.
[145]"(...) any dispute arising must be treated before the London Court of Justice (...)". The Bremen, 407 U.S., p. 2.
[146]Unterweser Reederei GmbH v Zapata Off-Shore Co (The Chaparral), [1968] 2 Lloyd's Rep 158.
[147]The Bremen, 407. U.S., pp. 19-20: "It is clear that Unterweser's action in filing its limitation complaint in the District Court in Tampa was, so far as Zapata was concerned, solely a defensive measure made necessary as a response to Zapata's breach of the forum clause of the contract. When the six-month statutory period for filing an action to limit its liability had almost run without the District Court's having ruled on Unterweser's initial motion to dismiss or stay Zapata's action pursuant to the forum clause, Unterweser had no other prudent alternative but to protect itself by filing for limitation of its liability. Its action in so doing was a direct consequence of Zapata's failure to abide by the forum clause of the to wage contract (...)". M.N. CRYSTAL, F. GIANNONI-CRYSTAL, Enforceability of forum selection clauses: A "gallant knight" still seeking Eldorado, in South Carolina Journal of International Law and Business, 8 (2), 2012, pp. 208ss.
[148]Carbon Black Export, Inc., 254 F.2d 297. For comments see: T.D. HALKET, Arbitration of international intellectual property disputes, Juris Publishing, New York, 2012, pp. 573ss.
[149]Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

conveniences here is not strongly in favor of (Unterweser) and (Zapata's) choice of forum should not be disturbed (...)"[150].

The Court of Appeal confirms the approach of the primary care judge, noting, among other things, che "England had no interest in or contact with the controversy other than the forum-selection clause (...); Zapata (is) a United States citizen and the discretion of the district court to remand the case to a foreign forum was consequently limited-especially since it appeared likely that the English courts would enforce the exculpatory clauses; (...) enforcement of such clauses would be contrary to public policy in American courts (...)"[151].

When the case comes to the scrutiny of the Supreme Court there is a split between the Federal courts of appeal, as evidenced by the Fifth Circuit decision[152] on which the judges in the *Bremen* case were based and the more liberal orientation of the Second[153]. The Supreme Court then grants the certiorari and pronounces, through the mouth of its Chief Justice Burger, a decision destined to produce its effects even today. The majority opinion of the Court begins by stating that "too much little weight and effect were given to the forum clause in resolving this controversy"[154]. According to Justices, the commercial expansion of the last twenty years after the end of the world war makes it necessary to overcome the parochial vision according to which all disputes must be resolved "under our laws and in our courts"[155]. Moreover, such an approach would represent a major obstacle to the development of American commerce in an increasingly transnational matrix economy[156].

The Court goes on in its reasoning citing the developments we have mentioned in the previous paragraph. The decision in Szukhent, the Model Act and the Restatement, as well as the favorable orientation of the same courts of London, are all elements that allow it to now consider the position widely shared. Neither the lack of connection between the chosen forum and the dispute, nor the prospect of the operation of the disclaimer clauses are sufficient reasons for not giving effect to a "choice of (...) forum (...) made in an arm's-length negotiation by experienced and sophisticated businessmen"[157]. One reason why English courts constitute the choice of a neutral and highly experienced forum on the law of navigation, the other because, in the economic and contractual reasoning carried out by the judges, the exemption clauses could have influenced the price of the contract paid from Zapata or representing the reason why the tugboat took the risk of transoceanic transport. The Supreme Court also directly

[150]The Bremen, 407 U.S., p. 6.
[151]The Bremen, 407 U.S., p. 7-8
[152]Carbon Black Export, Inc., 254 F.2d 297.
[153]Wm. H. Muller & Co., 224 F.2d 806. A. BRIGGS, Civil jurisdiction and judgments, op. cit.
[154]407 U.S., p. 8.
[155]A. BRIGGS, Civil jurisdiction and judgments, op. cit.
[156]The complete passage reads: "(...) 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 (...)".
[157]407 U.S., pp. 11-12 and16.

addresses the vexata quaestio of allter: “the argument that such clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at 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. No one seriously contends in this case that the forum selection clause "ousted" the District Court of jurisdiction over Zapata's action (...) give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause”[158]. And he concludes: “(...) there are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect (...) the correct approach is to enforce the forum clause specifically unless (the breaching party) could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overby 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 (...)"[159]. The burden, defined as heavy, weighs on the part that objects to the validity or enforcement of the clause on the forum[160]. The American common law seems, therefore, to follow the path traced by the English judge in distinguishing two moments of evaluation of the agreement on the forum. The first concerns the verification of the contractual-substantial validity of the clause itself, in particular with reference to the vices of fraud, duress and overreaching. The second is related, instead, to enforceability, that is to the decision whether to give effect to a valid agreement from the substantive point of view. In this case the judge is called to assess both the reasonableness of the choice made by the parties and the possible (in) justice of the specific case.

In fact, despite the petition in principle, the Bremen itself and, surprisingly, the subsequent decisions show not to distinguish clearly between the two profiles, at least not as in England, concentrating the whole analysis in the question about the enforceability of the agreement, of which contractual validity represents an aspect. Although the precedent in The Bremen is formally limited to the specific matter of admiralty, which, moreover, is of a federal nature, the Supreme Court's decision was hailed, and not wrongly, as a real general change of course on agreements on the forum, capable of explaining effects far beyond the narrow limits of the right of navigation[161].

[158]NADELMANN, Choice-of-Court clauses in the United States: The road to Zapata, in American Journal of Comparative Law, 21 (1), 1973, pp. 124ss.
[159]407 U.S., pp. 11-12 and 17.
[160]See in particular: J. FITCHEN, Enforcement of civil and commercial judgments under the new Brussels Ia Regulation (Regulation 1215/2012), in International Company and Commercial Law Review, 26, 2015, pp. 146ss. M.P. FONS, Commercial choice of law in context: Looking beyond Rome, in Modern Law Review, 78, 2015, pp. 242ss.
[161]See for example: Spradlin v. Lear Siegler Management Serv. Co., 926 F.2d 865 (9th Cir. 1991); Paper Exp. Ltd. v. Pfankuch Mashinen GmbH, 972 F.2d 753 (7th Cir. 1992); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir. 1992); Interamerican Trade Corp. v. Companhia Fabricadora de Pecas, 973 F.2d 487 (6th Cir. 1992); Mobile Sales and Supply Corp. v. Republic of Lithuania, 1998 WL 196164 (S.D.N.Y. 1998); New Moon Shipping Co., Ltd. v. Man B&W Diesel AG, 121 F.3d 24 (2d Cir. 1997); Argueta v. Banco Mexicano S.A., 87 F.3d 320 (9th Cir. 1996): “Although Bremen is an admiralty case, its standard has been widely applied to forum selection clauses in general”; Evolution Online Systems, Inc. v. Koninklijke Ptt Nederland N.V. et al., 145 F.3d 505 (2d Cir. 1998); K.K.D. Imports, Inc. v. Karl Heinz Dietrich GmbH & Co., 36 F. Supp. 2d 200, 202 (S.D.N.Y. 1999): “(...) the enforceability of forum selection clauses in admiralty,

9. THE DECISION IN CARNIVAL CRUISE CASE

If the Bremen still represents the leading case in the United States, it is important to refer also to a second case decided by the Supreme Court in the 1990s, the *Carnival Cruise* case[162]. The dispute concerns an action for damages brought by the Shute spouses against the Carnival Cruise company, based in Miami[163]. While the District Court rejects the action on the grounds of the absence of personal jurisdiction against the defendant[164], the Court of Appeal accepts the objections raised by the Shutes and affirms its jurisdiction. Faced with the knot of the jurisdiction clause, the Court of Appeals starts from the presumption of validity illustrated in Bremen, but goes on to note that in the Shutes case this should not be enforced because "(...) it was not freely bargained for"[165] and that "the Shutes are physically and financially incapable of pursuing this litigation in Florida"[166] and therefore the clause would have the concrete effect of depriving them of the possibility of obtaining justice[167]. Despite the fact that Carnival Cruise appeals against this decision before the Supreme Court, at first glance there seems to be no chance of success. The Court of Appeal, in fact, seems to make a correct and consistent application of the teachings of Bremen case. The summit court, however, has a surprise in store. The Supreme Court, in fact, grants the certiorari and the judge Blackmun writes the opinion of the court for a majority of seven Justices. The Court begins the argumentative path by making a distinction from the *Bremen* case. While the first concerned a "B2B" contract, probably developed ad hoc and concluded between experienced traders, the controversy in Carnival Cruise concerns a classic case of a contract of adhesion between a commercial operator and a consumer. In other words, there was no negotiation between the parties. For the Justices, however, this circumstance is not a reason to judge the non-enforceable clause. On the contrary, the distinguishing element from the *Bremen* case is functional to the Court in order to

diversity and federal question cases is governed by the doctrine of M/S Bremen (...)". There is no shortage of voices outside the pack, especially at the state level. Three US states, Iowa, Montana and Idaho, still consider the agreements on the forum for themselves unenforceable. See in argument also: G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 496. Other courts resolve the issue through an analysis based on the forum non conveniens, both at the federal level, see: D'Antuono v. CCH Computax Systems, 570 F.Supp. 708 (D.R.I. 1983); Neo Sack, Ltd. v. Vinmar Impex, Ltd., 1993 U.S. Dist. LEXIS 377 (S.D. Tex. 1993); Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285 (5th Cir. 1989); Furbee v. Vantage Press, Inc., 464 F.2d 835 (D.C. Cir. 1972); and in national level: Exum v. Vantage Press, Inc., 563 P.2d 1314 (Wash. Ct. App. 1977); Eads v. Woodmen of the World Life Ins. Society, 785 P.2d 328 (Okla. Ct. App. 1989); Greenwood v. Tillamook Country Smoker, Inc., 857 S.W.2d 654 (Tex. App. 1993). For analysis of the above cases see also: S.C. SYMEONIDES, Choice of law, Oxford University Press, Oxford, 2016, pp. 448ss. D.E. CHILDRESS III, M.D. RAMSEY, C.A. WHYTOCK, Transnational law and practice, Wolters Kluwer, New York, 2015. J. ANTOMO, Schadensersatz wegen der Verletzung einer internationalen Gerichtsstandvereinbarung?, Mohr Siebeck, Tübingen, 2017. G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[162]Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). L. GOLDMAN, My way and the highway: The Law and economics of choice of forum clauses in consumer form contracts, in New Western University Law Review, 86, 1991-1992, pp. 707ss.

[163]The back of the ticket reported the general conditions, among them "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". Carnival, pp. 587-588.

[164]For the District Court "(Carnival Cruise's) contacts with Washington (are) constitutionally insufficient to support the exercise of personal jurisdiction". Carnival Cruise, 499 U.S. p. 588.

[165]Shute v. Carnival Cruise Lines, Inc., 897 F. 2d (9 Cir. 1990), p. 389.

[166]Shute v. Carnival Cruise Lines, Inc., 897 F. 2d (9 Cir. 1990), p. 389.

[167]The Supreme Court criticizes this reasoning based on the lack of evidence in this regard. Carnival Cruise, 499 U.S., p. 594-95.

establish a partially new rule and conclude for the implementation of the clause in question. There are various reasons that the majority submits in support of their thesis:

"Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. Additionally, a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions (...) the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued"[168]. The Supreme Court therefore adopts a contractualist approach[169], in the law & economics style, in which attention to the position of the defendant seems to prevail over any concern about the destiny of the consumer. Carnival Cruise illustrates the "costs" of a different choice, in terms of fragmentation of the disputes in multiple forums, uncertainty and expenses (intended, in the court's reasoning, to influence the price of the service for the consumer) even if the reasoning appears as a proof that really supported by scientific considerations. The Court declares the choice of court clause valid, considering it sufficient that the parties had a notice[170]. After all, the Justice Blackmun, the Shutes "presumably retained the option of rejecting the contract with impunity"[171].

However, despite the dissent of Stevens and Marshall having played well in showing the weaknesses of the reasoning adopted by the majority[172], the possible objections to the correctness of the decision pronounced by the Supreme Court are substantially overcome by the constant loyalty with which the American courts have applied the *ratio decidendi* in *Carnival Cruise* for over twenty years[173]. It is therefore necessary to limit oneself to measuring the influence that the decision in question exerts on the principles expressed in Bremen. Well, while allowing a lot on the side of the strong part of the relationship, not even Carnival Cruise has the effect of condoning any clause

[168]Carnival Cruise, 499 U.S., pp. 593-94.
[169]G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 47ss.
[170]Carnival Cruise, 499 U.S., p. 590.
[171]Carnival Cruise, 499 U.S., p. 595.
[172]Carnival Cruise, 499 U.S., pp. 597-99: "I begin my dissent by noting that only the most meticulous passenger is likely to become aware of the forum-selection provision. I have therefore appended to this opinion a facsimile of the relevant text, using the type size that actually appears in the ticket itself. A careful reader will find the forum selection clause in the 8th of the 25 numbered paragraphs. Of course, many passengers, like the respondents in this case, will not have an opportunity to read paragraph 8 until they have actually purchased their tickets. By this point, the passengers will already have accepted the condition set forth in paragraph 16(a), which provides that "the Carrier shall not be liable to make any refund to passengers in respect of (...) tickets wholly or partly not used by a passenger." Not knowing whether or not that provision is legally enforceable, I assume that the average passenger would accept the risk of having to file suit in Florida in the event of an injury, rather than canceling-without a refund-a planned vacation at the last minute. The fact that the cruise line can reduce its litigation costs, and therefore its liability insurance premiums, by forcing this choice on its passengers does not, in my opinion, suffice to render the provision reasonable (...) clauses limiting a carrier's liability or weakening the passenger's right to recover for the negligence of the carrier's employees come in a variety of forms. Complete exemptions from liability for negligence or limitations on the amount of the potential damage recovery, requirements that notice of claims be filed within an unreasonably short period of time, provisions mandating a choice of law that is favorable to the defendant in negligence cases, and forum-selection clauses are all similarly designed to put a thumb on the carrier's side of the scale of justice (...)".
[173]Reynolds-Naughton v. Norwegian Cruise Line Ltd., 386 F.3d 1 (1st Cir. 2004); TradeComet.com LLC v. Google, Inc., 435 Fed. Appx. 31 (2d Cir. 2011); Calix-Chacon v. Global Int'l Marine, Inc., 493 F.3d 507 (5th Cir. 2007); Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133 (9th Cir. 2004). For more details see: J. ANTOMO, Schadensersatz wegen der Verletzung einer internationalen Gerichtsstandvereinbarung?, op. cit.

on the jurisdiction that is imposed by a corporation to a consumer. In other words, the enforceability of the clauses contained in an accession contract is not totally separate from a judgment regarding the reasonableness or fundamental fairness of the choice of the hole made. In *Carnival Cruise,* for example, the choice of the competent judge has fallen on the place where the company has its main place of business and this does not seem, in the eyes of the Justices, to have the aim of discouraging the actions promoted by consumers. A different solution in the sense of invalidity of the clause, the Court concludes, could still be justified if the selected forum is a "remote alien forum", in the case of "lack of notice" or in the absence of fairness towards the consumer. Finally, we remember that *Carnival Cruise,* like Bremen, is a decided case in admiralty whose extension beyond the borders of the right of navigation is possible, but not obvious. Equally not taken for granted is the application of the principle expressed in the context of transnational disputes, where the American actor would be forced to act not in the Sunshine State, but in a less hospitable "remote forum" located in a foreign State.

10. ENFORCEABILITY IN THE UNITED STATES

The profile of enforceability within the decisions of the American courts and through three guidelines: validity, reasonableness and public order. These are the three coordinates highlighted by the Supreme Court in *Bremen* case and which, therefore, can be validly used for their systematic character for exhibition purposes[174]. However, it should be stressed that the assessment made by the US courts tends not to distinguish clearly between the three hypotheses and to summarize everything in a unitary judgment on reasonableness, characterized, from time to time, by profiles that belong more to one or to other category[175].

The question of enforceability is based on the substantial validity of the agreement on the forum and its formation[176], attempting, without forcing its contents, a synthesis between the various positions. With regard to the form covered by the pact, a profile that also receives less attention in the United States than in European Union law, in principle a specific role is not required for the agreement on jurisdiction which, therefore, could also be concluded orally[177] or in a form permitted by the commercial

[174]The division used from G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 486ss. D. BISHOP, D.B. LEE, Enforceability of forum-selection clauses in international commercial contracts, in Current: International Trade Law Journal, 4,1995, pp. 20ss.

[175]D'Antuono v. CCH Computax Systems, 570 F.Supp. 708 (D.R.I. 1983): "Post-Bremen, the federal courts have synthesized and refined the rule, and have looked to a variety of factors in applying the Bremen yardstick of reasonableness. These include: 1. The identity of the law which governs the construction of the contract. 2. The place of execution of the contract(s). 3. The place where the transactions have been or are to be performed. 4. The availability of remedies in the designated forum. 5. The public policy of the initial forum state 6. The location of the parties, the convenience of prospective witnesses, and the accessibility of evidence. 7. The relative bargaining power of the parties and the circumstances surrounding their dealings. 8. The presence or absence of fraud, undue influence or other extenuating (or exacerbating) circumstances. 9. The conduct of the parties (...)". See also the next cases: Russo v. Ballard Med. Prods., 352 F. Supp.2d 177 (D.R.I. 2005); Lyon Fin. Servs., Inc. v. Nowobilska Med. Ctr., Ltd., 2005 WL 3526682 (D. Minn. 2005); Nisselson v. Lernout, 2004 WL 1630492 (D. Mass. 2004); Capelouto v. Societé de Banque Suisse, 1991 WL 60387 (S.D.N.Y. 1991). For analysis see: F. SPARKA, Jurisdiction and arbitration clauses in maritime transport, op. cit., G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[176]G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 487ss: "(...) although relatively few decisions have addressed this, a forum selection agreement would be unenforceable if it did not satisfy general contract law principles for the formation and validity of any contract (...)".

[177]Evolution Online Systems, Inc. v. Koninklijke Ptt Nederland N.V. et al., 145 F.3d 505 (2d Cir. 1998); Ferrari et al. v. Home Ins., 940 F.2d 550 (9th Cir. 1991); Pirolo Brothers, Inc. v. Angelo Maffei & Figli, Sas, 1988 WL 1055257 (S.D.N.Y. 1988). See for details of the above cases: G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

practice between the parties[178]. Often, however, it is the applicable substantive discipline which imposes the written form on the contract in its entirety, clause on the jurisdiction included.

The Bremen case establishes in point of validity that the derogation agreements to the jurisdiction must be considered "prima facie valid" if they are "freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power"[179]. *Carnival Cruise* partially modifies the paradigm, admitting also clauses on the forum that are not "freely negotiated" between subjects of equivalent contractual force, but imposed from one party to the other, with the sole condition that the counterparty has had notice[180].

Both decisions agree that an agreement invalidated by contractual defects such as fraud and duress is invalid, or the result of the marked disproportion between the parties' contractual strength (overreaching or overweening bargaining power, unconscionability)[181]. Later decisions have therefore pronounced invalidity of exemption agreements in the event of contractual fraud in a fiduciary relationship[182], disproportion in the contractual power between the parties, physical pressure and intimidation of one party on the other[183], inclusion of the clause by lawyers in agreement with each other, without consulting the client[184], failure to explain to the other party the meaning and consequences of the agreement on jurisdiction[185], and finally, in the event of corruption of the representative of one of the parties[186].

Despite the examples shown, many of the defenses based on fraud or duress are doomed to fail[187] due to the difficulty of proving that the agreement itself was the result of the flawed will of one of the parties, since the censorship could not be limited to hitting the contract in general due to the principle of severability[188]. As for the

[178]K.K.D. Imports, Inc. v. Karl Heinz Dietrich GmbH & Co., 36 F. Supp. 2D 200 (S.D.N.Y. 1999); New Moon Shipping Co., Ltd. v. Man B&W Diesel AG, 121 F.3d 24 (2d Cir. 1997). Its necessary a minimum meeting of the minds, MKC Equipment Company Inc. v. MAIL Code, Inc., 843 F. Supp. 679 (D.Kan. 1994); Different the case of the general conditions, as we can see in the case Carnival Cruise, 499 U.S. 585. G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[179]The Bremen, 407 U.S., p. 12.

[180]Carnival Cruise, 499 U.S., p. 590, e 594-95.

[181]The Bremen, 407 U.S. 1, 12 (1972); Carnival Cruise, 499 U.S., p. 595.

[182]Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848 (8th Cir. 1986). F. SPARKA, Jurisdiction and arbitration clauses in maritime transport, op. cit.

[183]Weidener Communications, Inc. v. H.R.H. Prince Baudar Al Faisal, 859 F.2d 1302 (7th Cir. 1988). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[184]Armco Inc. v. North Atlantic Ins. Co., 68 F. Supp. 2d 330 (S.D.N.Y. 1999). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[185]Preferred Capital, Inc. v. Sarasota Kennel Club, 2005 WL 1799900 (N.D. Ohio 2005). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[186]Crowson v. Sealaska Corp., 705 P.2d 905 (Alaska 1985). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[187]See, inter alia, Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133 (9th Cir. 2004); Marano Enterprises of Kansas v. Z-Teca Restaurants, LP, 254 F.3d 753 (8th Cir. 2001); Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385 (1st Cir. 2001); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285 (11th Cir. 1998); Afram Carriers, Inc. v. Moeykens, 145 F.3d 298 (5th Cir. 1998); MacPhail v. Oceaneering Int'l, Inc., 170 F.Supp.2d 718 (S.D. Tex. 2001); Marra v. Papandreou, 59 F.Supp.2d 65 (D.D.C. 1999). For more details see: G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit., L.H. ROSENTHAL, D.F. LEVI, J.K. RABIEJ, Federal civil procedure manual, Juris Publishing, New York, 2014, pp. 983ss.

[188]Envirolite Enterprises, Inc. v. Glastechnische Industrie Peter Lisec GmbH, 53 B.R. 1007 (S.D.N.Y. 1985). See, P. BORCHERS, Forum selection agreement in the Federal Courts after carnival cruise: A proposal for congressional reform, in Washington Law Review, 67, 1992, pp. 89-90. In this context see also the decision: Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), which repeat the decision: The Bremen affirmed that: "This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud (...) the clause is unenforceable. Rather, it means that a (...) forum-selection clause in a contract is

disproportion of bargaining power (overreaching), as shown by the Bremen, it concerned a case of experts in international trade, "an arm's-length negotiation by experienced and sophisticated businessmen"[189], and the Court had given the opportunity to reach different conclusions in case the clause had been imposed on a weak party[190]. The decision in Carnival Cruise, on the other hand, seems to have greatly limited the usability of this defense[191]. If it is rare for an American judge to refuse to give effect to an agreement on the forum concluded by expert operators[192], despite *Carnival Cruise*, the outcome is still more uncertain in the event that one of the parties can be considered weaker than the other[193].

Carnival Cruise leaves, in fact, open the possibility that the agreement is considered invalid, or rather non-enforceable, if spoiled for absence of notice[194]. An example of this is the lack of communication of the existence of the jurisdiction clause, particularly when the wording is printed on the back of a form. Even in this case, however, more than one judge imposed a certain amount of diligence on the consumer, described in a colorful way as "no one deterred him from getting his glasses and reading the contract"[195]. The part therefore has a duty to read the contract in its entirety, including fine prints[196], and even the lack of knowledge of the language in which it is written

not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion (...)". G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[189]Bremen, 407 U.S. a p. 12.

[190]Colonial Leasing Co. of New England v. Pugh Brothers Garage, 735 F.2d 380 (9th Cir. 1984): "(...) the standard of 'unfair or unreasonable' is designed to invalidate clauses such as those in question here. The evidence disclosed in each case that there was in fact no bargaining on the clause in question. It was contained in a form contract in fine print at the bottom of a page (...) this sort of take-it-or-leave-it clause will be disregarded". See also: Union Ins. Soc'y of Canton, Ltd. v. S.S. Elkion, 642 F.2d 721 (4th Cir. 1981); Compton v. A.G. Edwards & Sons, Inc., 728 F.Supp. 629 (D. Or. 1990); Yoder v. Heinold Commodities, Inc., 630 F. Supp. 756 (E.D. Va. 1986). The mere disproportion of bargaining power was already considered not sufficient in itself: Hodes v. S.N.C. Achille Lauro and Altri-Gestione, 858 F.2d 905 (3d Cir. 1988); as well as the mere fact that the clause had not been negotiated: Lien Ho Hsing Steel Enter. Co. v. Weithag, 738 F.2d 1455 (9th Cir. 1984); Medoil Corp. v. Citicorp, 729 F.Supp. 1456 (S.D.N.Y. 1990). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[191]P. BORCHERS, Forum selection agreement, op. cit., pp. 90ss.

[192]Lien Ho Hsing Steel Enter. Co. v. Weithag, 738 F.2d 1455 (9th Cir. 1984); Paper Exp. Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753 (7th Cir. 1992); K.K.D. Imports, Inc. v. Karl Heinz Dietrich GmbH & Co., 36 F. Supp. 2d 200 (S.D.N.Y. 1999); Bryant Electric Co., Inc. v. City of Fredericksburg, 762 F.2d 1192 (4th Cir. 1985); TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc., 915 F.2d 1351 (9th Cir. 1990); In Re Fireman's Fund Ins. Co., Inc., 588 F.2d 93 (5th Cir. 1979); General Electric Co. v. Siempelkamp GmbH, 29 F.3d 1095 (6th Cir. 1994); Dayhoff, Inc. v. H.J. Heinz Co. Et al., 86 F.3d 1287 (3d Cir. 1996). Leasewell, Ltd. v. Jake Shelton Ford, Inc., 423 F.Supp. 1011 (S.D.W.Va. 1976). T.C. HARTLEY, International commercial litigation. Text, cases and materials on private international law, op. cit. L.H. ROSENTHAL, D.F. LEVI, J.K. RABIEJ, Federal civil procedure manual, op. cit., G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[193]W.W. PARK, Bridging the gap in forum selection: Harmonizing arbitration and court selection, in Transnational Law & Contemporary Problematics, 8, 1988, pp. 36ss: "(...) an irony of all forum selection devices, whether arbitration clauses or choice-of-court agreements, is that the goals which justify their enforcement in one context will often call them into question in another. In a commercial contract concluded between sophisticated business managers advised by competent counsel, a forum selection clause can promote fair and efficient adjudication by permitting litigants from different countries to reduce the risk of adjudicatory bias. In a consumer or employment contract, however, the very same clause might deprive an unsophisticated individual of basic procedural safeguards, imposing a forum that is less accessible, and perhaps less sensitive to mandatory community norms such as non-discrimination laws, than would be a court at the individual's domicile. Thus, the value of freedom to choose a forum (like any liberty) must be measured against the way it operates in practice (...)".

[194]499 U.S., p. 595.

[195]Hoffman v. National Equip. Rental, 643 F.2d 987 (4th Cir. 1981). K.M. CLERMONT, Governing law on forum-selection agreements, in Hastings Law Journal, 66, 2015, pp. 647ss.

[196]Heller Fin., Inc. v. Midwhey Power Co., 883 F.2d 1286 (7th Cir. 1989); Paribas Corp. v. Shelton Ranch Corp., 742 F.Supp. 86 (S.D.N.Y. 1990); Karlberg European Tanspa, Inc. v. JK-Josef Kratz Vertriebsgesellschaft mbH, 618 F.Supp. 344 (N.D. Ill. 1985). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

is always an effective defense[197]. There are, however, sporadic decisions in favor of the part without notice, as in the case where "a consumer is told by a corporate agent to ignore boilerplate contract language containing a forum selection clause"[198], but it should be underlined that it is not effective knowledge is needed (actual notice), only a reasonably adequate notice[199].

On the validity, the criterion in question seems to have assumed, after Carnival Cruise, the connotations of a contractual type control in the point of formation of the jurisdiction clause, without other considerations being able to play a particularly incisive role.

11. (FOLLOWS) REASONABLENESS

The criterion of reasonableness has, to a certain extent, ended up absorbing within itself the evaluation of the enforceability of a clause on the forum. When we speak of reasonableness in the strict sense we refer, therefore, to the second category of exceptions to the enforceability of an agreement on the forum, provided by the same decision in The Bremen when it states that such agreements will not be effective when it would be "unreasonable or unjust" [200].

Born and Rutledge observe that "(...) under almost all analyses, the unreasonableness defense is very difficult to satisfy. The Model Act makes it clear that the burden of proof is on the party resisting enforcement. Bremen emphasized that a party must "clearly show" unreasonableness and that it bears of 'heavy burden' in so doing. Carnival Cruise repeated this formulation, and relied upon it in upholding the parties' forum selection clause. Lower courts have frequently invoked this burden of proof (...)"[201].

The first element that makes it difficult to prevail in defense in word is, therefore, the burden that weighs on the part that intends to oppose the enforcement of the agreement. The Court in *Bremen* had already called it a heavy burden[202], and subsequent jurisprudence confirmed this approach[203]. The part must prove that "the chosen forum is seriously inconvenient for the trial of the action"[204]. This could be a 'remote alien forum' in the case of an essentially local dispute. Even *Carnival Cruise* leaves the road open for an assessment if the controversy is "essentially to the one inherently

[197]Gaskin v. Stumm Handel GmbH, 390 F.Supp. 361 (S.D.N.Y. 1975); Corna v. American Hawaii Cruises, Inc., 794 F.Supp. 1005 (D. Haw. 1992). In the first case a clause written in German against the American part that did not know the language is considered valid. In the second a clause written in English against a Dutchman, see also: Karlberg European Transpa, Inc. v. Jk-Josef Kratz Vertriebsgesellschaft, mbH, 618 F. Supp. 344 (N.D. Ill. 1985); Samson Plastic Conduit & Pipe Corp. v. Battenfeld Extrusionstechnik GmbH, 718 F.Supp. 886 (N.D. Ala. 1989). For more details see also: M.J. JIMENEZ, Contract law: A case and problem based approach, Wolters Kluwer, New York, 2016.

[198]Yoder v. Heinold Commodities, Inc., 630 F. Supp. 756, 760 (E.D. Va. 1986). For the invalidity of the clause in the event of lack of notice see also: Chaser v. Achille Lauro Lines, 884 F.2d 50 (2d Cir. 1988); Couch v. First Guaranty Ltd., 578 F.Supp. 331 (N.D. Tex. 1984). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[199]Miller v. Regency Maritime Corporation, 824 F.Supp. 200 (N.D.Fla. 1992).

[200]Miller v. Regency Maritime Corporation, 824 F.Supp. 200 (N.D.Fla. 1992).

[201]G.B. BORN, P.B. RUTLEDGE, International civil litigation, op.cit.,

[202]407 U.S., p. 17.

[203]Carnival Cruise, 499 U.S., p. 594-95; Afram Carriers, Inc. v. Moeykens, 145 F.3d 298 (5th Cir. 1998); New Moon Shipping Co., Ltd. v. Man B&W Diesel AG, 121 F.3d 24 (2d Cir. 1997); Mitsui & Co. (USA), Inc. v. Mira M/V, 111 F.3d 33 (5th Cir. 1997); Interamerican Trade Corp. v. Companhia Fabricadora de Pecas, 973 F.2d 487 (6th Cir. 1992); In Re Diaz Contracting, Inc., 817 F.2d 1047 (3d Cir. 1987). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[204]407 U.S., p. 16.

more suited to [...] than in the other (...)"[205] or to the fact that the election of the forum represents a bad faith strategy to discourage the other party from starting a legal action. Serious inconvenience will be there even if "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"[206]. But it is necessary to prove that quarreling in the chosen forum [207] would deprive the part of one's "day in court"[208], for example because the judge elected is corrupt[209] or there is the certainty that it would not exercise its jurisdiction. The circumstance, however, was not to be known or foreseeable at the time of stipulation of the clause or to be the product of the counterpart's greater contractual strength. If the assessment elements were available at the time of signing, the judges tend to reject the defense in question[210]. As *Carnival Cruise* suggests, mutatis mutandis, such factors may have played a role in determining the price of the contract[211].

It is not even sufficient to give proof that the foreign forum would apply a right other than the US right or that it is not able to grant an adequate remedy[212], unless this is contrary to a public has been rejected routinely, with courts approving a wide variety of domestic and foreign fora"[213]. With this we are far from the minimum burden required to prevail in a motion to dismiss based on the doctrine of the forum non conveniens[214] and there are few cases in which the defense in question has been successful. Among these, the location of evidence in US territory[215] or the availability of adequate

[205]499 U.S., p. 594.
[206]The Bremen, 407 U.S. 18.
[207]J.T. GILBERT, Choice of forum clauses in international and interstate contracts, in Kentacky Law Journal, 65, 1976-1977, pp. 29ss, "(...) after all, the assumption is that if the chosen forum is slightly inconvenient, the party must have received consideration in return for making this agreement to its detriment". Paper Exp. Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753 (7th Cir. 1992); Moses v. Business Card Exp., Inc., 929 F.2d 1131 (6th Cir. 1991); Bense v. Interstate BAttery Sys. Of America, 683 F.2d 718 (2d Cir. 1982); Gaskin v. Stumm Handel GmbH, 390 F.Supp. 361 (S.D.N.Y. 1975).
[208]Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17-18 (1972).
[209]P. BORCHERS, Forum selection agreement, op. cit., pp. 92ss: "(...) in some instances parties have agreed to a forum, and then circumstances have changed so severely that the forum would undoubtedly be less fair to the party than when the contract was formed. Most commonly this has occurred if the parties, prior to the Iranian revolution in 1979, contracted to have cases heard in the Iranian courts. In this circumstance, lower federal courts usually have released parties from their obligation to litigate in Iran (...)". McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341 (8th Cir. 1985); Rasoulzadeh v. Associated Press, 574. F. Supp. 854 (S.D.N.Y. 1983); Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344 (11th Cir. 1982) in which the American courts have deemed the Iranian judge to be unsuitable. There are not many other cases, outside the Iranian question. See also for analysis of the above cases: X. YANG, state immunity in international law, Cambridge University Press, Cambridge, 2012.
[210]Interamerican Trade Corp. v. Companhia Fabricadora de Pecas, 973 F.2d 487 (6th Cir. 1992); Kotan v. Pizza Outlet, Inc., 400 F.Supp.2d 44 (D.C.C. 2005); Prince v. Leasecomm Corp., 2004 WL 727028 (M.D.N.C. 2004).
[211]Deolalikar v. Murlas Commodities, Inc., 602 F.Supp. 12 (E.D. Pa. 1984). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.
[212]Commerce Consultants Int'l, Inc. v. Vetrerie Riunite, SpA, 867 F.2d 697 (D.C. Cir. 1989); Marra v. Papandreou, 59 F. Supp.2d 65 (D.C.C. 1999); Breindel & Ferstendig v. Willis Faber & Dumas Ltd., 1996 WL 413727 (S.D.N.Y. 1996). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.
[213]G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.
[214]H.L. BUXBAUM, Forum selection in international contract litigation: The role of judicial discretion, in Willamette Journal of International Law & Dispute Resolution, 12, 2004, pp. 193ss. As often happens in a complex and stratified system like the United States, there are judges who opt for a different approach and fully apply the doctrine of the forum non conveniens also with reference to the agreements on jurisdiction.
[215]In Copperweld Steel Company v. Demag-Mannesmann-Boehler, 578 F.2d 953 (3 Cir. 1978), which the judge considers Germany to be the inconvenient forum for the location of the dispute and of the evidence (witnesses included) on US territory. The location of the evidence is relevant to the evaluation of the unreasonable clause also in Morgan Trailer Mfg. Co. v. Hydraroll, Ltd., 759 A.2d 926 (Pa. Super. 2000).

financial resources to conduct the dispute in the defendant forum assumes some importance[216].

12. (FOLLOWS) PUBLIC POLICY

The third and last set of exceptions to the enforceability indicated by the Supreme Court in *Bremen* is related to the assessment of whether the derogation agreement of the jurisdiction violates a strong public policy of the forum[217]. The mere possibility that a different law is applied is not sufficient reason to reject the validity of the clause on the forum. According to Michael Gruson: "Bremen explains this exception by suggesting that the stipulation of a "remote forum"[218], if such forum would apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum[219]. The Court had in mind the case where the foreign law that the contractual forum would apply according to its own rules of conflict of laws contains a rule that is in violation of an important public policy of the country or state of the excluded forum in which an action in violation of the forum-selection clause is pending (...)"[220]. The reference to "essentially American" disputes causes the exceptions to operate with varying intensity depending on the proximity of the case to American interests and parties. In *Bremen,* moreover, the English judge indicated in the clause would have applied English law and therefore considered a clause limiting liability, invalid according to American law. In this regard: "(...) Bremen teaches that the fact that the contractual forum would apply a different law from that of the excluded forum in which the suit in violation of the clause was brought does not lead to unenforceability of a choice-of-forum clause-unless, of course, the foreign law violates an important public policy of the country or state of the excluded forum (...)"[221].

The exception in question has no clear boundaries and its scope of operation is defined on the basis of legal provisions and jurisprudential clarifications. The Supreme Court has dealt with the juncture of public policy in several successive decisions, narrowing the boundaries and expanding the operating margins of private autonomy to a point of derogation from jurisdiction in the international context, considered here as a unitary concept comprising both the agreements on the forum and arbitration. In a first decision, *Scherk v. Alberto-Culver Co.*[222], the Supreme Court affirmed that the matter of securities can be subject to arbitration. By establishing a parallel between compromise and pact on the forum[223], the Court extends the arguments made in Bremen to

[216]In Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133 (9th Cir. 2004), emphasis is placed on the fact that the plaintiff could be deprived of his day in court because he lacks adequate financial resources. So too, in Sudduth v. Occidental Peruana, Inc., 70 F.Supp. 2D 691 (E.D. Tex. 1999). See also: Cabreras v. Efharis Shipping & Trading Co., 1997 WL 698020 (E.D. La. 1997); Effron v. Sun Line Cruises, Inc., 158 F.R.D. 39 (S.D.N.Y. 1994); Vignolo v. Chandris, Inc., 1989 WL 160986 (D. Mass. 1990). G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[217]The Bremen, 407 U.S., p. 15.

[218]M. GRUSON, Forum selection clauses in international and interstate commercial agreements, in University of Illinois Law Review, 1982.

[219]See in particular: F. GHODOOSI, The concept of public policy in law: Revisiting the role of the public policy doctrine in the enforcement of private legal arrangements, in Nebraska Law Review, 94, 2015, pp. 692ss. D.A. FRIEDMAN, bringing order to contracts against public policy, Florida State University Law Review, 39, 2011, pp. 564ss.

[220]M. GRUSON, Forum selection clauses in international and interstate commercial agreements, op. cit.

[221]M. GRUSON, Forum selection clauses in international and interstate commercial agreements, op. cit.

[222]417 U.S. 506 (1974).

[223]U.S., p. 519: "an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause (...)'.

overcome the previous restrictive orientation and declares that the broad category of "agreements on the forum" represents "almost (an) indispensable precondition to achievement of the orderliness" and predictability essential to any international business transaction"[224]. In the antitrust field, it is the well-known decision in the *Mitsubishi* case[225] that grants the parties the power to agree to settle disputes. In a well-known footnote nineteen the Court responds to the concerns that such an approach could undermine the application of delicate regulations such as the one regarding competition, stating a limit to the process of liberalization in the field of public policy: "The United States raises the possibility that the arbitral panel will read this provision not simply to govern interpretation of the contract terms, but wholly to displace American law even where it otherwise would apply (...) we merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy (...)"[226].

The Court also elaborates the doctrine of the "second look" as further caution with regard to the freedom granted to parties to derogate from American jurisdiction. According to the majority of the Justices, in fact, the American judges maintain the power to verify, in the recognition and execution of the foreign pronunciation (or the arbitration award), if and how effectively the issue was dealt with by the foreign authority. In the event that the result achieved is not in line with the internal public order rules, it will be possible to deny entry to the decision in the US legal system[227].

The Court then intervened in other matters, narrowing the limits of the concept of public order and affirming the possibility for the parties to agree on the forum even in the case of the application of statutes with a public flavor such as RICO (Racketeer Influenced and Corrupt Organizations Act)[228], COGSA (Carriage of Goods by Sea Act)[229] and Limitation of Vessel Owner's Liability Act[230]. The Supreme Court therefore

[224]M. GRUSON, Forum selection clauses in international and interstate commercial agreements, op. cit.
[225]Mitsubishi Motors Corp. v. Soer Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), in which The Bremen is also mentioned as an example of the recognition of the importance of jurisdiction choice clauses. For more details see: G. BLANKE, P.L. LANDOLT, EU and US antitrust arbitration: A hanbook for practitioners, Wolters Kluwer, New York, 2011, pp. 352ss.
[226]473 U.S., p. 637fn19.
[227]The approach is confirmed in: Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U.S. 528, (1995), "(...) were there no subsequent opportunity for review and were we persuaded that the choice of forum and choice of law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies(...)". For details see: R. THOMAS, The carriage of goods by sea under the Rotterdam rules, Taylor & Francis, New York, 2017.
[228]Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987). For analysis see: S.B. GOLDBERG, F.E.A. SANDER, N.H. ROGERS, Dispute resolution: Negotiation, mediation and other processes, Wolters Kluwer, New York, 2014. S.F. ALI, Consumer financies dispute resolution in a comparative context. Principles, systems and practice, Cambridge University Press, Cambridge, 2013.
[229]Vimar Seguros, 515 U.S. 528. Mitsui and Co., Inc. v. MIRA M/V., 111 F.3d 33 (5th Cir. 1997).
[230]Carnival Cruise, 499 U.S. 585. R. STEINHARDT, International civil litigation, ed. LexisNexis, New York, 2002, pp. 152ss. P. BORCHERS, Forum selection agreement, op. cit., pp. 65-67. W.J. WOODWARD, Finding the contract in contracts for law, forum and arbitration, in Hastings Business Law Journal, 2, 2006, pp. 1ss. In the same argument see also: AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (U.S. 2011). Amchem Products Inc v. British Columbia (Workers Compensation Board) (1993) 102 DLR (4th) 96 (Supreme Court of Canada). Holt Cargo Systems Inc. v. ABC Containerline NV [2001] 3 SCR 907 (Supreme Court of Canada). Morguard Investments Ltd. v. De Savoye [1990] 3 SCR 1077, (1990) 76 DLR (4th) 256 (Supreme Court of Canada). Jensen v. Tolofson [1994] 3 SCR 1022 (Supreme Court of Canada). For more details see: S.I. STRONG, Resolving mass legal disputes through class arbitration: The United States and Canada compared, in North Carolina Journal of International Law & Commercial Regulation, 37, 2012, pp. 905ss. S.I. STRONG, Does Class Arbitration 'Change the Nature' of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles, in Harvard Negotiation Law Review, 17, 2012, pp. 202ss. L.H. ROSENTHAL, D.F. LEVI, J.K. RABIEJ, Federal civil procedure manual, op. cit.

seems to suggest that both in the field of arbitration and that of the pacts on jurisdiction the exception of opposition to the public policy is not normally an insurmountable obstacle to the enforcement of the agreement signed between the parties. The profile of the opposition to a fundamental interest of the forum, if anything, detects ex post when requesting recognition of the decision in the US legal system.

13. SEVERABILITY: AUTONOMY OF THE PACT

The principle of autonomy of the pact on jurisdiction, or severability, of direct derivation from the world of arbitration and whose importance is capital in the functioning of an agreement on jurisdiction, is reflected in the conception that the jurisdiction clause constitutes a pact separate from contract in which it is inserted and only follows the fate of validity and effectiveness[231]. In practice, it answers the question whether the parties have concluded a single agreement that includes the provision on the resolution of disputes, or two separate agreements, obviously connected. In the theory of international commercial arbitration, it is a widely held principle that the arbitration clause constitutes a quid separate from the contract in which it is possibly included. The origin of such a principle is difficult to connect to theoretical and systematic considerations. On the contrary, it arises from practical needs: to prevent a party from nullifying the important effect of certainty given by the arbitration clause, simply by challenging the validity of the entire contract.

Furthermore, it allows the arbitral tribunal to pronounce the termination or invalidity of the contract without, for this reason, depriving itself of the jurisdiction conferred by the clause contained therein. Thus, it is stated, the arbitration clause is independent of the contract, severable, separate, and a national judge can not, in principle, prevent the use of arbitration for the mere prospect by one of the parties of defenses involving the validity or effectiveness of the contract. This does not mean, as is natural, that the arbitration clause is absolutely free from any direct censorship or defect of the contract that inevitably extends to all the provisions contained therein, including arbitration agreement[232].

For the same need of certainty, and to avoid too easy delaying maneuvers by the part dissatisfied with the choice of the forum, the concept of autonomy has also been affirmed in the field of jurisdiction clauses. In the modified version of the Brussels I Regulation, the principle has even been positivized and it is the same art. 25 to affirm that "(...) a jurisdiction clause that is part of a contract is considered independent of the other contractual clauses" and that "the validity of the jurisdiction clause can not be contested for the sole reason that the contract is invalid"[233]. The principle in question

[231]L. MERRETT, Article 23 of the Brussels I Regulation: A comprehensive code for jurisdiction agreements?, in International & Comparative Law Quarterly, 58, 2009, pp. 545ss.

[232]The House of Lord "set the bar to a successful challenge [of an arbitration agreement] extremely high", since it is required that the contestation of the arbitration clause is based on facts or defects related to the negotiation of the specific clause: Fiona Trust & Holding Corp v Privalov [2007] EWCA Civ. 20, [2007] Bus LR 686; sub nom Premium Nafta Products Ltd v Fili Shipping Co Ltd [2007] UKHL 40. For more analysis and details see: .H. WEBSTER, M. BUHLER, Handbook of ICC arbitration. Commentary, precedents, materials, Sweet & Maxwell, 2014. Z. SAGHIR, C. NYMBI, Delocalisation in international commercial arbiration: A theory in need of practical application, in International Company and Commercial Law Review, 8, 2016, pp. 272ss.

[233]See from the CJEU: C-269/95, Francesco Benincasa v. Dentalkit Srl of 3 July 1997, ECLI:EU:C:1997:337, I-03767, parr. 24 and 25, the conclusions of the Advocate General Vilaça in case: C-313/85, Iveco Fiat SpA

therefore provides that the clause is not part of the contract, it is separated from it and its affairs are autonomous. The concrete result is that attaching the invalidity of the contract does not allow you to escape the elected forum.

The Court of Justice of the European Union (CJEU) states on this point: "it is necessary to distinguish, firstly, between a clause attributing jurisdiction and the substantive provisions of the contract in which this clause is inserted. In fact, a jurisdiction clause that responds to a procedural purpose is governed by the provisions of the Convention which pursues the establishment of uniform rules of international jurisdiction. On the other hand, the substantive provisions of the main contract in which the clause is inserted as well as any dispute regarding the validity of the latter are governed by the lex causae which is determined by international private law of the State of the forum"[234]. To affirm the specific nullity of the extension clause, then, does not change the result significantly, in the sense that in any case this will continue to abstractly adjust the choice of the forum until it is assessed as invalid and therefore unproductive of effects. These principles are also functional to a relatively quick and easy verification of jurisdiction by the court seised, since it is not necessary to enter into the merits of the case[235]. In England too the principle in question is considered to be affirmed. In the arbitration the question of the autonomy of the clause was first addressed in the decision of the House of Lords in *Heyman v. Darwins Ltd,* in which, however, the Lords are divided. While for some in the case of contracts void ab initio the agreement on the forum would be unproductive of effects[236], for others the decision depends on the interpretation of the will expressed by the parties in the clause, ie if they also intend to report the invalidity profiles to the decisions of the referees. A subsequent decision by

contro Van Hool NV of 11 November 1986, ECLI:EU:C:1986:370, I-03349 e ss. For details see. T. BOSTERS, Collective redress and private international law in the EU, ed. Springer, Berlin, 2017, pp. 80. V. LAZIC, S. STLIJ, Brussels Ibis Regulation: Changes and challenges of the renewed procedural scheme, T.M.C. Asser Press, The Hague, 2016. pp. 64ss.

[234]CJEU: C-269/95, Benincasa v. Dentalkit Srl of 3 July 1997, op. cit., parr. 24 and 25.

[235]CJEU: C-159/97, Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA of 16 March 1999, ECLI:EU:C.1999:142, I-01597; C-288/92, Custom Made Commercial Ltd v. Stawa Metallbau GmbH of 29 June 1994, ECLI:EU:C:1994:268, I-02913; C-34/82, Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging of 22 March 1983, ECLI:EU:C:1983:87, I-00987. For analysis of the above cases see: J. HILL, A. CHONG, International commercial disputes: Commercial conflict of laws in English courts, op. cit.

[236]Lord Diplock in Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp., [1981] A.C. 909., 980. See for details: S.S.M. MOHMEDED, Party autonomy doctrine is the cornerstone of arbitral provisional measures, in International Academic Journal of Law and Society, 1 (1), 2016, pp. 30ss. In the same spirit see also: CJEU, C-159/01, Turner v. Grovit o 29 April 2094, ECLI:EU:C:2004:246, I-3565. According to the Rome I Regulation, the parties are not entitled to make a choice of a non-state body of law, such as the lex mercatoria as the Regulation refers to 'the law of a state' in the relevant provisions (A choice of non-state body of law, such as the lex mercatoria is allowed under Section 46(1)(b) of the Arbitration Act 1996. See, Recital 13 of the Rome I Regulation allows the parties to incorporate a non-state body of law or an international convention by reference into their contract. Moreover, Recital 14 of the Rome I Regulation states that if the EU adopts rules of substantive contract law (including standard terms and conditions) in a relevant legal instrument that instrument may provide that the parties may choose to apply those rules. For more details: R. MERKIN, The Rome I Regulation and reinsurance, in Journal of Private International Law, 5, 2009). Therefore, the Rome I Regulation will restrict the choice of the applicable law on the merits in arbitration proceedings to the law of a state. However, in the absence of any choice of law by the parties, Section 46(3) of the English Arbitration Act 1996 provides that the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. It has been argued that this statutory discretion in favour of the arbitrator enabling the selection of the conflict of laws rules of a jurisdiction to which the Rome I Regulation is irrelevant will not render the award capable of being challenged by the english courts. See also in argument: N. ANDREWS, Civil procedure, in A. BURROWS (ed.), English private law, Oxford University Press, Oxford, 2013, chapter 22. M.H. BALLESTROS, The regime of party autonomy in the Brussels I Recast: The solutions adopted for agreements on jurisdiction, in Journal of Private International Law, 10, 2014, pp. 292ss. K. BOELE-WOELKI, T. EINHORN, D. GIRSBERGER, S. SYMEONIDES (eds.), Convergance and divergance in private international law: Liber Amicorum Kurt Siehr, Eleven International Publishing, The Hague, 2010, pp. 564ss.

the Court of Appeals, on the other hand, makes a distinction between the "never-existent" contract and the "valid-but-vulnerable" contract, sanctioning the operability of the severability in the second group of hypotheses[237]. The House of Lords returns to the principle in Fiona Trust[238] and clarifies that even if the contract was concluded by fraud and corruption, such defects do not extend to the arbitration clause and, therefore, the matter must be defined by the arbitrators. The Arbitration Act itself (1996) provides that: "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (...) 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"[239]. For English law, however, severability is essentially contractual in nature[240]: the parties can include it, even implicitly, as well as exclude it. Despite a certain lack of jurisprudence, the same principle is also extended to the agreements on the forum which must therefore be considered as autonomous from the main contract, unless a different agreement is agreed between the parties[241].

In the United States the Supreme Court has explicitly given hospitality to the theory of arbitration in a series of decisions, and the principle can be considered consolidated[242]. The extension to court agreements is traced back to the decision in the *Scherk* case[243]. Although this also concerns an arbitration clause, the Supreme Court cites the *Bremen* and states: "(...) an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs suit but also the procedure to be used in resolving the dispute (...)"[244].

[237]Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd., [1993] QB 701 (CA). M. HOOK, The choice of law agreement as a reason for exercising jurisdiction, op. cit.

[238]Fiona Trust & Holding Corp. v Privalov, [2007] EWCA Civ 20, affirmed sub nom Premium Nafta Products Ltd v Fili Shipping Co. Ltd, [2007] UKHL 40.

[239]Arbitration Act 1996, par. 7. See for more details and analysis: R. GARNETT, Coexisting and conflicting jurisdiction and arbitration clauses, in Journal of Private International Law, 9, 2013, pp. 362ss.

[240]M.L.MOSES, The principles and practice of international commercial arbitration, Cambridge University Press, Cambridge, 2012, pp. 19ss. D. JOSEPH QC, Jurisdiction and arbitration agreements and their enforcement, Sweet and Maxwell, London. 2010, pp. 124ss. Under english law in cases of the plea of non est factum, fraud or duress it may be that both the substantive contract and the jurisdiction agreement are simultaneously impeached. As with arbitration agreements, where illegality is alleged, the nature of the illegality needs to be considered and whether it directly impeaches the jurisdiction agreement. In Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd (Credit Suisse First Boston (Europe) Ltd v. Seagate Trading Co Ltd [1999] 1 Lloyd's Rep 784, 797 (Rix J. without deciding the point); IFR Ltd v Federal Trade SpA [2001] All ER (D) 48 (Colman J.); and Sonatrach petroleum Corp v. Ferrell International Ltd [2002] 1 All ER (Comm) 627 at [30] (Colman J.); Connex South Eastern Ltd v MJ Building Services Group Plc [2004] EWHC 1518) the issue of severability arose in the context of an application for an anti-suit injunction made by the claimant relying upon a jurisdiction agreement contained in a trading confirmation A.J. BELOHLAVEK, The definition of procedural agreements and importancy to define the contractual nature of the arbitration clause in international arbitration, in M. ROTH, M. GIESTLINGER (eds.), Yearbook of international arbitration, ed. Intersentia/DIKE/NWV, Vienna-Graz, 2012, pp. 22ss.

[241]IFR Ltd. v. Federal Trade Spa, [2001] All ER (D) 48 (Sep). The judge also affirms the principle with regard to court agreements, since there is no conceptual reason to distinguish the treatment of jurisdiction clauses from the arbitration clauses. The question of the autonomy of the clause must be resolved in the light of the lex contractus: the applicable substantive law will give the answer if the agreement on jurisdiction can be considered something separate or not and if the applicable law is English, the clause will generally be considered severable by the contract.

[242]Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 404 (1967): "(...) a federal court may consider only issues relating to the making and performance of the agreement to arbitrate (...)". See also: R. NAZZINI, The law applicable to the arbitration agreement. Towards transaction principles, in International & Comparative Law Quarterly, 65 (3), 2016, pp. 684ss.

[243]Scherk v. Alberto-Cluver Co., 417 U.S. 506, 519 (1974). D. EPSTEIN, C. BALDWIN, International litigation, op. cit., Z.S. TANG, Jurisdiction and arbitration agreements in international commercial law, op. cit.,

[244]417 U.S., p. 519.

Moreover, in the case of an action aimed at declaring the termination of the contract, the agreement on jurisdiction will survive, and therefore will produce its effects, only if the lex contractus allows to consider the agreement on jurisdiction as a second contract, autonomous but connected to the first. The consequence in the opposite case, namely that the agreement on jurisdiction ceases its effects together with the contract (possibly depriving the jurisdiction of the judge who decides the resolution), appears almost mocking punishment for the failure to predict the principle of severability by the applicable law.

In the light of this equivalence, the Court rules out that "any arbitration or forum-selection clause in an arbitration or forum a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion"[245]. The subsequent jurisprudence followed the approach taken by the Court without hesitation[246]. At a theoretical level, we reiterate, the concept of severability is not easily justifiable: why should a contract clause be considered an agreement distinct from the contract in which it is inserted, immune to the fate of the main agreement? After all, as it is necessary to respect the principle pacta sunt servanda, it is equally opportune that a subject who has not concluded a pact or who has dissolved it, is not bound by it. Yet, lacking a convincing theoretical basis, the autonomy of the jurisdictional agreement fulfills the important practical function of ensuring certainty for the resolution of disputes, while at the same time protecting the principles of judicial economy, in a way that does not seem easily waivable.

The agreement on jurisdiction may therefore be modified, flawed, void, voidable, subject to condition and even settled by the parties, but each of these defenses must have as specific, even if not exclusive, the agreement itself and, in any In this case, it is likely that this will not be enough to distract the parties from the judge who has contractually appointed.

14. THE EFFECTS PLAN

The typical effect of the jurisdictional agreement is twofold: derogation and extension, two concepts that are born distinct but live in close connection. The procedural effect can be considered accompanied by specular rights and obligations assumed by the parties on the contractual-substantial level or, according to the processualist conception, to be the only product of the agreement on jurisdiction. We have already

[245]417 U.S., p. 519.

[246]Marano Enterprises of Kansas v. Z-Teca Restaurants, LP, 254 F.3d 753 (8th Cir. 2001); Afram Carriers, Inc. v. Moeykens, et al., 145 F.2d 298 (5th Cir. 1998); Stamm v. Barclays Bank of New York, 960 F.Supp. 724 (S.D.N.Y. 1997); Sanchez v. Valadez, 86 F.3d 1287 (3d Cir. 1996); Angelotti v. RW Professional Leasing Serv. Corp., U.S. App. Lexis 33387 (9th Cir. 1996); MGJ Industries, Inc. v. Greyhound Financial Corp., Inc., 826 F.SUpp. 430 (M.D. Fla. 1993); Moses v. Business Card Exp., Inc., 929 F.2d 1131 (6th Cir. 1991); AVC Nederland BV v. Atrium Inv. Partnership, 740 F.2d 148 (2d Cir. 1984). J.B. Hofmann v. Minuteman Press Int'l, Inc., 747 F.Supp. (W.D. Mo.1990), the district court does not extend the principle internally; in Gaskin v. Stum Handel GmbH, 390 F. Supp. 361 (S.D.N.Y. 1975), the fraud exception of the whole contract also affects the clause; in Certified Commodities Group, Inc. v. Roccaforte, 441 So.2d 264 (La. Ct. App. 1983), the termination of the main contract is based on the refusal to give effect to the clause on the forum contained therein. For analysis and details of the above cases see: F. SPARKA, Jurisdiction and arbitration clauses in maritime transport, op. cit., G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit., R.W. BOURNE, J.A. LYNCH, Modern Maryland civil procedure, op. cit.

opted for a substantial consideration of the agreement[247]. The way of acting of the pact on the power-duty of the judge to decide is also different.

In the arbitration case, in speciem with reference to arbitration, the principle of autonomy of the arbitration agreement arises almost as constitutive, since the invalidity or nonexistence of the same has direct repercussions on the power-duty of knowledge and decision of the arbitrators, who derive their authority from compromise and not from another source. Vice versa, in the case of the agreement on jurisdiction, any defect of the agreement does not in any case deprive the judge of his power, going to restore the ordinary powers that the judge derives from his own office. In this sense, only if the choice of the forum has designated a judge otherwise not connected with the dispute would have an effect similar to that in the matter of arbitration, that is, of lack of competence. In any other case, the judge could well know of the dispute by virtue of another criterion of jurisdiction in a dispute: a restriction for the continental judge, discretion for the Anglo-American colleague. The first profile that the judge must face in the analysis of an agreement on the forum that he has recognized as validly formed is that concerning the interpretation of the clause itself, what the British and the Americans define, by giving central importance, the construction of the will of the parties. After having determined the law applicable to the same clause, therefore, the judge is called to establish, on the basis of the *lex contractus* and the *lex fori*, what are the criteria of interpretation that must be applied. Also in this case the national approaches may vary, but basically the rules that govern the interpretation of the clause will be the same that govern its substantive validity[248].

[247]See the statute of the State of New York (New York General Obligations Law, par. 5-1402) which states that: "(...) notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding (. . .) any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state". Similarly, in every concrete hypothesis, a national system is invested by only one of the two effects, depending on whether the parties have chosen to extend or waive its jurisdiction. Here the exceptional character of art. 23 of the Brussels I Regulation which, being a supranational norm, regulates jointly and in a uniform manner all the aspects of derogation and extension that an agreement on jurisdiction produces within the european judicial service.

[248]O. KAHN-FREUND, Jurisdiction agreements, op. cit., pp. 828-829: "(...) on this the principles of English law would seem to be established. As long ago as 1893, in Hoerter (Trading as C. F. Mumm) v. Hanover Caoutchouc, Gutta Percha & Telegraph Works the Court of Appeal, speaking through Lord Esher M.R., held that a submission clause in a German contract must be construed according to German law. In the same spirit see also: Commission Regulation n. 593/2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6. for comments see: M. AHMED, The nature and enforcement of choice of court agreement. A comparative study, op. cit. See the next cases from the CJEU in argument: Verein für Konsumenteinformation v. Amazon EV Sàrl C-191/15 of 28 July 2016, ECLI:EU:C:2016:612; S. Kareda v. S. Benkò C-249/16 of 15 June 2017, ECLI:EU:C:2017:472; Höszig Kft v. Alstom Power Thermal services C-222/15 of 7 July 2015, ECLI:EU:C:2015:525; K Finanz v. Sparkassen Versicherung Ag. Wien Insurance group C-483/14 of 7 April 2016, ECLI:EU:C:2016:205; H. Lutz v. E. Bäuerle C-557/13 of 16 April 2015; Mühlleitner v. Ahmed Yusufi & Wadat Yusufi C-190/11 of 6 September 2012, ECLI:EU:C:2012:542. All the cited cases was published in the electronic Reports of the cases. For more details and analysis see: X.E. KRAMER, The interaction between Rome I and mandatory European Union private rules-EPIL and EPL: Communicating vessels?, in P. STONE, Y. FARAH, Research Handbook on European Union private international law, Edward Elgar Publishing, Cheltenham, 2015, pp. 250ss. A.L. CALVO CARAVACA, J. CARRASCOSA GONZÁLEZ, Litigaciòn internacional en la Uniòn Europea II, ed. Comares, Granada, 2017, pp. 106ss. R.A. BRAND, T. FISH, An american perspective on the New Japanese Act on General Rules for Application of Laws, in Japanese Yearbook of International Law, 2008, pp. 302ss. J. CARRUTHERS, Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law?, in The International & Comparative Law Quarterly, 61 (4), 2012, pp. 881ss. C.S.A. OKOLI, H.O. ARISHE, The operation of the escape clauses in the

It must therefore be clarified whether the parties wanted to conclude an exclusive or non-exclusive agreement. In the case of an exclusive clause, the parties have agreed to fight in a particular forum and intend to waive any other jurisdiction. On the other hand, in the case of a non-exclusive clause the exemption effect is missing and the parties have simply added or strengthened the competence of the elected forum[249]. Intermediate versions occur when the parties extend the competence of more than one legal system, or they agree with the competence of a different forum for each of the parties[250].

First of all, the CJEU is concerned with admitting a mutual extension agreement, even beyond the strict letter of the then art. 17 in C-23/78, *Meeth* case of 9 November 1998, par. 6: "art. 17, 1st sub-paragraph, of the Convention can not be interpreted in such a way as to exclude the agreement under which each of the parties, domiciled in different States, of a contract of sale can only be settled before the courts of their country"[251]. CJEU admits that "art. 17 refers verbatim to the designation, by the contracting parties, of a single judge, or of judges of a single State", but adds that "this formulation, informed to the most current practice in business life, can not however interpret itself in the sense that it is intended to exclude the possibility for the parties to appoint two or more judges for the purpose of settling any disputes; this interpretation is justified by the consideration that art. 17 is based on the recognition of the autonomy of the will of the parties in the matter of attribution of jurisdiction to judges called to know disputes that fall within the scope of the Convention, other than those that are expressly excluded pursuant to art. 17, second sub-paragraph"[252].

Both steps are found in point 5 of the justification. The second question is dealt with by the CJEU only in terms of compensation, but we will try to get some more general indications. The Court states that the question of the extent to which a court, brought by virtue of a reciprocal attribution of competence, of the kind in the contract between the parties, is competent to rule on the compensation which one of the parties deduces because of the obligation in question, it must be resolved taking into account the requirements of respect for the private autonomy that informs art. 17, and at the same time the needs of the economy of the proceeding, which are at the basis of the

Rome Convention, Rome I Regulation and Rome II Regulation, in Journal of Private International Law, 14 (4), 2012, pp. 516ss. K. KROLL-LUDWIGS, Die Rolle der Parteiautonomie in europäischen Kollisionsrecht, ed. Mohr Siebeck, Tübingen, 2013, pp. 573ss. L. D'AVOUT, Droits fondamentaux et coordination des ordres juridiques en droit privé, in E. DUBOUT, S. TOUZÉ (a cura di), Les droits fondamentaux: charnières entre ordres juridiques et systèmes juridiques, ed. Pedone, Paris, 2010, pp. 184ss. G. DANNEMANN, S. VOGENAUER, The common european sales law in context. Interactions with english and german law, Oxford University Press, Oxford, 2013, pp. 16ss. M. MCPARLAND, The Rome I Regulation on the law applicable to contractual obligations, Oxford University Press, Oxford, 2015. H. WAIS, Einseitige Gerichtsstandverinbarungen und die Schranken der Parteiautonomie, in Rabels Zeitschrift für ausländisches und internationales Privatrecht, 81, 2017. D. LIAKOPOULOS, Interactions between European Court of Human Rights and private international law of European Union, in Cuadernos de Derecho Transnacional, 10 (1), 2018.

[249] LEDERMAN, Viva Zapata!: Toward a rational system of forum-selection clause enforcement in diversity cases, in New York University Law Review, 66, 1991, pp. 423ss, provides an alternative definition like: "consent to jurisdiction clause". Some american judges, in the case of non-exclusive clause, fully apply the doctrine of the forum non conveniens, as if the clause had the sole effect of providing jurisdiction for the elected forum that could be lacking, without binding the parties or saying judge in any way. See also: G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 510ss.

[250] See from the CJEU: C-23/78, Nikolaus Meeth v. Glacetal of 9 November 1978, op. cit., it is a typical case of an asymmetric clause with anti-contentious purposes, according to which each party is obliged to refer only to the judge of the domicile of the counterpart. In this way, the person who promotes a judicial initiative and thus assumes the role of an actor is forced to do so in a forum that tends to be less favorable and more favorable to the defendant.

[251] CJEU, C-23/78, Nikolaus Meeth v. Glacetal of 9 November 1978, op. cit., par. 17

[252] CJEU, C-23/78, Meeth of 9 November 1998, op. cit.

overall Convention considered, in which the said article is inserted; in light of this dual purpose, art. 17 can not be interpreted as meaning that it prevents the court seised by virtue of a clause conferring jurisdiction belonging to the type described above, from taking account of the compensation linked to the legal relationship at issue, if it considers this to be compatible with the terms and with the meaning of the jurisdiction clause. The principles that seem to transpire from this brief reasoning are essentially two. The first is that there are other needs that must be taken into consideration as well as private autonomy, and that must be balanced with this. The second is that in general the preclusion can not be established for the proposition of compensation but it is necessary to look at the concrete extension clause designed by the parties. A confirmation can be read in the interpretation given by the CJEU in the Danvaern judgment: "art. 6, point 3, of the Convention refers only to the applications proposed by the defendants to obtain a separate conviction order[253]. In the most frequent hypotheses, however, the parties will have included in the contract a clause in which they indicate, with various formulations, the competence of a particular forum and it will be necessary to establish its nature. Europe and the United States are divided on the presumptive rule that must be applied, if it is not easy to understand the real intention of the parties. Where art. 23 of the Regulation poses a presumption of exclusivity of the agreement on the forum, the common law, especially American, operates a tenuous presumption against it. As for the first, it should be noted that if art. 23 of the Regulation, is the same letter of the provision that considers the "exclusive clause unless otherwise agreed by the parties", so that it is superfluous to identify the applicable law for the purpose of establishing or not the exclusivity of the agreement. Already in force of the previous formulation, the CJEU had valued and protected the freedom of determination of the parties, even beyond the letter of art. 17 of the Convention, and it is always up to the judicial credit to the plaintiff. The exceptions that can be raised and the conditions under which they can be raised are governed by national law.

In the United States, on the other hand, it is generally required that the parties use formulas that express or at least clarify their intention to make an exclusive agreement, otherwise the judges will have good game in believing that the parties intended to agree a mere faculty, not a true and an obligation to act in the elected forum[254]. In England the question is more complex, and the central point for English law is whether the agreement, beyond the use or not of the term "exclusive", obliges the parties to resolve their disputes in a given forum or represent a mere concession[255]. The exclusive or non-exclusive nature of the clause on the forum is not entrusted to presumptions

[253]RF High Commercial Court (RF VAS), Sony Ericsson Mobile Communications Rus v. Russian Telephone Company, decree n. 1831/12 of 19 June 2012. The French case, which called the art. 23 of the Brussels I Regulation, concerned a bank deposit agreement concluded by a French with a bank in Luxembourg. The agreement on the jurisdiction contained therein allowed the woman to act only in Luxembourg, but left the bank wide freedom. The Cour de Cassation, judging the agreement as a potestative, concludes that: "(...) elle était contraire à l'objet et à la finalité de la prorogation de compétence ouverte par l'article 23 du Règlement Bruxelles I". Cour de Cassation, decision of 26 September 2012, n. 983, La société Banque privée Edmond de Rothschild Europe c. Mme X. See also from the CJEU: C-341/93, Danvaern Production A/S v. Schuhfabriken Otterbeck GmbH & Co., of 13 July 1995, ECLI:EU:C.1995:239, I-02913, par. 18.

[254]P. BORCHERS, Forum selection agreement, op. cit., pp. 82: "(...) in less clear cases, courts have a mild preference for interpreting unclear provisions as exclusive forum agreements. The theory often invoked is that if the designated forum would have jurisdiction without the clause, giving the clause nonexclusive effect is meaningless (...)". In the same spirit see: A. BRIGGS, Agreements on jurisdiction and choice of law, op. cit., pp. 128-129.

[255]O. KAHN-FREUND, Jurisdiction agreements, op. cit., pp. 828-829.

and is therefore a matter of interpretation of the parties' willingness to negotiate[256]. In the absence of a clear or express intention of the parties, there is no unequivocal answer: the interpretative canons used by the courts have been varied, from general presumptions in favor of exclusivity, to a preference for non-exclusivity if the parties have agreed in the sense that they already have a weakened element in reading the CJEU. A controversy had also developed about paragraph 3 of the original wording of art. 17 with regard to the extension stipulated "in favor of one of the parties"[257], in particular on the difficulty of establishing when a forum was actually in favor of a party. The regulatory formulation, which incorporates the indications of the CJEU on this point, closes these problems eliminating on the one hand the reference to the exclusivity of the forum designated by the parties, on the other the reference to the prolongation favorable to only one of the parties. Article 17, sub-paragraph 3, of the 1968 Brussels Convention-in the consolidated version of 1998 is paragraph 5[258].

In terms of exclusivity, some international conventions can play a role, which generally prevail over domestic law and also on the same Regulation, if they provide, for example, explicitly that the agreement between the parties represents only one of the available forums, i.e. that the choice made is non-exclusive.

Once determined whether it is an exclusive or non-exclusive agreement, the judge will also have to define which aspects of the relationship are included in the formulation adopted by the parties, which, we said, have full freedom in defining the scope of the extension. In Europe, this issue is also reserved for the national court[259], and the terms of prolongation of jurisdiction must be interpreted restrictively.

Also from the jurisprudence in the matter of arbitration, which favors, instead, an extensive interpretation of the agreement[260], even if the letter of the clause is the subject of an interpretation defined as "meticulous" to reconstruct the will of the parties. In England the question is resolved in the light of the law applicable to the construction of the agreement. If this right is the English one, there is a favor about the concentration in the elected forum of all the disputes that refer to the extended contract, regardless of the contractual or extra-contractual nature, also to avoid fragmentation of the affair. The contractor who tries to avoid the choice of the court will have the burden of proving to the English judge that it was the parties' intention to allow some actions to escape the knowledge of the elected judge, and that this is supported by some commercial justification[261]. A further matter is related to the identification of the judge, which the parties can carry out in a precise and express way. In America one wonders whether the generic reference to the "judges" of a particular American state includes or excludes the competent Federal courts in that territory, with conflicting answers depending on the States. As seen for art. 23, even in the United States there is a widespread opinion

[256]O. KAHN-FREUND, Jurisdiction agreements, op. cit.,
[257]O. KAHN-FREUND, Jurisdiction agreements, op. cit., P. STONE, Stone on private international law in the European Union, op. cit.,
[258]CJEU, C-22/85, Rudolf Anterist v. Crédit Lyonnais of 24 June 1986, ECLI:EU:C:1986:255, I-01951.
[259]See art. 31 of the Regulation. P. STONE, Stone on private international law in the European Union, op. cit.,
[260]P. BORCHERS, Forum selection agreement, op. cit., pp. 84-85. G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 545-546.
[261]A. BRIGGS, Agreements on jurisdiction and choice of law, op. cit., pag. 152: "(...) what must the parties, as rational commercial actors, have intended? rather than "what is the meaning of the words used by the parties in their agreement on jurisdiction or choice of law? (...)'.

that the parties may have an impact on the territorial jurisdiction, but not on the jurisdiction by subject of the judge (subject-matter).

Moreover, it is clear from the settled case-law of the CJEU that no link between the court and the dispute is necessary[262], and this profile seems to be consolidated also in the American[263] and English pronunciations[264]. With this it is excluded that the designated judge must be one of those otherwise competent under other jurisdictional criteria, let alone the judge of the domicile of one of the parties. Lastly, the European jurisprudence questioned whether the judge's indication should be expressed in an express, unequivocal and definitive way from the moment of stipulation of the agreement or may vary, be determined by relationem or even be left to the determination of a third party. The CJEU gave an affirmative answer to the question in the judgment C-387/983, *Coreck Maritime GmbH v. Handelsveem BV and others* of 9 November 2000[265]. According to our opinion the validity of a clause identifying five territorially competent courts, all located within a single legal system, stating that it is only necessary that the clause indicates in favor of which foreign legal system the Italian jurisdiction is waived, but not also in favor of which specific judge of that order. However, there is invalidity if the designated judge can not be identified safely[266]. In the United States, an authority found that an agreement on the floating forum was invalid, in which the determination of the competent forum was not certain, but depended on extrinsic elements.

15. TENSIONS BETWEEN CIVIL LAW/COMMON LAW

The CJEU has adopted with regard to some peculiar common law institutions. In the name of the mutual trust and the mandatory jurisdictional criteria set forth in Regulation 44/2001, the CJEU has hit institutions such as the possibility of issuing an anti-suit injunction[267] to protect an agreement on the forum (or even an arbitration

[262]CJEU: C-56/79, Siegfred Zelger v. Sebastiano Salinitri of 17 January 1980, ECLI:EU:C:1980:15, I-00089, par. 4; C-106/95, Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL of 20 February 1997, ECLI:EU:C:1997:70, I-00911, par. 34.

[263]M. GRUSON, Forum selection clauses, op. cit., pag. 183: "(...) Bremen does not establish a requirement that there be a "reasonable relation" between the contractual forum and the transaction in question (...)", unless the choice of a "remote alien forum" to resolve "essentially local disputes" does not appear to be abusive or unreasonable. See also in argument: G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 509-10. With this we overcome the same concept of "natural" forum or judge which belongs to the analysis of the doctrine of the forum non conveniens, i.e. "most suitable forum for a particular case". H.L. BUXBAUM, Forum selection in international contract litigation, op. cit., pp. 194-95. UK appears in a certain sense more reluctant to abandon the notion of "most appropriate forum", especially where this coincides with English jurisdiction.

[264]J. HARRIS, L. COLLINS, Dicey, Morris e Collins, The conflict of laws, op. cit., pp. 516, 12.089.

[265]CJEU, C-387/98, Coreck Maritime GmbH v. Handelsveem BV and others of 9 November 2000, ECLI:EU:C:2000:606, I-09337, par. 15. For analysis see: A. MILLS, Party autonomy in private international law, Cambridge University Press, Cambridge, 2018.

[266]Preferred Capital, Inc. v. Sarasota Kennel Club, 2005 U.S. Dist. LEXIS 15238, No. 1:04 CV 2063, 2005 WL 1799900 (N.D. Ohio July 27, 2005); Preferred Capital, Inc. v. Aetna Maint. Inc., 2005 U.S. Dist. LEXIS 40867, No. 1:04CV2511, 2005 WL 1398549 (N.D. Ohio June 14, 2005); SRH, Inc. v. IFC Credit Corp., 275 Ga. App. 18, 619 S.E.2d 744, 746 (Ga. Ct. App. 2005). However, it is a line of cases concerning the same controversy against the Norwegian company. Other courts, in the same affair, have given effect to the agreement, see for example: IFC Credit Corp. v. Aliano Brothers General Contractors, 437 F.3d 606, 2006 U.S. App. LEXIS 2439, 2006 WL 230179 (7th Cir. Feb. 1, 2006); Preferred Capital, Inc. v. Al & Lou Builders Supply, Inc., 2006 Ohio 250, 2006 WL173161 (Ohio Ct. App. 2006); Popular Leasing USA, Inc. v. Borough of Highland Park, 2005 U.S. Dist. LEXIS 35659, No. 4:04CV01812 ERW, 2005 WL 3527300 (E.D. Mo. Dec. 22, 2005). For more details see: G.B. BORN, P.B. RUTLEDGE, International civil litigation in United States Courts, op. cit.

[267]See, R. BUTLER, B. WEIJBURG, Do anti-suit injunctions still have a role to play?-An english law perspective, in University of San Francisco Maritime Law Journal, 24, 2011-2012, pp. 258ss. C.M.V. CLARKSON, J. HILL, The conflict of laws, Oxford University Press, Oxford, 2011.

agreement), or the possibility for the English court to discretionally evaluate whether or not to exercise its jurisdiction through the doctrine of the forum non conveniens. If it is natural that not all English peculiarities could find hospitality within the European civil procedural law, strongly influenced by its civil law matrix, we note, however, how some of the roughnesses that are highlighted in relation to the Regulation system could have benefited tools developed in the common law forge. We refer in particular to the possibility for the judge to express a discretionary assessment regarding the exercise of their jurisdiction.

While the American judge and the English judge maintain a discretionary power over the content of the jurisdiction clause, through the decision on enforceability, this does not happen in the European and Italian discipline. It is no coincidence that in the European system where the need was felt to limit the possibility of derogation from jurisdiction, in the face of an institutional disparity between the parties involved, it was done with precise positive rules to protect subjects deemed to be weaker. Despite the existence of these protected categories, however, many users point to the possibility that even in the European system the court seised is reserved a margin of union of the content of the agreement on the forum. Such power, which usually assumes the connotations of a union of reasonableness of the elected forum, is still excluded from the CJEU[268], and was not introduced with the reform of the Regulation[269].

A clear stance against the assessment of the opportunity or appropriateness of the choice made by the parties is represented by the pronouncement of the CJEU in the *Owusu* case[270] with which he deprived the English judge of the forum tool non conveniens in all cases in which European legislation must be applied. The problem arises for the English judge if he can exercise his discretionary power and, therefore, assess the appropriateness of the choice made by Owusu, also in light of the fact that most of the evidence and witnesses are in Jamaica. The main problem is represented by the fact that in the case of the English defendant the jurisdiction subsists according to art. 2 of the Regulation, as a forum for the defendant's domicile, and it is unclear whether this binds the judge to exercise his power.
Given the link of the dispute not with another Member State, but with an extra-EU status, it was not obvious that the CJEU considered the matter attracted to the Regulation. The European judge, on the other hand, states that "the uniform rules on the jurisdiction contained as competent or the respect of the constitutional principles of due process (...)"[271]. For the application of the Regulation, therefore, no conflict is necessary, even if it is a potential matter of competence between two Member States of Union, it

[268]CJEU, C-159/97, Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA of 16 March 1999, op. cit., par. 45.
[269]In Ellinger v. Guiness, Mahon & Co., [1939] 4 All E. R. 16 (Ch.). See also: Oppenheimer v. Louis Rosenthal & Co., [1937] 1 All E.R. 23; in the same spirit see also the case: Carvalho v. Hull Blyth Ltd., [1979] 1 W.L.R. 1228, [1979] All ER 280. For more details: A. BRIGGS, Civil jurisdiction and judgments, op. cit. S. BAUGHEN, Shipping law, op. cit., Z.S. TANG, Jurisdiction and arbitration agreements in international commercial law, op. cit., T.C. HARTLEY, International commercial litigation. Text, cases and materials on private international law, op. cit.,
[270]CJEU, C-281/02, Andrew Owusu v. N. B. Jackson and others of 1st March 2005, op. cit., C. CUNIBERTI, Forum non conveniens and the Brussels Convention, in International & Comparative Law Quarterly, 54, 2005, pp. 973ss. T.C. HARTLEY, The European Union and the systematic dismantling of the common law of conflict of laws, in International & Comparative Law Quarterly, 54, 2005, pp. 814ss. A. BRIGGS, The impact of recent judgments of the European Court on English procedural law and practice, in International Lis, 3, 2005, pp. 137ss.
[271]C-281/02, Andrew Owusu v. N. B. Jackson and others of 1st March 2005, op. cit.

is sufficient to highlight the international jurisdiction of the Member State in which the defendant is domiciled.

The rest of the decision is almost obvious: the discretionary element inherent in the forum non conveniens is incompatible with the imperativeness of the jurisdiction criterion provided for by art. 2 of the Regulation, which "is derogable only in cases expressly provided for by the (Regulation itself)"[272]. Legal certainty, the need not to undermine the legal protection of persons residing in the Union and the necessary uniform application of the Regulation's criteria are all reasons that CJEU cites to exclude a different solution. The result is that the English courts are bound by the Regulation to exercise their jurisdiction, without being able to make any assessment of appropriateness of the specific case. In terms of agreements on the forum, *Owusu* essentially means that the English judge, in applying the European legislation, by its imperative and mandatory nature, must shift its analysis plan from enforceability to the validity of the pact. It will no longer be able to apply the Eleftheria principles and make a discretional assessment regarding the choice made by the parties: if the agreement complies with the requirements, especially in terms of form, as provided for by art. 23 of Regulation 44/2001, will be bound to the determination made by the parties, both as regards the extension effect and the derogation of the English jurisdiction. Ultimately, through the process of European integration, the ghost is manifested that for centuries has undermined the stillness of the English judges, ie the possibility for the parties to oust their jurisdiction.

While acknowledging the firm decision of the CJEU, and excluding rebus sic stantibus signs of reconsideration by its jurisprudence, we can not fail to express some regrets about the lost opportunity to "contaminate" European Union law with some common law tint. In our opinion the grant, although cautious, of a certain space to the discretion of the judge, especially in order to indicate another order (especially if european) more suitable to know of a dispute, could help to curb the practice of the forum shopping and increase the degree of integration and mutual trust between the various european forums[273]. The second point that we like to remember is represented by the decision in *West Tankers*[274] which established the uselessness of the so-called anti-suit injunctions under Regulation[275]. The primary care judge accepts the request and

[272]F. FERRARI (ed.), Forum shopping in the international commercial arbitration context, ed. Sellier European Law Publishers, Münich, 2013, pp. 69ss.
[273]G.A. BERMANN, Forum shopping at the "gateway" to international commercial arbitration, in F. FERRARI (ed.), Forum shopping in the international commercial arbitration context, op. cit.
[274]CJEU, C-185/07, Allianz Spa e Generali Assicurazioni Generali Spa v. West Tankers Inc of 10 February 2009, ECLI:EU:C:2009:69, I-00063. For details see: A. BRIGGS, Civil jurisdiction and judgments, op. cit.,
[275]CJEU: C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA of 27 April 2004, ECLI:EU:C:2004:228, I-03565. A. BRIGGS, Agreements on jurisdiction and choice of law, op. cit., p. 196: "(...) an injunction (...) is an order that the party to whom it is addressed act in accordance with what his conscience should direct him to do (...) The court does not so much restrain as insist on self -restraint, while threatening measures of compulsion if that self-restraint is not forthcoming. But all the court does is look to the alleged wrongdoer and require that he now do what the law and his conscience requires. It lifts its eyes no higher than that; it claims no wider a power, and assumes no greater a responsibility than that of insisting that those brought before it should act as the law and conscience demands (...)". T.C. HARTLEY, Antisuit injunctions in support of arbitration: West Tankers still afloat, in International and Comparative Law Quarterly, 63, 2015, pp. 966ss. In the same spirit see also: The International Law Association's Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Litigation take a restrictive approach to anti-suit injunctions. Subject to the exception in Principle 7.3, Principle 7.1 accepts that there is no place for such a remedy where both states are parties to an international convention specifying common rules for the exercise of original jurisdiction. Nor indeed should such a remedy be ordered where the court is satisfied that

pronounces anti-suit injunction[276], against which the insurance companies offer direct appeal to the House of Lords. It is at this point that the supreme English instance asks for the clarifying intervention of the CJEU asking "(...) if it is compatible with Regulation (CE) n. 44/2001 the fact that the judge of a member state issues a prohibition addressed to a subject to undertake or continue a proceeding in another member state, on the ground that such proceeding violates an arbitration agreement"[277]. CJEU preliminarily, excludes that the proceeding from which the request of the House of Lords originated is included in the regulation. However, this circumstance does not prevent it from examining the question due to the consequences of the anti-suit injunction which "undermine the useful effect (of the Regulation, preventing) the achievement of the objectives of unification of the rules on conflicts of jurisdiction in civil matters. and commercial and free circulation of decisions in this same matter"[278]. According to CJEU, "(...) this occurs in particular when such a procedure prevents a court of another Member State from exercising the powers conferred on it by virtue of the Regulation (...)"[279]. The judges then shift the focus from the English to the Italian dispute where the insurance companies have acted under article. 5, n. 3, of the Regulation, as a place "in which the harmful event occurred"[280]. The presence of an arbitration clause in the contract between West Tankers and Erg, which may or may not be applicable to insurers, becomes irrelevant at this point. What matters to the CJEU is that the anti-suit injunction would have the effect "of preventing (...) a judge of a Member State, as a rule competent to settle a dispute pursuant to art. 5, point 3, of the Regulation (...) to rule (...) on the applicability of the latter to the dispute before it"[281]. Such an eventuality is judged contrary to the principle according to which each judge "ascertains itself, by virtue of the provisions applicable to it, its own competence to rule on the controversy submitted to it" than to the principle of mutual trust which must inform relations between the judges of the European system. The CJEU can only answer the House of Lords question in the

the other court will apply the Principles (Principle 7.2). In this way, the Committee sought to build the idea that ordinarily deference should be given to the court seised of the substantive proceedings, at least where that court has rules permitting it to decline jurisdiction in certain cases. However, importantly Principle 7.3 qualifies both of the previous paragraphs by permitting an exception in the case of a manifest breach of an exclusive jurisdiction clause under the law of both states. However, the International Law Institute's Resolution on The Principles for Determining when the Use of the Doctrine of Forum Non Conveniens and Anti-suit Injunctions is Appropriate adopts a more liberal approach towards anti-suit injunctions (International Law Institute, Bruges Session 2003, Second Commission, 2nd September 2003 (Rapporteur: Sir Lawrence Collins, Co-rapporteur: M. Georges Droz) in Texts, Materials and Recent Developments, in Yearbook of Private International Law5, 2013, pp. 337ss. M.L. NIBOYET, Le principe de confiance mutuelle et Les injonctions anti-suit, in P. DE VAREILLES-SOMMIERES (ed.), Forum shopping in the european judicial area, Hart Publishing, Oxford & Oregon, Portland, 2007, pp. 77, 85ss, highlights that the 2003 Bruges Resolution states that anti-suit injunctions are not, in principle, contrary to international law. However, the nature and scope of the exercise of the power to grant the injunction determines whether their use is appropriate). C.J.S. KNIGHT, Anti-suit injunctions and non-exclusive jurisdiction clauses, in Cambridge Law Journal, 69, 2010, pp. 26ss. P. NEILSON, The new Brussels I Regulation, in Common Market Law Review, 50, 2013, pp. 504ss. C. SIM, Choice of law and anti-suit injunctions: Relocating comity, in International and Comparative Law Quarterly, 62, 2013, pp. 704ss.

[276] R. FENTIMAN, Anti-suit injunctions-Comity redux, in Cambridge Law Journal, 71, 2012, pp. 274ss. R. FENTIMAN, The scope of transnational injunctions, in New Zealand Journal of Public and International Law, 11, 2013, pp. 324ss.

[277] CJEU, C-185/07, Allianz Spa e Generali Assicurazioni Generali Spa v. West Tankers Inc of 10 February 2009, op. cit.

[278] R. FENTIMAN, The scope of transnational injunctions, op. cit.

[279] CJEU, C-185/07, Allianz Spa e Generali Assicurazioni Generali Spa v. West Tankers Inc of 10 February 2009, op. cit.

[280] R. FENTIMAN, The scope of transnational injunctions, op. cit.

[281] CJEU, C-185/07, Allianz Spa e Generali Assicurazioni Generali Spa v. West Tankers Inc of 10 February 2009, op. cit.

sense that the anti-suit injunction can not find room within the European procedural law.

The exclusion of the operativity of anti-suit injunction in the European system is not limited to the subject of arbitration, but must be understood in a broader sense. Therefore, the English court is deprived of this power even when its objective is the protection of an agreement on the forum. If it is difficult for the civil law jurist not to share this decision, however, the problem remains in the field of finding means to ensure the fulfillment of the agreement on jurisdiction and, therefore, protecting its function in terms of certainty and predictability. In this sense, the prospect of the obligation for those who have violated the pact on the court to compensate for the damage that the other party has suffered is interesting, even if the issue has not yet been explored both at the doctrinal and jurisprudential level[282].

16. FROM THE EFFECTIVE CONSENT TO THE PRESUMED CONSENT .... IN INTERNATIONAL PRIVATE EUROPEAN LAW

The starting point is undoubtedly the existence of an effective consent, to be ascertained really, manifested in a clear and precise manner[283] in written form or in verbal form confirmed in writing. The protection of consent and therefore of the weak contractor is achieved to a maximum extent, at the expense of speed and informality of bargaining. Not only that, private autonomy is forced into formal channels, while being free to determine the content of the extension[284]. The balance is therefore moved markedly towards the protection of consent. With the evolution of the law and the sedimentation of jurisprudence, it happens that the second term of the framework, freedom from constraints, driven by the reasons for trade, gradually reclaim its space in the sense of a relaxation from those constraints. At the same time it is able to express strong pressures on the legislator, and the result is known. But the CJEU itself is the first institution to realize the need to look at trades with a differentiated view: even when it also rigidly interpreted the second formal requirement, a verbal agreement with written confirmation, thus frustrating the expectations of those who read you an openness to trade[285], the CJEU admitted that in the case of current business relationships, an exception could be made to the rigidity of the verification of the effective

[282]Union Discount Co. v. Zoller, [2001] EWCA Civ 1755. C. CUNIBERTI, Requeio, La sanction des clauses d'élection de for par l'octroi de dommages et intérêts, ERA Forum, 11, 2010, pp. 7ss. D.S. TAN, Damages for breach of forum selection clauses, principled remedies, and control of international civil litigation, in Texas International Law Journal, 40, 2004-2005, pp. 624ss. K. TAKAHASHI, Damages for breach of a choice-of-court agreement, in Yearbook of Private International Law, 10, 2008, pp. 57ss. S. DUTSON, Breach of an arbitration or exclusive jurisdiction clause: The legal remedies if it continues, in Arbitration International, 16, 2000, pp. 90ss. M. CLARKE, Maritime law evolving, Hart Publishing, Oxford & Oregon, Portland, 2013, pp. 2542ss. M. AHMED, The nature and enforcement of choice of court agreement. A comparative study, Hart Publishing, Oxford & Oregon, Portland, 2017.
J. STRAND, Determining the existence of consent for choice-of-Court Agreements under the Brussels I-bis Regulation, in The European Legal Forum, 14, 2014, pp. 114ss. C.S. SYMEONIDES, Codifying choice of law around the world: An international comparative analysis, Oxford University Press, Oxford, 2014.
[283]CJEU, C-24/76, Estasis Salotti v. Ruewa, of 14 December 1976, ECLI:EU:C:1976:177, I-01831, par. 7. CJEU, C-438/12, Weber v. Weber of 3 April 2014, ECLI:EU:C:2014:212, published in the electronic Reports of the cases. D.LIAKOPOULOS, Giustizia materiale nel diritto internazionale privato e comunitario, ed. Giuffrè, 2009.
[284]D.LIAKOPOULOS, Giustizia materiale nel diritto internazionale privato e comunitario, op. cit.
[285]See the conclusions of the Advocate General Capotorti in case C-24/76, Estasis Salotti v. Ruewa of 14 December 1976, ECLI:EU:C:1976:153, op. cit. R. PLENDER, M. WILDERSPIN, The european private international law of obligations, Sweet and Maxwell, London, 2015.

consent[286].The theme is therefore already outlined in 1976: protection of effective consent and rigid form on the one hand, the practice of commercial trafficking and freedom on the other. What happens next is only the story of a principle that is gradually eroded by the reasons for trade.

The situation at first glance is today profoundly changed with respect to 1968. The changes made to article 23 have introduced two types of form "per relationem"[287]. In the case of the form admitted by the practices of the parties, it should be noted that consent is protected by the element of good faith which is the guiding light of this formal element. The constant repetition over time, having uniformed themselves repeatedly under certain conditions, are an adequate guarantee of the parties' consent and the correspondent's approval closes the game by not legitimizing an opposition of bad faith to conditions that can now be called "peaceful". It can be stated that in the requirement pursuant to art. 23, lett. b, there is no real presumption of consent that is objectively subsisting, albeit mediated by the principle of good faith. The element of real innovation is represented by the uses of international trade[288] which operate a double revolution towards the consensual element. The judge is allowed to presume as existing the consent of the parties (or rather the "disadvantaged" part) if this acts as an operator of international trade and there exists a use that foresees the conclusion of the agreement in the form to which the shop conforms. Therefore we have the first passage from the necessity of verifying an effective consent to the possibility of presuming it[289] if the existence of use is demonstrated. Relative presumption, of course, but still an

[286]According to the case: C-25/76, Segoura v. Bonakdarian of 14 December 1976, ECLI:EU:C:1976:187, I-01851. R. PLENDER, M. WILDERSPIN, The european private international law of obligations, op. cit.

[287]See for more details: A. SCHULZ, Reflection paper to assist in the preparation of a Convention on jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters (Preliminary Document No 19 of August 2002) in Proceedings of the Twentieth Session of the Hague Conference on Private International Law (Tome III, Intersentia, Antwerrp, Oxford, 2010), pp. 12ss. T.C. HARTLEY, M. DOGAYCHI, Explanatory report on the preliminary draft Convention on Choice of Court Agreements', Preliminary Document No 25 of March 2004. T.C. HARTLEY, M. DOGAUCHI, Explanatory report on the preliminary draft Convention on exclusive choice of Court Agreements (Preliminary Document No 26 of December 2004) in Proceedings of the Twentieth Session of the Hague Conference on Private International Law (Permanent Bureau of the Conference, ed. Intersentia, Antwerp, Oxford, 2010, pp.167, 195-197.

[288]C-106/95, MSG v. Les Gravières Rhénanes of 20 February 1997, ECLI:EU:C:1997:70, I-00911; C-159/97, Trasporti Castelletti of 16 March 1999, ECLI:EU:C:1999:142, I-01597; C-387/98, Coreck Maritime of 9 November 2000, ECLI:EU:C:2000:606, I-09337. For more details and analysis see: J. HILL, A. CHONG, International commercial disputes: Commercial conflict of laws in English courts, op. cit., G. DANNEMANN, S. VOGENAVER, The common sales law in context. Interactions with english and german law, Oxford University Press, Oxford, 2013, pp. 295ss. A. BRIGGS, The conflict of laws, Oxford University Press, 2013. P. ROGERSON, Collier's conflict of laws, Cambridge University Press, Cambridge, 2013.

[289]CJEU, C-159/97, Trasporti Castelletti of 16 March 1999, op. cit., par. 20. C-116/02, Erich Gasser GmbH v. MISAT Srl of 9 November 2003, ECLI:EU:C:2003:657, I-14693; cf Article 31(2) of the Recast Regulation has effectively reversed the CJEU ruling in Gasser but the exclusion of non-exclusive jurisdiction agreements from the scope of Article 31(2) may render such agreements susceptible to the very same torpedo tactics that had acquired notoriety under Article 27 of the Brussels I Regulation. For more details see: T.C. HARTLEY, Choice-of-Court Agreements and the new Brussels I Regulation, in Law Quarterly Review, 129, 2013, pp. 310ss. T.C. HATLEY, The Brussels I Regulation and arbitration, in International and Comparative Law Quarterly, 63, 2014, pp. 844ss. P. HAY, Notes on the European Union's Brussels-I "Recast" Regulation, in The European Legal Forum, 13, 2013, pp. 2ss. M. HORSPOOL, M. HUMPHREYS, European Union law, Oxford University Press, 2012. C. KESSEDJIAN, Commentaire de la refonte du règlement n° 44/2001, in Revue Trimestrielle de Droit Européen, 47, 2011, pp. 118ss. U. MAGNUS, P. MANKOWSKI, Brussels I Regulation, ed. Sellier European Law Publishers, Münich, 2011, pp. 492ss. L. MOERER, Binding corporate rules: Corporate self-regulation og global data transfers, Oxford University Press, Oxford, 2012, pp. 172ss. P. STONE, Stone on private international law in the European Union, Edward Elgar Publishers, Cheltenham, 2018. E. LEIN (ed.), The Brussels I review proposal uncovered, BIICL, London, 2012, pp. 76ss. U. MAGNUS, Choice of Court Agreements in the review proposal for the Brussels I Regulation, in E. LEIN (ed.), The Brussels I review proposal uncovered, BIICL, London 2012, pp. 85ss. T. RATKOVIC, D.R. ZGRABLJIC, Choice-of-Court Agreements under the Brussels I Regulation (Recast), in Journal of Private International Law, 9, 2013, pp. 246ss. H. SERIKI, Injunctive relief and international arbitration, ed. Routledge, London & New York, 2014.

inversion of the burden of proof that can lend to the "disadvantaged" part a diabolical probatio. The fulcrum should therefore be represented by the proof of use[290] and its knowledge by the subjects involved. In reality, the scope of the new law goes so far as to recognize the use that is generally and regularly observed by the majority of professional operators in the commercial branch that are homogeneous to that in which the parties operate[291]. So there is a double presumption, of consent to the extension and of the knowledge of the use, which occurs simultaneously. Without wishing to express value judgments on the modification made, one can limit oneself to observing that there is not much room left for the verification of an effective consent and therefore for the protection of the so-called "weak" contractor[292].

In reality, two factors operate as a partial counterweight to this strong opening. The first is given by the use that is created by the regular behavior of the generality of the operators, and is therefore at once evident and "reasonable" in the sense that arises from the meeting of the different needs of the opposing operators. The second element is given by a subjective limitation: only with respect to those who hold the status of international trade operators, and who act in this capacity, the attenuation of form and therefore of consent is legitimized. For private subjects the only available forms remain those listed in lett. a, which presuppose the verification of the effective consent. A further guarantee is also provided for the three protected categories, insurance, consumers and workers, in which the extension before the dispute is further limited. I would therefore conclude by stating that, if the passage from an effective consent to a doubly presumed one is undeniable, this shift is limited both objectively and subjectively to international trade, a field that so loudly called for such an "evolution". It is also clear that we do not have the victory of international trade on individuals, but the distinction between the two categories and the relevant applicable disciplines.

Another derogation from the principle of effective consent could be found in the so-called collective case. In particular, the Court has been able to examine the phenomenon of corporate statutes. In general there is a problem every time a subject, part of a "legal fiction", can be bound despite the absence or the opposition of his volition. However, this is a somewhat peculiar hypothesis. It is undeniable that in the case in question the consent of the individual may be missing or even being contrary[293]. However, the CJEU has concluded[294] that all members are bound by the extension clause included in the company by-laws through amendment, subjecting their validity to the

[290]CJEU, C-106/95, MSG v. Les Gravières Rhènanes of 20 February 1997, op. cit., par. 24.

[291]This despite the european and national jurisprudence insist on declaring the need to ascertain an effective and specific consent to protect the "weak" party. In argument see, C-106/95, MSG v. Les Gravières Rhènanes, op. cit.,; C-116/02, Gasser of 9 December 2003, ECLI:EU:C:2003:657, I-14693. For more details see: J. HILL, A. CHONG, International commercial disputes: Commercial conflict of laws in English courts

[292]This is the reason that leads to criticism of the wide validity recognized in the extension clauses of jurisdiction contained in the bills of lading. Such an approach seems to protect only the satisfaction of the carriers only, that is to say only one of the categories of subjects at stake. It is no coincidence that the Hamburg Rules provide for a different balance of interests. See also the case from the CJEU: C-214/89, Powell Duffryn v. Pettereit of 10 March 1992, ECLI:EU:C:1992:431, not published. For more details see: S. GRIFFITH, J. ERICKSON, A. WEBBER, Research handbook on representative shareholder litigation, Edward Elgar Publishers, 2018, pp. 449ss. J. BORG-BARTHET, The governing law of companies in European Union law, Hart Publishing, Oxford & Oregon, Portland, 2012, pp. 164ss.

[293]H. GAUDEMET-TALLON, Compétence et exécution des jugements en Europe, LGDG, Paris, 2010, pp. 537, "la Cour de justice s'écarte dans l'arrêt Powell de ce qui fût sa préoccupation première, à savoir assurer de la réalité du consente-ment de chaque partie à una clause attributive de juridiction".

[294]CJEU, C-214/89, Powell Duffryn v. Pettereit of 10 March 1992, op. cit. observing moreover that the written form ex art. 23 is generally satisfied because, paragraph 26, "in the legal systems of all the Contracting States, the statutes of a company are in written form (...)".

knowability of the by-laws. In reality, this knowability is in re ipsa because the publicity of the statute is an essential element in all the european legal systems, so it can be considered automatic. The exception to the consent of the individual could lead to the conclusion that there is a further passage from the effective consent to the presumed consent, but this perspective of analysis, centered on the single member, does not seem correct. The extension is not the result of a contractual agreement between the members, it does not derive from the consent of each single member according to a principle "everyone binds himself"[295]. It is the expression of the assembly, the body appointed to express the social will, a will by definition common to all[296]. It is no coincidence that the means available to protect minorities, that is, the appeal of the resolution, is suitable to protect the individual only in the event that this social will was formed in a "wrong" way, and not in the case of mere disagreement. The consensual element to be verified is not that of the individual, who has no power in relation to society. Moreover the source of modification of the company statute is the will of the assembly, the social will, not the will of the individual. And the element that produces the binding force towards the individual is the statute, that is, the company rules that the members have agreed or in any case to which they have decided to undergo. It seems to us that, without forcing, we can refer to the principles that govern the social will, which is certainly different from the private and contractual to conclude that, although the individual may not make his contribution to the formation of the majority, we are not in presence of an exception to the principle of effective consent, since it is not to the consent of the individual to be looked at in this case.

17. THE CONTROL OF REASONABLENESS BY THE JUDGE UNDER REGULATION 44/2001

Article 23 of Regulation 44/2001 in itself does not contain any positive indication in this regard, but not even an express exclusion of a verification by the judge on the reasonableness of the chosen forum. By fully assigning the contractors protection function to the requirement of the determination of the dispute, to the effectiveness of the agreement and to the satisfaction of the formal requirements, it would seem, however, not to refer to the content characteristics of the court's election. This approach seems to be confirmed by the CJEU, which has repeatedly stated that the elected forum does not need any connection with the dispute, expressing a power of unconditional choice of the parties, when exercised in compliance with European requirements[297]. It is

[295]Expression used also from the: International Law Association, 'Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Litigation' Resolution 1/2000, (2000) 69 ILA Rep. Conf. 13; Report (2000), 69 ILA Rep. Conf. 137. International Law Institute, The Principles for Determining when the Use of the Doctrine of Forum Non Conveniens and Anti-suit Injunctions is Appropriate (2003) Bruges Session, Second Commission, 2nd September 2003 (Rapporteur: Sir Lawrence Collins, Co-rapporteur: M Georges Droz) in Texts, Materials and Recent Developments, in Yearbook of Private International Law, 5, 2003, pp. 337, 338. International Law Institute, Autonomy of the Parties in International Contracts Between Private Persons or Entities (1991) (Rapporteur: Eric Jayme). See also: D.LIAKOPOULOS, Party autonomy and the lex limitativa, in The International Lawyer, 2016.

[296]CJEU, C-214/89, Powell Duffryn v. Pettereit of 10 March 1992, op. cit., par. 19, "(...) becoming and remaining a shareholder in a company, the shareholder agrees to be bound by all the provisions contained in the company's bylaws and the decisions taken by the company's organs in accordance with the provisions of applicable national law and the bylaws, even if some of the aforementioned provisions or decisions do not find its consent (...)".

[297]CJEU, C-159/97, Trasporti Castelletti of 16 March 1999, op. cit., parr. 49 and 50; C-56/79, Siegfred Zelger v. Sebastiano Salinitri of 17 January 1980, ECLI:EU:C:1980:15, I-00089, par. 4; C-106/95, MSG v. Les Granèves Rhènanes of 20 February 1997, op. cit., par. 34; C-269/95, Benincasa v. Dentalkit Srl of 3 July 1997,

therefore clear that in the reading of the Court of Luxembourg there is no room for control of the forum by the court concerning the reasonableness of the forum with respect to the characteristics of the relationship at issue. Some scrutiny was claimed by some authors at the time of the *Powell Duffryn v. Pettereit* of 10 March 1992 sentence[298], underlining that the jurisdiction extension clause provided for in that case was correct inasmuch as it elected the "forum societatis", ie the natural forum of the company in most of the European legal systems[299], but the setting did not meet the favor of the CJEU. The reasoning is justified especially in the light of the first two formal requirements, already particularly strict, in the sense that in the case of agreement on jurisdiction concluded in writing or orally with written confirmation, the control over the clause is exhausted by compliance with the envisaged forms[300].

The analysis of the other two "shape containers" could lead to different outcomes. With regard to the form allowed by the practices which the parties have established among themselves, given the importance of the principles of compliance and good faith in operating this mechanism of conclusion, it seems appropriate that the judge be allowed to verify that, in practice, the the content of the agreement concluded in a "loose" form is not in itself the same as it had previously been agreed upon by the parties, namely that thanks to the lightening of the formal profile, one party did not take advantage of the other with surprise elements. On the other hand, as regards the form admitted by the uses of commerce, given that use can take on a material relevance[301] as well as formal, it applies, mutatis mutandis, what was said a little above: since the external element is recalled precisely by the European standard, the judge it may be called upon to carry out a verification within the scope of the standard. This control then, rather than "reasonableness" is a verification of the "conformity" of the choice of the forum to the use of trade, a parameter that is not intended as discretionary but objective, which acts as a limit for the activity of the judge and guarantee for the concerns of those who do not intend to give room for discretion in the Brussels I[302] system.

ECLI:EU:C:1997:337, I-03767, par. 28. U. MAGNUS, P. MANKOWSKI, Brussels I Regulation, op. cit., F.M. WILKE, The impact of the Brussels I Recast on important "Brussels" case law, in Journal of Private International Law, 11, 2015, pp. 130ss. D. LIAKOPOULOS, C. HEINZE, Choice of Court agreements, coordination of proceedings and provisional meaures in the reform of the Brussels I Regulation, in Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ), n. 75, 2011.

[298]CJEU, C-214/89, Powell Duffryn of 10 March 1992, op. cit.

[299]It is precisely the Advocate General Tesauro in par. 12 to support it, but not followed by the Court. Such a notion of "natural forum" does not really have room in the Rules, nor is there any connection between the cause and the forum for the purpose of the extension. This statement, which I share, is the result of the weight that private autonomy has in the context of the Community system and of the extension in particular. From the fourteenth recital of Regulation 44/2001: "Without prejudice to the criteria of exclusive jurisdiction provided for in these Regulations, the autonomy of the parties with regard to the choice of the competent court for contracts not included in the category of insurance and consumption contracts must be respected and work in which this autonomy is limited (...) ".

[300]We refer once again to the form admitted by the practices that the parties have established between them and the form envisaged by the use of international trade, corresponding to the letters. b and c of the art. 23.

[301]CJEU, C-159/97, Trasporti Castelletti of 16 March 1999, op. cit., par. 49: "(...) the e-lesson of the competent court can be assessed only in light of considerations that are related to the requirements of art. 17 "even if it then states that" the art. Article 17 of the Convention disregards any objective link between the contested legal relationship and the designated judge "and" a further check must be ruled out of the justification of the clause and of the objective pursued by the party who entered it and can not be granted relevance, with regard to the validity of said clause, to substantive rules of responsibility in force before the chosen forum (...)".

[302]The merit of allowing a control of conformity of the extension clause in cases where the consent is presumed also lies in an equitable distribution of the burden of proof. Serious about who objected to the existence of the extension prove the existence of the use (whether it is use between the parties or trade is not relevant). If the party were able to prove the existence of a given use and therefore of the extension, it would be burden of the

As long as the integration between the various European legal systems remained imperfect and the relevant legislative differences, it was perhaps appropriate that a choice such as that to derogate from more favorable forums was guaranteed beyond the "protected" categories and therefore a control, even of a discretional nature, was hypothesised, by the judge[303]. Perhaps today such a need is felt with less force because the European substantive disciplines are ever closer, especially where European regulations and directives dictate uniform norms or objectives, while a modern principle of mutual trust should lead us to consider any equivalent forum within European Union.

18. (FOLLOWS) EFFECTS AGAINST THIRD PARTIES

As a common contract, the jurisdiction agreement usually produces legal e ffects only in respect of the parties. The possible operation of the agreement also with regard to third parties raises, therefore, various complex problems. In general, the contractual rule applies for which the private regulations are valid only between the parties that have contributed to their volition for the formation of the legal transaction. So the starting point is the general unavailability to third parties of the extension of jurisdiction.

On the other hand, there may be cases in which the third party has some special link with the relationship that is the subject of the agreement on jurisdiction, so much so that an extension of his efficacy to him is justified. For example, the contract could have been concluded by two parties to the advantage (also) of other subjects. The agreement contained in the contract for the benefit of the third party can be seen as an additional right of the beneficiary party, since it is to its advantage, both as a legitimate burden, since those who purchase only rights can not oppose any burden. Another frequent case in practice is that of the transfer of the contract or some rights.

The CJEU has endorsed the relationship of third parties with the agreement on jurisdiction on several occasions. The question of the validity of a clause on the court against the third beneficiary was the subject of a lawsuit concerning an insurance contract[304]. In concluding positively that the third beneficiary can avail itself of this clause, the CJEU has also affirmed a relevant principle, however obvious: the requisites

other, that here we assume also to be the weak part, to prove the diffformity of content of the extension with respect to the hole indicated in the use and therefore to neutralize the election of the forum. In this way it would be necessary for the resistant party, and not for those who already have to prove the existence of the extension, the burden of proving this further element and at the same time would partially allay the criticism of the presumption of consent by conferring to the party resistant to the power to demonstrate that the extension does not correspond to good faith.

[303]C. KOHLER, Rigueur et souplesse en droit international privé: Les formes prescrites pour une convention attributive de juridiction “dans le commercie international” par l’art. 17 de la convention de Bruxelles dans sa nouvelle rédaction, in Diritto del commercio Internazionale, 4, 1990, pp. 626ss., which does not limit such control to the protection of the "faibles" parts but also extends it to the "professionels. See also. T. RAUSCHER, Europäischrs Zivilprozess-und Kollisionsrecht EuZPR/EuIPR, ed. Sellier European Law Publishers, Münich, 2011.

[304]CJEU, C-201/82, Gerling Konzern speziale Kreditversicherung AG and others of 14 July 1983, ECLI:EU:C:1983:217, I-00615. The EAM (Transport Trucking Authority), an Italian body authorized to issue the "TIR carnet" for the international transport of goods by road, a member of the International Road Transport Union, was suppressed and replaced by the Ministry of the Treasury. The Italian customs administration, creditor of some sums due for pecuniary penalties, taxes, rights and accessories, quoted the Treasury before the Court of Rome for the collection of such credits. The Treasury in turn cited as a guarantee a pool of banks represented by the German bank Gerling Konzern Speziale Kreditversicherungs-AG on the basis of an insurance contract stipulated by the IRU on behalf and interest. For more details see: T. BOSTERS, collective redress and private international law in the European Union, ed. Springer, Berlin, 2017, pp. 107ss.

envisaged by art. 23 must not be assessed with respect to the third party, but must be satisfied between the original parties[305].

Another case in which a vaguely problematic problem has been posed is the case of the company statutes, which the CJEU has adopted in the Powell Duffyn v Pettereit case of 10 March 1992[306]. The CJEU has established, correctly, that the clause included in the company statute binds not only the shareholders who voted in favor of the resolution to amend the by-laws, but also the absent members, dissenting shareholders and future shareholders. For the first two categories of members, absent and dissenting, there is no real problem of effectiveness towards third parties, since these shareholders are not third parties but parts of the company contract[307] and are subject to the social discipline relating to the formation of the common will. The future shareholders are, instead, third parties with respect to the resolution, but are bound by the rules of the company that make the by-laws the common regulation for all members, present and future. We believe it is not, in these cases, it is necessary to verify compliance with the form ex art. 23 regarding the purchase of shares, since it is in the nature of the companies that all members are bound by the articles of association and therefore is the buyer's responsibility to read the rules to which he voluntarily decides to submit[308].

[305]P. ANCEL, La clause attributive de juridiction selon l'article 17 de la convention de Bruxelles, in Rivista di Diritto Internazionale Privato e Processuale, 1991, pp. 291ss, which is affirmed that: "(...) la prorogation se prête, comme un obligation, au mécanisme de la stipulation pour autrui" e anche che "la prorogation de for n'a pas la caractère strictement personnel (...) a l'instar d'une obligation ordinaire, elle est considéreé comme un bien, elle est cesible, voire négociable".The extension of jurisdiction is an element of legal transaction, designed to be evaluated in economic terms and to act as compensation for other contractual elements. As any element of the contract lends itself to being transferred to others. The motivation for the decision follows the conclusions of Advocate General Mancini. The first supporting reason brought by the Advocate General concerns the protective ratio of the formal requirements, which is not present in relation to third parties who receive only advantages and not the charges. It also emphasizes the Advocate General in par. 4, in case: C-201/82, Gerling Konzern speziale Kreditversicherung AG and others, op. cit., "there is no legal system that imposes, even less in writing, such an act [of accession] if not to avoid the revocation of the stipulation". Furthermore, the General Sdvocate notes that art. 17, referring in a technical sense to the "parties", also provides literal arguments, since "parties" are only "stipulant" and "promissory" and not also the one who by definition is "third" with respect to the relationship. It is then the same special regulation in the insurance field that also provides for non-contracting parties the insurance, the possibility of exploiting the extended forums without the need for any adhesion. Finally, an argument suggested by the Commission, good faith requires the insurer to honor the commitment which, as a party, has been assumed both towards the policyholder and the beneficiary and the insured. For Mancini it is more the "pacta sunt servanda" principle, Ibidem, point 6 of the conclusions. We can therefore state that, in the light of this interpretation, the third party beneficiary of a contract may avail itself of the extension clause contained in the contract concluded in its favor. In the case decided by the Court, the insurance nature of the contract meant that the extended forum was only one of those available to the beneficiary. Where the contract in favor of the third party does not fall into a protected category, we believe that the third party beneficiary has the burden of proposing his action in the extended forum, if this is of an exclusive nature. In the insurance field, however, the Court excluded the enforceability of the clause against the third party.See also the case: C-112/03, Société financière et industrielle du Peloux v. Axa Belgium and others of 12 May 2005, ECLI:EU:C:2005:280, I-3727. G. VAN CALSTER, European private international law, op. cit.

[306]CJEU, C-201/82, Gerling Konzern speziale Kreditversicherung AG and others, op. cit., par. 20. This consideration, together with the need for the party to express a clear and precise consensus on the presence of third-party beneficiaries, represent the protection granted to the subject who is obliged to provide services to the third party. It also makes clear that no verification in relation to the requirements pursuant to art. 23 must be experienced in relation to the third party. Notwithstanding the fact that it was a case of an extension of a protected forum in the field of insurance, there are no particular problems in extending the interpretation of the CJEU to the ordinary extension pursuant to art. 23. accordin to this opinion not only on the basis of the eadem ratio between these two types of extensions, of which that in the insurance field is only a species of the genus ex art. 23. But also because in this case the extension was stipulated for the benefit of the subject contracting the insurance and therefore also for the benefit of the third beneficiary, a situation that can occur similarly in many contracts also unrelated to the insurance field.

[307]C-71/83, Tilly Russ v. Nova of 19 June 1984, ECLI:EU:C:1984:217, I-00577.

[308]CJEU, C-159/97, Trasporti Castelletti of 16 March 1999, op. cit., C-387/98, Coreck Maritime of 9 November 2000, ECLI:EU:C:2000:606, I-09337.

Instead, it is the case of takeover or transfer in the contract that has raised the biggest problems. The solution decided by the CJEU in the *Tilly Russ* judgment Nova of 19 June 1984[309] and also confirmed later is not very satisfactory in terms of the uniformity of European procedural law: it is up to the applicable national law to establish whether the subject takes over all the rights and obligations of the transferor, in which case also the extension of competence is binding[310].

[309]CJEU, C-71/83, Tilly Russ v. Nova of 19 June 1984, op. cit., that is, "the extension is binding if the third party takes over the rights and obligations of the shipper according to the national law applicable". In this regard, the expression adopted by Avv. Gen. Sir Gordon Slynn, which affirmed that: "If the holder does not stand in the shoes of the original national law enforcement officer, then a new agreement has to be found between the holder and the carrier". By national law we mean the lex causae or the law applicable to the relationship on the basis of the choice made by the parties and the rules resulting from the application of the private international law and procedural law of the court seised. See also: J. Newton, The uniform interpretation of the Brussels and Lugano Conventions, Hart Publishing, Oxford & Oregon, Portland, 2002, pp. 209-225. D. LIAKOPOULOS, C. HEINZE, Choice of Court agreements, coordination of proceedings and provisional measures in the reform of the Brussels I Regulation, op. cit.

[310]In a not particularly broad argument, the CJEU judgment is cited: C-8/98, Dansommer A/S v. Andreas Götz of 27 January 2000, ECLI: EU: C: 2000: 45, I-00393, in which the CJEU had been able to confirm that "the exclusive com- petition rule for property contracts art. 16, sub-paragraph 1, lett. a), of the Convention is applicable to an action for damages for bad maintenance of the premises and for damages caused to an accommodation leased by a private person to spend a few weeks of vacation, even if it is not brought directly by the owner of the property, but by a professional tourist operator in which the person had rented the accommodation and who acts in court as a result of subrogation in the rights of the owner of the property (...). According to our opinion, therefore, the applicability of the extension also applies to the assignees in dealings with the assigned debtor, since the obliged and transferred person can not be compared to the assignee, who at the time of the obligation was third and therefore unrelated to the agreed extension of jurisdiction, in a position different from the one it had towards the seller, also in relation to the extension of jurisdiction, which therefore also applies to the third assignee, precisely because it takes over the same position of the his predecessor". If the transferee had really taken over the rights of the transferor. It is noted that the first step to be considered is to reconstruct the exact scope of the inter-pretational rule set out in the European ruling. On the one hand it can be argued that it is up to the law regulating the relationship transferred, and subject to extension, to establish whether and under what conditions the third party is bound by the clause. On the other hand, the other guideline refers to the regulation only for the case of the transfer of the substantial legal position, the occurrence of which automatically links the transfer of the effects of the extension clause. The problem is similar to that seen with regard to the uses of the international trade, if these are to provide the specific form for the extension or only a generic form of conclusion of the trade agreements. According to Penasa, the second approach is the most convincing one, so the European rule on the matter must be interpreted as meaning that the CJEU would have considered a question of conventional law as opposing the third party to the extension clause, referring to the applicable national law only on the issue of the transfer, from the shipper to the borrower, of the legal position deriving from the bill of lading. The solution is justified in the light of several factors, including the fact that the CJEU spends a certain amount of motivation without limiting itself to referring to the "applicable national law"; the non-relevance of the issue where relevant to the applicable law, since the CJEU has always refused to take a position on these matters; the substantial preference for autonomous solutions, such as the one shown here; the greater certainty and predictability of the rule and the forum thus obtained. While agreeing with the reading of Penasa, I must record how even the proposed reconstruction ends in reality to remain at the discretion of the various national rights, which is why it is allowed to doubt the real "autonomy" of this solution. The CJEU hearing is faced with two alternatives. In one case it could verify whether (to the third) the juridical position object of the agreement has been concretely transferred", but this would mean that the judge "to solve the quaestio iurisdictionis should know (at least a part of what constitutes) the merit of the cause". Both quotations: Ibidem. Such an eventuality has been repeatedly cited by the Court, which has insisted on the necessary rapidity of the judge's assessment of his jurisdiction. Alternatively, the case of the so-called "doubly relevant circumstances" in which the same question is relevant both for the purpose of jurisdiction and of merit can be considered. In these cases the judge is allowed to verify his or her competence or on the basis of conclusive and pertinent facts, and therefore with a less intense motivating commitment than that required to decide the merit; or instead of relying on the mere statements of the actor. But even this solution because, in contravention of the requirement that the positions of transferor and assignee are equaled in all, such an approach "is apt to lead to the opposition of the extension clause also in those cases where the position of the borrower is not equivalent to that of the shipper for which admitting the enforceability of the extension clause even in such a case will not be equal to that of the shipper for which admitting the enforceability of the extension clause even in such a case would in no way be justified, at least according to the reasoning of the CJEU. The rule inferable by Tilly Russ, therefore, places the interpreter before a "dead end".Ibidem. For this reason, the solution that could not make use of a "single" principle can not be criticized. The Italian ruling, however, shows the side from the point of view of the reasoning, since it does not argue satisfactorily the argumentative path that leads it to establish the enforceability of the extension of jurisdiction agreed in the relationship between the transferred and the transferor also towards the assignee banks.

In this case decided in *Tilly Russ v. Nova* of 13 June 1984 the dispute concerned in particular the enforceability to the third bearer of a bill of lading containing the extension of jurisdiction, but the solution is extensible beyond the maritime transport to all cases of transfer and takeover in the contract[311]. Once it is established that it is necessary to look at the applicable national law to regulate the situation of third parties, it remains to be analyzed in which parts the satisfaction of the European Union requirements for the extension of jurisdiction should be assessed, whether to the original parts or to the substituted parties[312]. Both the application requirements[313] and the requirements related to the validity of clause[314] must be assessed with respect to the parts of the original relationship at the time the agreement is signed as compliance with these conditions are the conditions for the valid succession of third parties in the position of the original parties[315]. If the clause was not valid pursuant to art. 23 between the original parts, can not be valid even between the parties that have succeeded in their position, which do

[311]It appears to us to be unexceptionable and extremely effective with regard to the reconstruction of the rule enunciated in Tilly Russ v. Nova of 19 June 1984, due to a reconstruction of what could be the "different rule" implicit and underlying the decision supported also in light of some European rulings. This second part of the argument seems to me somewhat less convincing. Also because the principle enunciated by the CJEU would be that in hypothesis of succession in the controversial relationship, an agreement on the jurisdiction concerning the disputes on this relationship, validly stipulated among the original (alleged) holders, is also opposable to the third, in order to the judgments that have object of the existence or nonexistence of the relationship in question to the said third party, as having the original (alleged) owner. It convinces us about the goodness of the principle enunciated, especially from the point of view of the recognition of greater autonomy of the extension clause with respect to the contract, untying its enforceability from the actual assignment of the main contract and linking it instead to the formulation of the application by the actor. We prefer to reject also the possible criticism that in this way expose the extension to the arbitrariness of the plaintiff, because in case of wrong formulation of the question this part would expose to a double risk: to the loss on merit or to the formation of a "useless" judgment "because concerning facts and rights other than the actual relationship at issue". Ibid. Such an uselessness would be, for example, in the case of a negative assessment action based on a false premise. The debtor-actor would be guaranteed a judgment against the transferee (or alleged), but such a judgment would be ineffective because it is based on a reconstruction of relationships that does not correspond to reality. The transferee would have a good game to propose a new action concerning the actual relationship between the parties. In the event that the plaintiff-debtor acts in a negative assessment in an incompetent forum, formulating the request in order to avoid the extension clause, also underlining that this would guarantee only a "short or medium term" advantage. However, the prejudice for the defendant-assignee or creditor could be very significant, such as to compel him to lodge a counterclaim in the incompetent forum to avoid waiting for the issue of jurisdiction to be settled, thus accepting the forum chosen by the debtor. See also in the same spirit the case: C-116/02, Gasser of 9 December 2003, ECLI:EU:C:2003:657, I-14693.

[312]This principle was also confirmed in the subsequent judgments of the CJEU: C-159/97, Transport Castelletti of 16 March 1999 and C-387/98, Coreck Maritime of 9 November 2000, op. cit. However, since we can say that he had a good game in showing the flaws of the rule enunciated by the CJEU in Tilly Russ case, the question needs to be re-proposed in the interpretation for a further definition, hoping that the CJEU will carry out an analysis as profound as the one illustrated by Penasa. Given that the parties can change during the course of the relationship a number of times, at each step the problem of succession will arise in accordance with the applicable national law. This means that the following is meaningful only if national law provides for a succession of succession.

[313]CJEU, C-387/98, Coreck Maritime of 9 November 2000, op. cit., par. 20, it is argued that: "(...) the validity of a clause attributing jurisdiction in the light of art. 17 of the Convention must be assessed in terms of relations between the initial parts of the initial contract (...) the conditions of application of art. 17 of the Convention referring to these parties "and" art. 17 (...) shall only apply if, on the one hand, at least one of the parties to the initial contract is domiciled in a Contracting State and, on the other hand, the parties agree to bring their counter-proceedings before a court or some judges of a Contracting State (...)"; but according to our opinion the requirement of the election of the european judge must, if it were identified by relationem and destined to change, also exist at the time of the action. For more details see. A. MILLS, Party autonomy in private international law, Cambridge University Press, Cambridge, 2018, pp. 171ss.

[314]CJEU, C-159/97, Trasporti Castelletti of 16 March 1999, op. cit., par. 40 and C-387/98, Coreck Maritime of 9 November 2000, op. cit., parr. 16ss.

[315]Of course, it will not be trivial to evaluate the effective consent and knowledge of the clause or use of international trade for parties residing in non-EU countries, who have stripped themselves of the contract and who therefore have no interest in the case. This is partially remedied by the presumption made by the "knowability" of the uses of international trade. See paragraph 2.7.4. It is the Avv. Gen. Léger to report it, points 141-3, in his conclusions to Case C-159/97, Transport Castelletti of 16 March 1999, op. cit., followed later by the Court, in point 43. On the need to assess the knowability of the original parts.

not renew their consent[316] to the clause but limit themselves to acquire the rights and obligations of the assignee[317].

The CJEU has addressed the question of the adherence of the agreement over the jurisdiction contained in a contract of sale to the third sub-purchaser[318]. The CJEU launches its own argumentative path, reaffirming the centrality of the element of the effective consent that must be verified by all the parties to the agreement on jurisdiction. This, together with the principle of normal relativity of the effects of a contract, induces the CJEU to affirm the ordinary unenforceability of the agreement on jurisdiction over third parties. At this point the judges of Luxembourg must deal with the previous jurisprudence which admits the effectiveness of the clause also towards third parties. The principle expressed in Powell Duff ryn v. Pettereit of 10 March 1992, is easily overcome, since already the pronunciation *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA (Handte v. TMCS)* of 17 June 1992, has qualified the rights of the sub-purchasers towards the producer as not belonging to the subject matter of the contract. It is less easy to overcome the established jurisprudence in matters of enforceability of the clause to the third party taking a bill of lading. Here the CJEU operates an interesting distinguishing: the consolidated jurisprudence *Tilly Russ v. Nova* of 19 June 1984, Transport Castelletti of 16 March 1999 and Coreck Maritime of 9 November 2000, concerns, and is limited, the phenomenon of bills of lading, for which already most of the Member States would foresee the succession of the third borrower in the position of the goods loader. In the case of a series of contracts for the transfer of ownership, on the other hand, there is no automatic succession of the sub-purchaser in the position of the assignor: the profile is "differently considered in Member States"[319]. This is enough for the CJEU to intervene and dictate an autonomous and uniform rule: "it is therefore necessary to refer to the general rule (...) according to which the notion of "jurisdiction clause" must be interpreted as an autonomous concept and give full application to the principle of the autonomy of the will, on which article 23, par. 1, of Regulation (...)"[320].

After having demonstrated remarkable hermeneutical acrobatics, the landing was easy after all. The CJEU can only conclude that "a clause attributable to jurisdiction agreed in the contract between the manufacturer of an asset and the purchaser thereof can not be opposed to the third party that, following a succession of contracts of ownership stipulated between parties established in several Member States, has purchased this asset and intends to initiate an action against the producer"[321]. The decision of the

[316]CJEU, C-387/98, Coreck Maritime of 9 November 2000, op. cit., par. 25.
[317]Announces the CJEU sibillina, "without their nationality being relevant for the purpose of this examination", according to par. 42 in houses: C-159/97, Transport Castelletti of 16 March 1999. The same applies in the absence of a requirement of application of art. 23: if the European legislation did not apply among the original parts, it is not clear why it should be applied to the succeeding parties with a sort of attraction of the clause within the European framework.
[318]CJEU, C-543/10, Refcomp of 7 February 2013, ECLI:EU:C:2013:62, published in the electronic Reports of the cases.
[319]CJEU, C-26/91, Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA (Handte v. TMCS) of 17 June 1992, ECLI:EU:C:1992:268, I-03967, par. 16: "(...) in the case of the action of the buyer of a product purchased from an intermediary seller brought against the manufacturer in order to obtain compensation for damage resulting from the non-compliance of the thing, it should be noted that there is no contractual relationship between the sub-buyer and the manufacturer, since the latter has never assumed any contractual obligation towards the scuba diver himself (...)".
[320]CJEU, C-543/10, Refcomp of 7 February 2013, op. cit. parr. 34-36.
[321]CJEU, C-26/91, Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA (Handte v. TMCS) of 17 June 1992, op. cit.

CJEU deals with a topic that is all in all new, and is an interesting study of the issue of non-accessibility to third parties of jurisdiction agreements. Although achieving a partly sharable result, however, the argumentative path followed does not seem to be exempt from censorship. On the one hand, the recalled (and misrepresented) case law on bills of lading has always been very cautious in not agreeing at European level the automatic enforceability of a jurisdiction clause against the third party, but limiting it to cases where the national law provide for a succession in the position of the loader. On the other hand, the alleged need for an autonomous interpretation based on the diversity of views in place in Member States on the issue, seems an invasive, as unjustified, invasion of the field, in an area that the Coreck Maritime judgment of 9 November 2000, instead, he had wanted to reserve with sensitivity to national law and to the prudent appreciation of the judge of merit[322].

19. THE PROBLEM OF BILLS OF LADING.

The land of the bills of lading constitutes a territory of evolution, proof and privileged clash for a series of rules of the Regulation. In our case, the extension clause of the jurisdiction contained in a bill of lading is of particular interest. Given the autonomy of such a clause with respect to the negotiating outline in which it is inserted, it is not necessary for present purposes to fully define what the policy is or what its exact nature is[323].

The first sentence concerning bills of lading is pronounced by CJEU in 1984[324] when the English amendment is still in the text of the old art. 17 had not entered into force. The case saw in opposition to the Belgian judge the anonymous company Geominne Hout, domiciled in Belgium, and the company Parteenreederei ms. Tilly Russ and Mr. Ernst Russ owners of the "Tilly Russ" ship, domiciled in Germany. The case concerned the compensation claimed by the Belgian company for damages and "failures" related to a load of timber purchased by an American company and transported on the "Tilly Russ" from Toronto to Antwerp. The objection, rejected at first and second instance, was revived before the Belgian Supreme Court (Hof van Cassatie), which brought an incidental appeal to CJEU. The main question concerned the possibility of considering the extension contained in the policy as concluded in writing or confirmed in writing pursuant to art. 17 of the Convention, also "taking into account the generally applicable practices"[325]. Notwithstanding the reference made by the Belgian Court to the "uses", it was not possible for the CJEU to take this hypothesis into account, since the 1978 amendment was not yet in force. The CJEU resolved the issue in line with previous judgments policy[326] would satisfy the requirements pursuant to art. 17 only if it represented an agreement on the extension concluded in writing and with

[322]CJEU, C-387/98, Coreck Maritime of 9 November 2000, op. cit. parr. 24 and 26. G. VAN CALSTER, European private international law, op. cit.
[323]The Advocate General Gordon Slynn confirms this in his Opinion in case C-71/83, Tilly Russ v. Nova of 19 June 1984, op. cit.: "it is (...) not for this Court under the Convention to decide the broad question as a bill of lading (...) constitute a contract of carriage, or (...) it is a mere receipt for goods shipped or document separated from the contract of carriage. That remains a question of national law. The question of the bill of lading is capable of constituting the provision of an agreement as to jurisdiction (...)".
[324]C-71/83, Tilly Russ v. Nova of 19 June 1984, op. cit.
[325]C-71/83, Tilly Russ v. Nova of 19 June 1984, op. cit.
[326]CJE, C-24/76, Estasis Salotti v. Ruewa of 14 December 1976, op. cit., and in case C-25/76, Segoura v. Bonakdarian of 14 December 1976, op. cit. So double subscription.

guarantees of effective adhesion of both parties or the written confirmation of a previous verbal agreement expressed: both unrealistic hypotheses in the world of seafarers. The only opening, in the wake of the obiter dictum in *Segoura v. Bonakdarian* of 14 December 1976[327], is admitted in the case of current business relationships if it proves that these relationships are governed by the general conditions of the author of the confirmation and that knowledge of the clause, contained therein and always present in the pre-printed forms, is therefore not denied according to good faith. In this case, according to the European courts, the verbal agreement could also be absent[328]. The hypothesis is not irrelevant but not even common and no space is still given to the uses of commerce. Moreover, the need to protect the consent of the parties[329] is still felt as the *ratio* of the discipline of art. 17 and therefore the certainty and the reality of consent are preferred to the flexibility of commercial transactions. It is true that the sentence is "rigid" towards international trade, but it is also true that, within the limits of the law in force, there were not many other possibilities, especially in light of the interpretations already given[330].

The discipline outlined by the CJEU literally opens the door to those "current uses in the field" to which the Hof van Cassatie had timidly referred in 1983. Once the court seised has verified the existence of a use corresponding to the behavior followed by the parties in the field of maritime transport of goods, "the game is done". In the field of the extension of jurisdiction it is therefore the practice that becomes a regulator of the relationships between the commercial operators and guarantor of the consensus or awareness of the parties. As Ancel observes, the modification of San Sebastiano, even if it accentuates the rigor of the need of form defined by the use defining it in a branch of commerce, consecrates the "obligatory" nature of such use: "Le commerce international pardone pas facilement les négligences"[331]. The parties, when they act as professionals in the field of maritime transport, must know that there are some practices.

The last CJEU ruling that addresses the problem of the extension contained in a bill of lading is in 2000, in the case that saw some Dutch companies (Handelsveem BV and others), holders of policies, owners and insurers of a peanut load coming from China opposed to the company Coreck Maritime GmbH of Hamburg hiring the Russian ship used for the occasion. The Dutch companies cited for damages Coreck Maritime and the Russian shipowner in Rotterdam before the Rechtbank, a competent court pursuant to art. 5.1, but Coreck objected, inter alia, to the presence of an extension of jurisdiction on the back of the policies. The court of first instance dismissed the objection for lack of clarity of the clause[332], and this decision was confirmed at second instance by the Gerechtshof of Hague. Finally, the Hoge Raad called for an interpretative

[327]CJEU, C-25/76, Segoura v. Bonakdarian of 14 December 1976.
[328]CJEU, C-71/83, Tilly Russ v. Nova of 19 June 1984, op. cit., par. 18.
[329]That is to avoid that an extension clause goes unnoticed.
[330]To put it with the Advocate General Gordon Slynn, referring to the judges of the Court of Justice: "They can not extend the e ff ect of those words", in the conclusions of the case C-71/83, Tilly Russ v. Nova of 19 June 1984, op. cit.
[331]P. ANCEL, La clause attributive de juridiction selon l'article 17 de la convention de Bruxelles, op. cit., C-71/83, Tilly Russ v. Nova of 19 June 1984, op. cit.
[332]The policy, standard model prepared by the BIMCO (third body), contained a clause that determined the judge and applicable law based on the country of residence of the carrier (contractual) and a "carrier identity" clause intended to guarantee the applicability of the conditions of the policy also to another carrier that had "actually" carried out the transport.

intervention by the CJEU. The reference for a preliminary ruling allowed the Court to address some interesting points.

The scenario that emerges from this normative and jurisprudential evolution therefore starts from an "unsuitable" framework to satisfy the needs of the maritime trade operators and reaches a substantial acceptance of their positions. With the ruling *Tilly Russ v. Nova* of 19 June 1984[333] allowed some elasticity only in the presence of current and homogeneous relationships.

The practice of transport was substantially ignored with the consequence that in fact the extensions contained in the policies should not have had space inside of Union. But the thrust of trade has breached both the conventional text and the orientation of the EU judges, which, through use, have opened the door to the "informal" extension contained in the policy. The thing that perplexes it is not so much to have endorsed an existing practice. The CJEU did not admit the extension contained in the policy, but only opened the door to uses in general: it is the responsibility of the national courts to verify that a certain use exists and is knowable for the parties. The perplexity is concentrated on the particular case in point of the policy. Is there a strict need to recognize the validity of an extension contained therein? The advantage is that for carriers (or for the charterers of the ship, issuers of the policy) who can unilaterally choose the competent forum[334]. The damage is all of the shippers and receivers of the goods. In practice, given the strongly unilateral nature, it was decided to favor one category to the detriment of the others: more than the reasons for international trade, therefore, the interests of transporters are protected. This reflects a certain recent orientation, where, for example, in art. 5 num. 1[335] relating to the jurisdiction for contractual obligations, it was decided to bring "certainty" in the two most common cases: delivery of goods and provision of services. In both cases, one chooses to privilege a contractor, buyer or user of the service, to the detriment of the other. Such a privilege is sometimes desirable, as in the case of consumers, insurance contracts or workers, when there is a rationale concerning the nature of the contract or contractors that justifies such protection. Instead in the case of art. 5 point 1, and especially in the case of the policy, this reason seems to lack. In the policy, on the contrary, we choose to take advantage of the "strong" part that prepares the document (only latently or accidentally contracted) and penalizes the parties who, in the face of this document, may not even be able to object. Let us make no illusions: the loader at most "becomes aware" of the clause and is facing a crossroads that consists in accepting the policy and all the conditions or giving up the transport. In my opinion, the right objective is to guarantee the flexibility and speed of the traffickers by choosing inappropriate means. The question is naturally different if the parties have established long-term business relationships, since good faith acts at the same time as an element of protection for the shipper and as a limit to the possibility of challenging the knowledge of the clause. But in such a case the repetition by the parties in question to legitimize a certain form, not the repetition by other commercial operators.

These observations are aggravated by the fact that art. 23 does not allow uses related to the content and does not allow the content of the clause to be checked. The

[333]CJEU, C-71/83, Tilly Russ v. Nova, op. cit.
[334]R. FENTIMAN, Unilateral jurisdiction agreements in Europe, in Cambridge Law Journal, 72, 2013, pp. 25ss. R. FENTIMAN, International commercial litigation, Oxford University Press, Oxford, 2015.
[335]C-71/83, Tilly Russ v. Nova of 19 June 1984, op. cit.

doors then open to the arbitrariness of one part with respect to the other. These are specific cases: the extension of jurisdiction contained in the general conditions of contract attached for the first time to a confirmation letter and the extension of jurisdiction contained for the first time in a bill of lading. Given the peculiarity of the two hypotheses, it would not be agreed to "crystallize" what is now considered a "use by antonomasia" and to dictate, alongside the general opening to the uses of trade, however, in a more rigorous manner, specific rules for the two hypotheses? This is already done for example for the art. 5 point 1 and for the so-called "big risks" in the insurance field, it could be done for these two cases. What seems to me debatable, ultimately, is to undermine the scaffolding of a general rule to pursue a specific end that is to admit "two" commercial practices. The provision of two specific rules would have allowed to rebalance the reasons of the parties involved.

To conclude, the existence of a use that includes the inclusion of a clause for the extension of jurisdiction overleaf in the general conditions of the bills of lading and the subsequent acceptance by the shipper without underwriting or equivalent behavior, and without even any guarantee of consent effective, seems to be now ius receptum.

In reality the hypothesis is not so peaceful. It is true that a clause of this kind often appears in policies. Other is to ensure that there is a behavior that is regularly and generally observed by maritime traffickers in the sense of accepting this clause without signing it. The codified use is, if anything, the habit of carriers to insert such a clause: is this sufficient to confirm the regular and general acceptance by shippers? It seems to me that the assessment of use does not take place with the necessary rigor. Even more so if we look at some conventional tools, we can see that the relevance of these agreements has strongly diminished: the so-clled "Hamburg Rules"[336], for example, do not provide such automaticity. On the contrary, any agreement on the forum contained in the transport contract constitutes only one of the alternative forums, however, available[337] for the parties and therefore its effectiveness is greatly reduced. Only after the controversy has developed is it possible to conclude exclusive extension agreements, since there is no doubt about the effective consent and the attention of the remaining parties at a time when the conflict is obvious[338].

20. THE TACIT ACCEPTANCE OF THE FORUM

The tacit acceptance of the forum, or tacit extension of jurisdiction, constitutes a very important institution, known by all the systems considered. This is a mechanism that, by linking to the charge for the party challenging the jurisdiction of the court seised, allows the judge to simplify or suspend the examination of jurisdiction in all

[336]UN Convention on the Carriage of Goods by Sea, 30 March 1978. According to art. 21 of the Hamburg rules:: "the principal place of business or, in the absence thereof, the habitual residence of the defendant; or (...) 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; or (...) the port of loading or the port of discharge; or (...) any additional place designated for that purpose in the contract of carriage by sea (...)".

[337]Art. 21, par. 5 of Rules: "Notwithstanding the provisions of the preceding para-graphs, an agreement made by the parties, after a claim under the contract of carriage by sea as arisen, which designates the place where the claimant may institute an action, is effective (...)".

[338]CJEU, C-48/84, Hannelore Spitzley v. Sommer Exploitation SA of 7 March 1985, ECLI:EU:C:1985:109, I-003777, par. 15, that: "the art. 18 (...) is based on the principle that, by appearing before the court seised by the plaintiff without objecting to its lack of jurisdiction, the defendant implicitly expresses his assent to a court other than that designated by the other provisions of the convention (...)".

those cases in which the defendant does not object, or late , to its competence. The link of tacit acceptance (prorogatio fori post litem natam) with the agreement on the hole (prorogatio fori ante litem natam) is not that possible. Although at the basis of acceptance there is a fiction of the defendant's consent to the forum chosen by the actor, the institution's ratio is more directly connected to the need of certainty in terms of jurisdiction and procedural economy. The presumption of consent to the jurisdiction that is operated in the presence of a remissive behavior of the defendant is absolute and unrelated to any claim to verify an effective consent[339].

The importance of this category only as a sensuous consensual side with regard to the agreements on the forum is that, as Kahn-Freund argues,"(...) the express contractual jurisdiction clause (...) is, as it were, submerged in the subsequent tacit submission (...)"[340]. In other words, the institution of tacit acceptance, endowed with its own profound autonomy, renders the examination of the jurisdiction clause by the elected judge superfluous in the event that the defendant does not object to its inexistence in time. Even more incisively, it exceeds the clause itself if the court is waived and the jurisdiction of this is not contested. In the English and United States jurisdictions, the tacit extension is based on the institute of consent or submission to jurisdiction, peacefully established by the jurisprudence[341].

The European regulation devotes the tacit acceptance to art. 24 which considers the establishment of the defendant as a genuine jurisdictional title, endowed with a particularly relevant force: "the court of a Member State before which the defendant appeared is competent"[342]. Also in this case there are only two limitations to the

[339]O. KAHN-FREUND, Jurisdiction agreements: Some reflections, in International & Comparative Law Quarterly, 26 (4), 1977, pp. 826ss. F. SPARKA, Jurisdiction and arbitration clauses in maritime transport, op. cit., Z.S. TANG, Jurisdiction and arbitration agreements in international commercial law, op. cit.,

[340]O. KAHN-FREUND, Jurisdiction agreements: Some reflections, op. cit.

[341]M. GRUSON, Forum selection clauses in international and interstate commercial agreements, in University of Illinois Law Review, 1982, pp. 195, “contractual submission and con-sent to personal jurisdiction is effective to confer personal jurisdiction when service is made in the manner agreed upon. The Supreme Court stated: "(...) it is settled (...) that 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 (...)”. Citing the decision: National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964). For more details see: A. IDES, C.N. MAY, S. GROSSI, Civil procedure and problems, Wolters Kluwer, New York, 2016. G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 467ss.

[342]According to our opinion, the breadth of the criterion of jurisdiction examined here leads to the question whether it is necessary for one of the parties to be domiciled in a Member State. On the one hand, the extent of the tacit extension of jurisdiction that is capable of derogating from all other jurisdictional, community and internal titles (except for article 22), on the other, the ordinary subtraction of disputes must be highlighted that do not present a subjective connection with the EU law, to the advantage of the conflict rules of the court seised. It can be concluded that art. 24 is also applicable in the sense of establishing the jurisdiction of a Union judiciary appealed by two persons not domiciled in the Union, merely because the defendant does not raise the objection of incompetence in good time? Analyzing the norm individually, one could be inclined to state that it has an operating scope that transcends the regulatory limits and therefore lends itself to an affirmative answer. Above all for the incipit of the rule that states "in addition to the cases in which his (ie, the judge) jurisdiction results from other provisions of this Regulation": effectively the hypothesis described could be part of that large set that is outlined by expression "as well as in cases". But the standard is not isolated with respect to the context and in Regulation we find a rule, art. 4, which, if the defendant has his domicile outside the Union, establishes the application of the conflict rules of the court seised, subject to articles 22 and 23. Art. 24 is not included as an exception. Now, it is true that in the prevision of the Convention, art. 4 mentioned only art. 16 (today is article 22) and the doctrine had correctly included also art. 17 (now article 23) on the basis of the "Eudem ratio" and of the common "exclusivity". But it is also true that art. 24 does not share the same ratio of art. 23, nor is it possible that art. 4 incorporates all the provisions of the Regulation one by one. Article 23 intends to give space to the private autonomy of the parties, to enhance their choice: the aim is also to give uniform application to the extension of competence in the Union sphere. Article 24 is instead a mixed element of amnesty, automaticity, simplification in which the will of the parties is merely an element. Neither art. 24 shares the exclusivity of art. 22 for which reasons of regulatory complexity or proximity to the object of the

operation of this criterion of jurisdiction: the existence of an exclusive forum pursuant to art. 223[343] or the fact that the defendant appeared in a timely manner by objecting the defect of jurisdiction. Not even the protected holes of insured, consumer and worker exclude the operation of art. 24, on the basis of the consideration that these subjects, considered "weak" in the pre-litigation phase, do not need special protection when the conflict is now current and evident. Not even for the Regulation the presence of a previous agreement expressed on the forum pursuant to art. 23 constitutes an obstacle to the tacit acceptance operation[344]. Following the interpretative activity carried out by the CJEU, not even the second limit that excludes the operation of art. 24 if "the appearance (of the defendant) occurs to object to incompetence" poses major interpretative doubts. It is now undisputed that the defendant can explain defenses also on the merits and is not forced to limit his or her complaints to the jurisdictional profile[345].

A question that is always up to date is that relative to the procedural moment in which the attributable effect of competence occurs, that is to say the final deadline for the proposition of the defective exception of jurisdiction. In this case the question is eminently procedural and could not be resolved by the CJEU[346] through the abstract identification of a certain moment, referring to the concrete determination of the

dispute operate. So I do not see a solid ground on which to extend the scope of art. 4 first paragraph also to the tacit extension. In the absence of such an extension, will be the rules of conflict of the forum to operate: it is not doubted that in many States these rules will operate in the sense of allowing the tacit extension to conditions similar or even easier. Of course, the fact that an acquis is present could lead the interpreter to take the road to the application of the uniform EU principle. This would be motivated more by the opportunity than by reason. Instead, a modification to the Regulation would be necessary to proceed in this direction. After all, we do not see the urgency. Instead you would not need to investigate the domicile: the arguments put forward are not without importance but I think they excessively isolate the law, without grasping the systematic context.

[343]The presence of an exclusive forum pursuant to art. 22 does not generate particular applicative or interpretative problems, also given the particular operation of community litigation in the sense of always favoring the competent judge pursuant to art. 22. Article 25 Regulation 44/2001 "The judge of a Member State, invested in the main proceedings of a dispute for which Article 22 establishes the exclusive jurisdiction of a judge of another Member State, declares his own incompetence (...)".

[344]CJEU, C-150/80, Elefanten Schuh GmbH v. Jacqmain of 24 June 1981, ECLI:EU:C:1981:148, I-01671, parr. 8ss.

[345]The present formulation partially, but significantly, differs from the homologation contained in the Brussels Convention: "This rule is not applicable if the comparison takes place only to contest the incompetence". Article 18 of the Brussels Convention in the consolidated text of 1998. The presence of the adverb "only" in some language versions (Dutch, German and Italian according to the Opinion of Advocate General Sir Gordon Slynn in Case C-150/80, Elefanten Schuh GmbH v. Jacqmain of 24 June 1981, op.cit.,). Reproduced later also in the English one, had led some to believe that in order to avoid the tacit extension the defendant should limit himself to pleading only the defect of jurisdiction, without being able to no defense on the merits, however subordinated. The defendant would have been faced with the unreasonable crossroads between the possibility of pleading the defect of jurisdiction without defending himself on the merits, exposing himself to all the forfeiture of the case if he succumbed to the point, or defending himself on the merits thus losing the possibility of challenging the title of attribution of the dispute to the judge. In contrast, the French version (article 18 of the Convention in the consolidated text of 1998, French version: "Cette règle n'est pas applicable si la compution pour pour objet de contester la compétence") did not contain the incriminating adverb and led to the much more reasonable result of allowing the defendant to defend himself both at the point of jurisdiction and, possibly in a subordinate manner, on the merits.

[346]The new formulation of art. 24 in the regulation, accepting the indications of the CJEU and standardizing the texts to the French version, it overcomes the issue by eliminating the offending adverb. The Court had already overcome the impasse in the sense of allowing the joint proposition of the defense also on the merits. See in argument from the CJEU the next cases: CJEU, C-150/80, Elefanten Schuh GmbH v. Jacqmain of 24 June 1981, op. cit., cit., C-27/81, Établissements Rohr Société anonyme v. Dina Ossberger of 22 October 1981, ECLI:EU:C:1981:243, I-02431; C-25/81, C.H.W. v. G.J.H. of 31 March 1982, ECLI:EU:C:1982:116, I-01189; C-201/82, Gerling Konzern speziale Kreditversicherung AG and others, op. cit.; C-99/96, Hans-Hermann Mietz v. Intership Yachting Sneek BV pf 27 April 1999, ECLI:EU:C:1999:202, I-02277. It should be noted that the first four sentences are practically contemporary, as if suddenly the knot had come to a comb. In the CJEU judgment, C-48/84, Spitzley v. Sommer Exploitation SA of 7 March 1985, ECLI: EU:C:1985:105, I-00787, the CJEU reiterates the orientation also towards the plaintiff with respect to the counterclaim.

procedural law of the forum, given the diversity and technicality of the various European procedural disciplines[347].

21. AGREEMENT ON THE COURT AND LITIGATION UNDER REGULATION 44/2001

To determine which court is competent to assess the validity of a jurisdiction clause, there are mixed criteria of lis alibi pendens[348], Kompetenz-Kompetenz or autonomy of jurisdictions[349]. The approaches can be variously abstract. The indication made by the parties in the jurisdiction clause could be emphasized and therefore, as is generally recognized in the matter of arbitration[350], it is up to the court indicated therein to determine whether or not it is competent by virtue of this agreement. Alternatively, the importance of the temporal prevention criterion can be emphasized, and that the court first seised is competent to know the validity of the clause, regardless of whether it prolongs or waives its jurisdiction. Finally, and it is the approach that seems to be favored by national laws, the autonomy of each judge can determine the validity and effectiveness of the jurisdiction clause independently of the sought effect. In all these cases, then, the fact that the same dispute is pending before another court, and in particular that stated in the agreement, may or may not be relevant.

England and the United States do not ignore the issue of the international lis alibi pendens, but they give you a different answer from the one commonly accepted in the civil law systems that refers to the temporal prevention criterion in a more or less rigid way. In the modern common law the slope of a foreign proceeding usually detects for the purpose of the evaluation in point of forum non conveniens, without acquiring decisive importance if the foreign cause has been incardinated before the domestic judgment[351]. Some American courts distinguish the hypotheses of forum non conveniens, which, moreover, operates regardless of the simultaneous slope of a foreign procedure, and lis alibi pendens, arranging in the first case the rejection of the action and in the second case the mere suspension. This distinction is more evident on the domestic level than on the international side, where a ruling by the Supreme Court is lacking[352]. In general, the American courts seem less concerned by the phenomenon of parallel proceedings than we will see in Europe. In addition, if the foreign proceeding,

[347]CJEU, C-150/80, Elefanten Schuh GmbH v. Jacqmain of 24 June 1981, op. cit., parr. 15 and 16: "The contestation of jurisdiction can have the effect attributed to it by art. 18 only if the plaintiff and the judge are enabled to understand, right from the defendant's first defensive act, that this act is intended to deny jurisdiction. The Court of Cassation asks, in this regard, if the incompetence should be raised "in limine litis". For the interpretation of the convention, the latter concept is of difficult application, given the considerable differences between the laws of the Contracting States with regard to the court's appeal, the appearance of the defendant and the manner in which the parties to the case must formulate their conclusions. It results, however, from the aim pursued by the art. 18 that the objection of incompetence, if it does not precede any defense on the merits, can not however be subsequent to the act considered, by the national procedural law, as the first defense addressed to the court seised (...)".

[348]C. MCLACHLAN, Lis pendens in international litigation, vol. 5, Les livres de poche de l'Académie de droit international de La Haye, 2009.

[349]The judge has pronounced itself and then poses a subsequent problem of the means to re-propose the matter to the appellate court, in order to prevent the establishment of a judgment on jurisdiction. This question is obvious outside the content of Article. 24 of the reg. n. 44/2001, so much so that it has never constituted the subject of interpretative controversies.

[350]G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 467ss.

[351]G.B. BORN, P.B. RUTLEDGE, International civil litigation, op. cit., pp. 467ss. A. PARRISH, Duplicative foreign litigation, in George Washington Law Review, 78, 2010, pp. 238ss.

[352]"the Supreme Court has not considered the question in the international context, and few lower court decisions consider the subject in any depth. The content of U.S. law relating to the lis pendens doctrine is therefore often uncertain and difficult to ascertain". Such a propensity, probably, suggests that the English or American judge does not believe much in the autonomy with which every order could or should judge a clause on the forum.

initiated or even threatened, appears to be in violation of the agreement on the hole stipulated between the parties, the English or American judge does not hesitate to issue an anti-suit injunction to impose its termination[353].

The system in which the question of the relationship between jurisdictional and lis pendens agreements has been explored and discussed more extensively is, without a doubt, the European one. Litigendency[354] is a very important institution in the economy of Regulation 44/2001, as it allows to avoid the formation of conflicting judgments within the Union, one of the main obstacles to the free circulation of sentences[355]. For this reason the European rule has a rigid mechanism, based on the strict principle of temporal prevention which guarantees that only the court first seised proceeds to examine its competence and, therefore, to a decision on the merits. Each court appealed subsequently must suspend the case and await the determination of the first judge. The profile that interests us here is the delicate relationship between litigation and agreement on jurisdiction, in particular if the presence of a clause on the forum allows to derogate from the rigid principle just stated. The CJEU made one of its most criticized pronouncements on the point[356], in which it was considered practically irrelevant the existence of an agreement on the forum for the purpose of operating the lis pendens rule, and therefore prevailed the criterion of temporal prevention without corrective measures. This approach has recently been overturned by Regulation 1215/2012 which has instead accepted a Kompetenz-Kompetenz criterion. The story that gave rise to the decision of CJEU in Gasser saw the Italian company MISAT S.r.l. and the Austrian company Erich Gasser GmbH, including long-standing commercial relations. The relevant legislation was ratione temporis still the Brussels Convention, but the *ratio decidendi* is also peacefully valid for the Regulation. The relationship between the two companies deteriorates, so much so that both decide to turn to the judicial authority. The Oberlandesgericht asks: "(...) if the judge subsequently seised pursuant to art. 21, first paragraph, of the Brussels Convention, can verify the jurisdiction of the court beforehand, if the second judge has exclusive jurisdiction by virtue of an extension of competence pursuant to art. 17 of the same Convention, or if the judge designated by the parties must, in spite of the clause attributing jurisdiction, proceed ex art. 21 of the aforementioned Convention"[357].

[353]See Art. 27 of the Regulation 44/2001.

[354]CJEU, C-351/89, Overseas Union Insurance Limited and others v. New Hampshire Insurance Company of 27 June 1991, ECLI:EU:C:1991:279, I-03317, the lis pendens work indiscriminately from the applicability of the Regulations or from the domicile of the parties, while following the interpretation provided in CJEU in case: C-144/86, Gubish Maschinenfabrik KG v. Giulio Palumbo, ECLI:EU:C:1987:528, I-04861. For further details see. L. HAUBERG WILHELMSEN, International commercial arbitration and the Brussels I Regulation, Edward Elgar Publishers, 2018. J.J. FAWCETT, P. TORREMANS, Intellectual property and private international law, Oxford University Press, Oxford, 2011. G. VAN CALSTER, European private international law, op. cit.

[355]See, the 15 recital: "The harmonious functioning of justice presupposes that the possibility of a parallel procedure is reduced to a minimum and that two incompatible decisions are not issued in two Member States. It is necessary to establish a clear and efficible mechanism for resolving cases of lis pendens and connection and, given the existing national differences in the matter, it is appropriate to define the moment in which a case is considered "pending". For the purposes of this regulation, this moment should be defined independently".

[356]CJEU, C-116/02, Gasser of 9 December 2003, op. cit. See also: J. HILL, A. CHONG, International commercial disputes: Commercial conflict of laws in English courts,

[357]CJEU, C-116/02, Gasser of 9 December 2003, op. cit., par. 20. Various the arguments presented to the CJEU. On the one hand, Gasser and the United Kingdom Government support the prevalence of art. 17 on art. 21, therefore the substantial inapplicability of the lis pendens towards the judge indicated in the extension clause of the jurisdiction. In favor of this thesis, the prevalence of art. 17 with respect to all the other norms of the Convention and the duty for the judges not indicated in the clause declaring the office incompetent.

The CJEU solves the question on the basis of the ratio decidendi already defined in the Overseas[358] sentence: "(...) in this case, a jurisdiction of the judge subsequently appealed is claimed on the basis of art. 17 of the Convention. However, this circumstance is not such as to call into question the application of the procedural rule contained in art. 21 (...), which is clearly and solely based on the chronological order in which the judges were appealed. Moreover, the court seised per second is, in no case, more qualified than the court first seised to rule on the competence of the latter"[359]. The words used are practically the same as the previous sentence, specifying, this time, that also art. 17 is included. In the continuation of the motivation, the CJEU shows to accept the arguments proposed by the Commission regarding the relationship between art. 16 and art. 17, considering the fact that it is determined "once and for all" what the judge is called to assess the validity of a jurisdictional extension clause, ie the court seised first. The Court dismisses the concerns expressed by the United Kingdom Government, stating that "the difficulties (...) resulting from the dilatory behavior of the parties (...) are not such as to call into question the interpretation of one of the provisions of the Brussels, as it results from its formulation and its purpose"[360]. Finally, he concludes, answering the question posed by the Oberlandesgericht, that "art. 21 of the Brussels Convention (must) be interpreted as meaning that the judge subsequently seised and whose jurisdiction has been relied on by virtue of a clause conferring

Furthermore, the United Kingdom Government contends that the requirements of commercial transactions require certainty and therefore the extension clause which may be agreed upon must be fully respected. In order to avoid the risk of incomprehensible judgments, it is also suggested that the other judges should suspend the case pending that the judge indicated in the jurisdictional extension adjudicates in his own jurisdiction. On the opposite side are the MISAT company, the Italian government and the EU Commission. Their reasoning is based on the distinction between art. 17 and art. 16, concluding that only the latter constitutes an exception to the operation of the lis pendens. In fact, only the so-called "absolute exclusivity" competence is provided as an express limit to the liturgy and requires the judge to strip himself of the dispute, and only the violation of art. 16 involves the prohibition of recognizing the sentence issued. As reported in the conclusions of the General Advocate Léger in C-116/02, Gasser, "it would be absurd to oblige the court exclusively competent by virtue of art. 16 to suspend the proceedings, since the decision that is pronounced by the court previously seised, by an incompetent hypothesis, could produce its effects only in the State in which it was pronounced". Vice versa, the determination of the competent court pursuant to art. 17 can be overcome at any time, by means of a new agreement or even for the operation of the tacit extension mechanism. Furthermore, it is argued that both judges are equally qualified to assess the jurisdiction extension clause, there being no reason to prefer the judge chosen by the parties, arguing from Decision C-351/89, Overseas Union Insurance Limited and others v. New Hampshire Insurance Company of 27 June 1991, op. cit., in which paragraph 23 of the CJEU states that: "(...) it should also be noted that the court seised per second is, in no case, more qualified than the court first seised to rule on the latter's jurisdiction. In fact, that jurisdiction is directly determined by the rules of the Convention, which apply to both courts and which can be interpreted and applied with equal authority by each of them, or is, according to article 4 of the Convention, by the law of the State of the court first seized, which therefore will undoubtedly be more qualified to rule on its jurisdiction. "From the whole of the sentence it is not clear whether the powers under Article 17 can be included in the so-called" exclusive "ones, for which the Court had suggested a different solution in the sense of removing them from the operation of article 21, see paragraph 26: "except in the case where the court seised per second has an elusive covered by the agreement and, in particular, by art. 16 of the same, art.21 of the Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court seised per second can only suspend the proceedings if it does not declare itself to be incompetent and can not itself determine the jurisdiction of the court seised first". The Advocate General Léger takes a position in favor of the prevalence of the extension of jurisdiction over litigation, sharing the arguments proposed by the British government. Léger also considers the profile of the useful effect of art. 17, dreading the danger of deferral activities, especially those related to actions of negative assessment, which allow the debtor to act as an actor in an incompetent forum in order, at least, to delay the satisfaction of the creditor. The interpretative proposal put forward by the Advocate General is however different from that of the United Kingdom, since the effect of derogation from the operation of the lis pendens would only be in those cases in which the extension is absolutely clear. Of value, this solution would allow to repress the obvious cases of abuse without, however, undermining the system of lis pendens.

[358]CJEU, C-351/89, Overseas Union Insurance Limited and others v. New Hampshire Insurance Company of 27 June 1991, op. cit.

[359]CJEU, C-116/02, Gasser of 9 December 2003, op. cit. parr. 46-48.

[360]CJEU, C-351/89, Overseas Union Insurance Limited and others v. New Hampshire Insurance Company of 27 June 1991, op. cit.

jurisdiction must however suspend the proceedings until the court previously seised has declared to be incompetent"[361].

The CJEU even before the ruling was issued in the Gasser case[362]. The decision, in its choice of rigidity and the penalization made in relation to the choice clauses of the forum, has been much criticized, not without reason. The practice has signaled the risk that entails the principle enunciated, that is the abusive practice of those who act in a forum only in violation of an agreement, with the sole purpose of putting the counter party in distress[363]. The strict first-in-time rule also penalizes any aspects of mediation or alternative and out-of-court dispute resolution, favoring the criterion of the forum running[364].

The principle expressed in Gasser has been superseded in the new Regulation 1215/2012[365], which provides for a new specific rule that regulates lis pendens if the

[361]CJEU, C-116/02, Gasser of 9 December 2003, op. cit.

[362]In speciem the complexity of the phenomenon is highlighted, excluding however that the extension of jurisdiction could, de iure seasoned, play a role of exception in the matter of lis pendens. Let us not forget the exception of the lis pendens by the choice of the forum clause. So we can welcome the solution adopted by the CJEU, signing several points, obviously criticizing the position suggested by the United Kingdom and based on the "absolute sacredness" of the will of the parties, having a good game to argue that the CJEU deals with the question of the exclusive basis of the positive right. He too dismisses the fear of an abusive behavior by the debtor as a mere "petition of principle". For more details and analysis see: P. BRIZA, Choice of Court agreements: Could the Hague choice of Court agreements Convention and the reform of the Brussels I Regulation be the way out of the Gasser-Owusu disillusion?, in Journal of Private International Law, 5 (3), 2009, pp. 539ss. T.C. HARTLEY, The European Union and the systematic dismantling of the common law of conflict of laws, in International & Comparative Law Quarterly, 54, 2008, pp. 813ss. F. FERRARI (ed.), Rome I Regulation, Sellier European Law Publishers, Münich 2015. B. YÜKSEL, The relevance of the Rome I Regulation to international commercial arbitration in the European Union, in Journal of Private International Law, 7, 2011, pp. 150ss. J.J. JUIPERS, Party autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice, in German Law Journal, 10 (11), 2009, pp. 1514ss, which affirmed that: "(...) few legal decisions are truly inevitable (...) ordained once the Court adopted a "formal" rather than 'instrumental' approach to the Brussels Convention-one which prized (...) logic above consequences, theory above practice". It is therefore the basic choice that determines the outcome: theory versus practice, purely logical analysis against the evaluation of consequences. Once one of the two prevailing elements is considered, the sentence is written almost by itself. This is therefore the main criticism that is being brought to the European institution: the main concern is to avoid the conflict between judges that constitutes the nemesis of the system of uniform law from the CJEU's point of view. It is emphasized that such a conflict is only on one of the two aspects of the issue, and the less relevant one since "to seek at all costs to avoid parallel litigation is to tilt at a phantom target". The duration and maintenance costs of two parallel processes are effective deterrents. Furthermore it is the experience of practice which suggests that this is a marginal eventuality. According to the lawyer (Juipers), "many would see a pressure for one party might invoke a court's jurisdiction for tactical reasons. For the purpose of avoiding the parallel litigation, but controlling unfair forum shopping. The danger is all greater because in practice, to win the battle of the forums is to win outright. Normally a defendant sued in an inconvenient forum is likely to settle (...)". According to our opinion the idea of "likely to settle" is perhaps less current for the experience of our system. Fentiman echoes the positions expressed in the course of the case by the British government, because it shares its culture and concerns. Once again, however, the CJEU is deaf to the requests coming from such a precious experience: "(...) the crux of the decision is that the Court refused to tolerate any risk of parallel proceedings and irreconciliable judgments" and "Gasser shows the European regime to be insensitive to procedural justice for defendants (...)". See also in argument: M. AHMED, The nature and the enforcement of the choice of court agreement. A comparative study, Hart Publishing, Oxford & Oregon, Portland, 2017.

[363]This applies to the greatest extent when more than one competing forum is available, so that those who hold the qualification as an actor have the privilege to choose the forum. However, it can also be used in an abusive way to paralyze the chosen forum in the clause.

[364]See recital n. 22.

[365]See art. 31 of Regulation 1215/2012. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, entry in force from 10 January 2015. See in argument for more details and analysis: P.A. NIELSEN, The New Brussels I Regulation, in Common Market Law Review, 50 (4), 2013, pp. 503ss. P. HAY, Notes on the European Union's Brussels-I "Recast" Regulation, in The European Legal Forum, 2013, pp. 2ss. M. POHL, Die Neufassung der EuGVVO-im Spannungsfeld zwischen Vertrauen und Kontrolle, in Praxis des Internationalen Privat-und Verfahrensrechts, 33, 2013, pp. 109ss. A. NUYTS, La refonte du règlement Bruxelles I, in Revue Critique de Droit International Privé, 102, 2013, pp. 3ss. I.P. BERAUDO, Regards sur le nouveau Règlement Bruxelles I sur la compétence judiciaire, la reconnaissance et l'exécution des

existence of an agreement on jurisdiction is raised. The new rule provides, in principle, a Kompetenz-Kompetenz mechanism which centralizes the assessment of the validity of the clause by the elected judge[366]. Thus, the situation is reversed by guaranteeing maximum protection for the parties' autonomy, but by exposing oneself to the risk of abuse in the opposite direction[367]. We therefore consider it appropriate that the court first seised must assess, if not the validity of the clause itself, that it is at least prima facie existing[368]. The institute thus recreated recalls in a certain way the operation of the lecturer on the subject of art. 22, but any extension to the agreements on the forum of the prohibition to recognize a sentence issued in violation of a criterion of absolute exclusive jurisdiction under art. 22[369].

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décisions en matière civile et commerciale, in Journal du Droit International, 140 (4), 2013, pp. 742ss. A. STAUDINGER, Schiedsspruch und Urteil mit vereinbarten Wortlaut, in Festschrift für Friedrich Graf von Westfalen, Dr. Otto Schmidt Verlag, Köln, 2010, pp. 662ss. V. RIJAVEC, W. JELINEK, W. BREHM, Die Erleichterung der Zwangsvollstreckung in Europa, ed. Nomos, Baden-Baden, 2012, pp. 214ss. See in argument the next cases from the CJEU: C-368/16, Assnes Havn v. Navigatos Management (UK) limited of 13 July 2017, ECLI:EU:C:2017:546; C-341/16, Hanssen Beleggingen v. Tanja Prast-Knippin of 5 October 2017, ECLI:EU:C:2017:738; C-230/15, Brite Strike Techonologies v. Strike Strike Tecnologies SA of 13 July 2016, ECLI:EU:C:2016:560; C-350/14, Lazar v. Allianz Spa of 10 December 2015, ECLI:EU:C:2015:802; For more details see: G. PAYAN, Droit européen de l'exécution en matière civile et commerciale, ed. Bruylant, Bruxelles, 2012. B. KÖHLER, Dual-use contracts as consumer contracts and no attribution of consumer status of a third party to the proceedings under Brussels-I Regulation, in Praxis des Internationalen Privat-und Verfahrensrecht, 37, 2017. F. GASCÓN-INCHAUSTI, La reconnaissance et l'exécution des décisions dans le règlement Bruxelles I bis, in E. GUINCHARD (eds), Le nouveau règlement Bruxelles I bis. Règlement n° 1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, ed. Larcier, Bruxelles, 2014, pp. 210ss. D. LIAKOPOULOS, Interactions between European Court of Human Rights and private international law of European Union, in Cuadernos de Derecho Transnacional, 10 (1), 2018, pp. 260ss.

[366]Paragraphs 2 and 3 shall not apply to the matters referred to in sections 3.4 or 5 in cases where the action is proposed by the policyholder, the insured, a beneficiary of the insurance contract, the injured party, by the consumer or by the worker and the agreement is invalid pursuant to the provisions contained in the aforementioned sections.

[367]This is partly the proposal made by the British Government in Gasser. The 4th paragraph of the new art. 31 provides that the standard does not apply to protected holes. A party convicted in court, that is, could plead the existence of an (improbable) clause on the forum to paralyze the proceedings and make it necessary to argue about the existence of the said clause in the chosen forum.

[368]According to our opinion the national court should assess whether the agreement is valid and efficient on the basis of the European rules and to divest the dispute in favor of the judge elected only after the positive outcome of this verification. Furthermore, the operation of this particular type of liaison should be subordinated to the decision of the first judge to suspend the case. In this way there would be no gray areas because if the clause appears prima facie existing and it is easy to determine the indicated court, it will be that judge who knows the validity of the clause and possibly also of the dispute. The mechanisms indicated here "also avoid any suggestion that one of the court, is better able to determine the effect of article 23 than another court, the court first seized. If the question is not clear, the judge for first seized will be able to deepen the analysis of the same and also withhold the case, since the litigation will impose on the court seised; second to suspend the case, avoiding risks of parallel proceedings. This mechanism would allow the abusive practices to be struck in the two forms in which they arise: if the debtor will act in negative assessment in a derogated court in disregard of a clause on the forum, the creditor-defendant will have a good game to appeal to the elected judge and ask the court seised first to enforce such an agreement. After having assessed the defendant's fumus boni iuris, the prejudiced judge will suspend the proceedings pending the assessment by the second. On the other hand, if the creditor has acted in the correct forum, and the debtor attempts to escape you through the allegation of the existence of a court extended, the judge will have a good game in considering such an abusive behavior, not following him. This proposal seeks to bring together the strengths of others, tempering their flaws.

[369]Extending such a prohibition also in relation to the extension agreements would have the effect of multiplying the uncertainty, damaging the institution of the extension and the parties making use of it. The CJEU has issued an important decision that is halfway between the lis pendens and the question of the circulation of decisions. CJEU, C-456/11, Gothaer Allgemeine Versicherung AGcontro Samskip GmbH of 15 November 2012, ECLI:EU:C:2012:719, published in the electronic Reports of the cases. The dispute concerns a lawsuit for damages caused by the Samskip carrier to a brewery plant transported to Mexico on behalf of the German company Krones, brought by Krones itself and by four insurance companies. The particularity is that the parties are acting in Germany before the Landgericht Bremen only after the decision of the Hof van beroep of Antwerp declares the defect of the Belgian jurisdiction on the basis of a clause on the jurisdiction contained in the bill of lading, which elects Iceland which competent forum. The clause in favor of the Icelandic judge falls within the Lugano system and not in the context of Regulation 44/2001, but the issue of the effectiveness of

The decision in question establishes therefore an important and innovative principle, valid for the field of agreements on the forum but probably destined to transcend the boundaries, according to which even the ritual decisions, provided they are definitive, are destined to circulate and explain their own preclusive e ff ect in the territory of the Union. Thus, a decision issued by a European judge who considers an agreement on the forum to be valid or even invalid will be binding on each Member State. Given the ratio decidendi it should not make any difference that the indicated judge belongs to the Brussels I system or, as in the case in question, to the Lugano system[370]. Probably the principle is also extensible in the case of agreement that elects the competence of a judge not belonging to either of the two regional systems.

22. COORDINATION TESTS: THE 2005 HAGUE CONVENTION

The ambitious goal of promoting a global judicial area for international trade has continued to seduce the imagination of theorists and practitioners, so that since the early 1990s, a large number of countries have once again met in the context of Hague Conference on Private International Law[371]. The attempt was to draw up a universal convention on jurisdiction[372] and the recognition of judicial decisions in civil matters

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the Belgian judgment in Germany is a matter for Brussels I. Following the defenses carried out by the carrier, the Landgericht considers it appropriate to request the interpretation of the CJEU whether the Belgian decision is binding on the German court and to what extent. In particular, the judge asked whether (1) in the notion of "decision" the decisions which are exhausted in ascertaining the absence of the procedural conditions of admissibility (so-called merely procedural sentences), such as (2) a final judgment of the degree, are also included of judgment, by which the court seised declines its international jurisdiction on the basis of a clause conferring jurisdiction and specifically if (3) each Member State is obliged to recognize the decisions issued by the court of another Member State concerning the effectiveness a clause conferring jurisdictional rights stipulated inter partes, when, according to the national law of the judge of the country of origin, the verification of the effectiveness of this clause has the authority of res judicata, even if the decision in this regard constitutes part of a merely procedural sentence that rejected the appeal (paragraph 21). The European court, taking up the ranks of its previous case-law as a point of recognition, before the circulation regime "also applies to a decision by which the court of a Member State declines its jurisdiction on the basis of a clause conferring jurisdiction, regardless of the classification of that decision under the law of another Member State" (paragraph 32). It therefore concludes that "the judge before whom the recognition of a decision by which the court of another Member State has declined its competence on the basis of a jurisdiction clause is bound is bound by the ascertainment of the validity of this clause, contained in the justification of a decision, which has become final, declaring the inadmissibility of the action " (paragraph 43).

[370]T.C. HARTLEY, Choice of Court Agreements under the european and international instruments: The Revised Brussels I Regulation, the Lugano Convention and the Hague Convention, Oxford University Press, Oxford 2013, pp. 4-6, 129-130. R. GARNETT, Substance and procedure in private international law, Oxford University Press, Oxford. 2012, pp. 105ss.

[371]Convention du 15 avril 1958 sur la compétence du for contractuel en cas de vente à caractère international d'objets mobiliers corporels.

[372]T. VON MEHREN, Recognition and Enforcement of Foreign Judgments: A new approach for the Hague Conference?, in Law & Contemporary Problems, 1994, 57 (3), pp. 272ss. L.E. TEITZ, The Hague choice of Court Convention: Validating party autonomy and providing an alternative to arbitration, in American Journal of Comparative Law, 53 (3), 2005, pp. 542ss, which defined it as: "Arthur's baby". T. VON MEHREN, Drafting a Convention on international jurisdiction and the effects of foreign judgments acceptable world-wide: Can the Hague Conference project succeed?, in American Journal of Comparative Law, 49 (2), 2001, pp. 192ss. F.K. JUENGER, A Hague judgments Convention?, in Brooklyn Journal of Internatonal Law, 24, 1998-1099, pp. 112ss. A.L. LOWENFELD, Thoughts about a multinational judgments Convention: A reaction to the Von Mehren Report, in Law & Contemporary Problems, 57 (3), 1994, pp. 290ss. S.B. BURBANK, Jurisdictional equilibrium, the proposed Hague Convention and progress in national law, in American Journal of Comparative Law, 49, 2001, pp. 206ss. In addition to the objective of promoting a global judicial area, there were further elements at the basis of the negotiations. One of these is the fact that the United States is not part of any treaty relating to the jurisdiction and the recognition of judgments. The only experience worthy of note in this sense is represented by the negotiations between the USA and the United Kingdom in the 1970s, which were wrecked due to the British perplexities-in particular the insurance sector-about the damages awarded by the American juries,, see: F. JUENGER, A Hague judgments Convention?, op. cit., pp. 111-13. The problem of "punitive damage" or "award" has not been underestimated by the editors of the 2005 Convention. The American doctrine repeatedly reaffirms that the project's initiative has been taken by the USA because of the

on the model of the 1968 Brussels Convention. This work, although not yet crowned by the success of a "great result"[373], left to the operators of the sector a valuable tool to regulate questions of jurisdiction related to their contractual relations by negotiation: this is the Hague Convention on the choice clauses of the forum[374] which, pending the collection of the instruments of ratification necessary for the its entry into force, it can count on the precious signatures of the United States and of the European Union[375] as well as on the interest to adhere to it shown by China which does not seem to be of a formal nature[376]. The text of the Convention, despite its inevitable nature of compromise, is a decidedly appreciable effort to coordinate different legal systems which, in the field of selection of the forum and the regime to be granted to the relevant clauses, exhibit, before even different solutions, methods and approaches marked by deeply divergent policies. Establishing uniform and equivalent rules in the insidious sector of

perceived use of the restrictive orientation. foreign law against the recognition of decisions by US judges. These authors do not fail to underline how the victorious part in an American trial has serious problems in obtaining recognition and execution of its decision in other countries, contrasting the openness that the judges would show towards decisions made in jurisdictions. foreign. This is not the place for a critical analysis of the attitude of the various jurisdictions regarding the recognition of foreign citizens. It is however desirable that judgments and evaluations in this matter are supported by empirical studies and not only by doctrinal impressions. In the sense of marked imbalance. See in argument: L.E. TEITZ, The Hague choice of Court Convention, op. cit., pp. 544ss. T.C. HARTLEY, The Hague choice of Court Convention, in European Law Review, 31 (3), 2006, pp. 414ss. W.J. WOODWARD, Saving the Hague choice of Court Convention, in University of Pennsylvania Journal of International Law, 20, 2007-2008, pp. 658ss. Contra F. JUENGER, A Hague judgments Convention?, op. cit., pp. 114ss. A.L. LOWENFELD, Thoughts about a multinational judgments Convention, op. cit., pp. 303ss. A.F. PEREZ, The international recognition of judgments: The debate between private and public law solutions, in Berkeley Journal of International Law, 44, 2011, pp. 58ss.

[373]The original project of a tenuously exhaustive system has encountered some obstacles, deriving in the first place from the strong lack of homogeneity of the legal systems. In this case, it was decided to concentrate on the choice of court clauses only, an instrument of great importance for international trade, on which the agreement did not seem impossible. The outcome of these renewed treaties is the convention that we propose to examine. L.E. TEITZ, The Hague Choice of Court Convention, op. cit., pp. 545, highlights other elements of the original project, as well as the unpredictable use of the Internet and electronic commerce, the centrality assumed, at least in the European field, as well as the acceleration (in some ways unexpected) of the process of integration of the European Community, today Union. See also in argument: J. TALPIS, N. KRNJEVIC, The Hague Convention on the Choice of Court Agreements of June 30, 2005: The elephant that gave birth to a mouse, in Southwestern Journal of Law & Trade in the Americas, 13 (1), 2006, pp. 3SS. T.C. HARTLEY, The Hague Choice of Court Convention, op. cit., cit., pp. 415, highlights the different objectives of the main actors: to limit the exorbitant jurisdiction of the United States for Europe, to increase the recognition and execution of its sentences abroad for the United States.

[374]C. KESSEDJIAN, L'èlection de for-Vers une nouvelle convention de la Haye in Grenzüberschreitungen. Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit. Festschrift für Peter Schlosser zum 70. Geburtstag, Mohr Siebeck, Tübingen, 2005. T. KRUGER, The 20th Session of the Hague Conference: A new choice of Court Convention and the issue of EC membership, in International & Comparative Law Quarteraly, 55 (4), 2006, pp. 447ss. A. SCHULZ, The 2005 Hague Convention on choice of Court clauses, in Journal of Private International Law, 2 (2), 2006, pp. 243ss. L.E. TEITZ, The Hague choice of Court Convention, op. cit., C. THIELE, The Hague Convention on Choice-of-Court Agreements-was it worth the effort? in Conflict of laws in a globalized world, Cambridge University Press, Cambridge, 2007. W.J. WOODWARD, Saving the Hague Choice of Court Convention, op. cit.

[375]The signature of the European Union and not of the individual States starts from the opinion 1/03 made on 7 February, 2006, ECLI:EU:C:2006:81, I-01145 from the CJEU, which was able to define the external competences of the Union in matters of jurisdiction, recognition and enforcement of judgments in civil and commercial matters. In particular, moving from the judgment C-22/70, Commission v. Council (AETS) of 31 March 1970, ECLI:EU:C:1970:32, I-00263, the CJEU ruled that "the conclusion of the new Lugano Convention concerning jurisdiction, recognition and enforcement of judgments in the matter civil and commercial (...) falls entirely within the exclusive competence of the European Community". See in argument for more details: M. CREMONA, Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017, in European Constitutional Law Review, 14, 2018, pp. 232ss. M. CREMONA, Defining competence in EU external relations: lessons from the Treaty reform process, in A. DASHWOOD, M. MARESCAU, Law and practice of EU external relations, Cambridge University Press, Cambridge 2008, pp. 34-69. M. CREMONA, A. THIES, The European Court of Justice and external relations law: Constitutional challenges, Hart Publishing, Oxford & Oregon, Portland, 2014. M. CREMONA, H.W. MICKLITZ, Private law in the external relations of the European Union, Oxford University Press, Oxford, 2016. D. PATTERSON, A. SÖDERSTEN, A companion to European Union law and international law, Wiley Blackwell, New York, 2016, pp. 57ss.

[376]T.U. GUANGJIAN, The Hague Choice of Court Convention-A chinese perspective, in American Journal of Comparative Law, 55, 2007, pp. 348ss.

selection of the judge competent to hear the dispute, the Convention aims to provide commercial operators with predictability to the forum appointed to exercise jurisdiction and certainty regarding the circulation of the decision rendered by that forum. The preamble to the Convention makes clear that it underlines the importance of "uniform rules on jurisdiction and enforcement of foreign judgments in civil matters" aimed at creating an "international regime that provides certainty and ensuring the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements"[377]. Functionally coordinating the identification of the negotiation of the iurisdictio with the recognition of the decision resolving the dispute that emanates from the designated negotiating judge, the Hague Convention follows the model successfully adopted by the 1958 New York Convention on Arbitration[378] and thus intends to to international contractors a real alternative in the choice between arbitration means and judicial means for the resolution of disputes. Three regulatory principles aimed at achieving this result: the judge indicated in the clause must exercise his decision-making power; the court of another Contracting State must suspend or decline its jurisdiction in any case, even if the adjudication court has subsequently been seized on the same case; any judge must recognize and execute the decision issued in the chosen forum.

23. INTERNATIONALITY OF THE DISPUTE

With regard to the international nature of the controversy, it should immediately be noted that the conventional legislation makes a differentiation according to whether the jurisdiction rules contained in Chapter II of the Convention or the rules on recognition and execution set out in Chapter III[379]. come into play. For the purposes of applying the Convention upon the exercise of jurisdiction, a dispute is considered "international" in the presence of at least one element of extraneousness, or of a connection with a foreign system. Actually, art. 1 (2) proposes a negative definition and qualifies a dispute as "international" unless the residence of the parties, the contractual relationship and all other elements relevant to the settlement of the dispute are rooted in a single Contracting State. In this way, a negative answer is given to the question whether the designation of a foreign judge is sufficient to confer an international character on an agreement. The alteration that the extension implies to the framework of the competences is not sufficient, alone, to bind the judges of the Contracting State to the observance of the conventional rules. The choice made by the editors of the Convention deserves appreciation because it avoids the uncertainties and debates caused in Europe on the question whether the internationality of the dispute is a condition for application of the provisions of art. 17 Brussels Convention, now art. 23 of Regulation 44/2001[380]. At the time of circulation of the decision, instead, paragraph 3 of art. 1 considers the requirement of "internationality" to be satisfied when the recognition or

[377]T.U. GUANGJIAN, The Hague Choice of Court Convention-A chinese perspective, op. cit.
[378]J. GRAVES, Court litigation over arbitration agreements: Is it time for a new default rule?, in The American Review of International Arbitration, 23 (1), 2012, pp. 113ss. J. KARTON, The culture of international arbitration and evolution of contract law, Oxford University Press, Oxford, 2013, pp. 17ss.
[379]C. THIELE, The Hague Convention on Choice-of-Court Agreements-was it worth the effort? in Conflict of laws in a globalized world, op. cit.
[380]See, L.A. VELASCO SAN PEDRO, C. HERRERO SÁNCHEZ, J.A. ALMUNIA, Private enforcement of competition law, ed. Lex Nova, Valladolid, 2011, pp. 617ss.

enforcement of a foreign measure is requested. The category of "international" disputes for the purposes of recognition is therefore wider, permitting the circulation of the decisions that are made by a judge not invested with competence pursuant to art. 1 (2) of the Convention[381]. Having validly assumed its jurisdiction on the basis of the Convention is not a condition for the recognition of the resulting decision. The foreign decision circulates independently of the title on the basis of which the judge issued it and even if the Convention could not have been applied to the moment of the exercise of jurisdiction.

24. (FOLLOWS) EXCLUSIVE CLAUSES

The second element that helps determine the scope of the Convention is the "exclusive" nature of the jurisdiction clause[382]. Pursuant to art. 3 are considered "exclusive" clauses stipulated between two or more parties that give the power to know the disputes, present or future, arising from a specific legal relationship to a judge, or to the courts, of a Contracting State excluding any another judge and that they are concluded or documented in writing or by another means of communication that has the characteristics of a durable record[383].

Par. b) adds that the choice of forum clauses must be presumed to be exclusive, unless the parties have explicitly indicated the non-exclusive nature. If a civil lawyer could simply take note of this indication, this is radically innovative when one thinks of the well-established attitude of the jurisprudence, particularly American, in presuming, on the contrary, the non-exclusive nature of the jurisdiction clause, except for the literal and express indication of exclusivity. The presumptive mechanism provided for in par. b), moreover, allows the scope of the Convention to be expanded, attracting exclusive clauses in the category, and as such regulated by the conventional discipline, a greater number of agreements on the forum.

The regulation of the formal profile of the clause is particularly interesting, especially when compared to the European discipline of art. 23 of Regulation 44/2001/EC. In contrast to the european standard, the Hague Convention does not prescribe the adoption of a particular form for the validity of the agreement, merely requiring a form

[381]C. THIELE, The Hague Convention on Choice-of-Court Agreements-was it worth the effort? in Conflict of laws in a globalized world, op. cit.

[382]The limitation only to the exclusive clauses stems from the need to avoid confronting the question of the lis pendens that would have been called into question by the extension of the coverage to non-exclusive clauses. The latter, by their nature, allow the coexistence of multiple jurisdictions equally competent and, therefore, equally legitimated to rule on a dispute. In general on the "exclusive clauses" T. KRUGER, The 20th Session of the Hague Conference, op. cit., pp. 448ss. It is a "cultural clash" between civil law and common law. Not even the extension c.d. "tacit" of the jurisdiction is regulated by the Hague Convention. See also in argument: TJ. TALPIS, N. KRNJEVIC, The Hague Convention on the Choice of Court Agreements of June 30, 2005: The elephant that gave birth to a mouse, op. cit., pp. 9: "(...) under the Convention, an excluded court cannot acquire jurisdiction simply via informal measures taken by the defendant who is sued in an excluded forum; instead it must be conferred by a new express choice of court agreement that conforms to Article 3 (...)".

[383]Art. 3 "un "accord exclusif d'élection de for" signifie un accord conclu entre deux ou plusieurs parties (...) qui désigne, pour connaître des litiges nés ou à naître à l'occasion d'un rapport de droit déterminé, soit les tribunaux d'un Etat contractant, soit un ou plusieurs tribunaux particuliers d'un Etat contractant, à l'exclusion de la compétence de tout autre tribunal (...) et qui est conclu ou documenté: i) par écrit ; ou ii) par tout autre moyen de communication qui rende l'information accessible pour être consultée ultérieurement". L'equiparazione tra forma scritta e registrazione durevole è mutuata dall'art. 6(1) UNCITRAL Model Law on Electronic Commerce del 1996.

of probationem[384]: the agreement must be concluded or documented in writing or on other support lasting. The formal element here does not have the function of protecting the validity of the agreement or the presence of an "effective consent", whose defense is delegated to other specific norms relating to the substantial profile[385], but only to dictate a procedural rule in test point of the jurisdiction pact.

The letter of the provision leads us to affirm, with relative certainty, that the derogation from the jurisdiction must be the result of an agreement between the parties and have as object a legal relationship with defined contours, meaning by this requirement the prohibition of agreements on the so-called "blank" jurisdiction or otherwise undetermined[386]. On the other hand, despite the reference to the agreement, it seems not to exclude the validity of the clauses contained in forms, general contract conditions or, more generally, in non-negotiated texts: in any case, the judge will have to assess whether the clause has been validly completed on the basis of the applicable substantive rules. For the definition of the limits of the "exclusivity", the reference to the "courts of one Contracting State or one or more specific courts" is central[387]. From the standard of the rule it is assumed that, as long as you indicate judges belonging to a single State, the most varied combinations are allowed: a specific judge can be indicated (e.g Civil Court of Brussels), a territorial fraction (e.g "the forum competent is Cancún, Mexico") or simply the state in its entirety[388]. Combinations of courts of a single state may also be indicated, without affecting the exclusivity of the clause. Net of an express indication by the parties, therefore, what characterizes the clause as "non-exclusive" is the involvement of the jurisdiction of different States: exclusivity seems to depend not so much on having indicated the competence of a single judge but from the traceability of the various indications to a single State. According to the prevailing

[384]A. BUCHER, La Convention de La Haye sur les accords d'élection de for, in Revue Suisse de Droit International et Europèen,16 (1), 2006, pp. 36-37, specifies that, since the agreement must not be confirmed in writing but only documented, it follows that it is not necessary that the party proves to have communicated to the other party about the documentation. National law can not impose further formal requirements. It is not without significance that they are predominantly authors from the civil law area who insist on the formal profile.

[385]In the Hague Convention, the formal moment does not exhaust the verification by the judge, who is called to give an assessment of the clause both from the point of view of the capacity of the parties to the conclusion of the agreement, both in terms of substantial validity (null clause and void). According to L.E. TEITZ, The Hague Choice of Court Convention, op. cit., pp. 552-53, the editors of the Convention failed to reach an agreement to evenly regulate substantive requirements, opting for a reference to national law: "It was ultimately left for the non-chosen or requested court to decide whether such to contract or the resulting judgment would not be enforced because it is "manifestly contrary" to the forum's public policy ". J. TALPIS, N. KRNJEVIC, The Hague Convention on Choice of Court, op. cit., pp. 22ss believe that the Convention, by limiting the exceptions to the operation of an exclusive clause, ends up giving an autonomous notion of "agreement", overcoming the fragmented nature of national laws: "Article 6 (...) as such, subject to limited exceptions, (...) preserves agreements that would otherwise be unenforceable because, inter alia, the agreement was either in an adhesive business form setting, not negotiated hidden in a standard form agreement, or incorporated in a computer readable click-wrap agreement (...)".

[386]There is talk of disputes "which have arisen or may arise in connection with a particular legal relationship". These indications are strengthened by the discipline that protects the consent of the parties since it can validly express their consent only if the object is at least sufficiently determinable. The clause on jurisdiction contained in "framework agreements" destined to dictate the rules for an indefinite number of future performances determined by the normative framework should not pose particular problems.

[387]R.A. BRAND, Arbitration or litigation? Private choice as a political matter, in Yearbook of Arbitration & Mediation, 8, 2016, pp. 24ss.

[388]T.C. HARTLEY, The Hague choice of Court Convention, op. cit., pp. 422ss, The European Union, rectius the CJEU may also be referred to as competent, but the issue is not peaceful. To the federal systems (defined in the Convention "non-unified legal systems") a specific provision is dedicated, the art. 25, according to which when the convention speaks of "State" this term must be interpreted in the sense of "federation" or "territorial unity" having regard to the specific case. Some issues remain open, for example, if in the unified legal systems provided for by art. 25, it is possible to indicate as competent the courts of two different territorial units (eg Ohio and New Jersey) or the state and federal jurisdiction (eg. Pennsylvania e District Court for the southern district of the State of New York)?

opinion, the so-called "asymmetric" agreements, both when the choice of the forum requires only one of the contracting parties, and where the clause indicates jurisdiction (also exclusive but) different for each of the parties to the agreement[389]. On the other hand, it is quite legitimate to provide for different forums for different segments of the same complex legal relationship (eg the New York court for disputes relating to copyright and the Athens Civil Court for all other disputes)[390]. Lett. d) warns that the jurisdiction clause represents a separate element from the contract in which it may be inserted[391].

This specification essentially has the function of preventing a party from having the power to evade the jurisdiction clause simply by attaching the invalidity of the contract that contains it; at the same time it is avoided that the declaration of invalidity of a contract overwhelms, ex post, the jurisdiction of the judge who has detected it. Finally, the complex assessments concerning the validity of the entire legal relationship can not be reconciled with a decision on jurisdiction, the definition of which is a prerequisite for the assessment of the merits of the dispute[392]. The determination of the judge by the parties does not have the strength to overcome the internal rules of allocation of jurisdiction by subject, value and territory: the impression is that the editors of the Convention intended to balance the power recognized by private autonomy with the reasons of state sovereignty, in effect conferring on the parties the power to identify-exclusively-only the order within which to dispute, but not the specific judge. The fate of non-exclusive clauses, definable as residual as all those that do not meet the requirements described above. Although these are apparently unrelated to the scope of the Convention, they are subject to special regulations. Since they are very much used in certain international commercial practices and as such deserving of protection, art. 22 recognizes to the contracting States the possibility of making a declaration of mutual recognition of the decisions issued pursuant to a non-exclusive clause. The Convention, fully consistent with the non-exclusive nature of the indication of negotiation, does not impose any positive or negative obligation on the courts when the jurisdiction is exercised. The decision issued, however, must be recognized in all Contracting States if both the State of origin and the State of destination have made the declaration provided for by art. 22.

[389]Even an agreement of the expression: "A must act in the state X, B in the state Y" would cause problems in the management of the lis pendens where both subjects are activated simultaneously in their respective forums. This is the reason for the exclusion of otherwise damaging and deserving protection

[390]J. TALPIS, N. KRNJEVIC, The Hague Convention on choice of Court, op. cit., pp. 11ss.

[391]The autonomy of the jurisdiction clause ensures that the election of the judge remains valid even if the contract has expired or terminated. The formulation of the standard is insufficient, according to our opinion, to guarantee full material autonomy of the clause and to guarantee its legal independence from the rest of the contract. Do not forget that the evaluation of the validity of the clause as provided for by the convention can already be binding (see articles 5, 6, 8 and 9), even more so if it is necessary to apply the rules of private international law of the forum.

[392]In the absence of rules on the lis pendens, the non-exclusive clauses allow the (legitimate) establishment of parallel disputes. T. KRUGER, The 20th Session of the Hague Conference, op. cit., pp. 450SS. THE. TEITZ, The Hague Choice of Court Convention, op. cit., pp. 555ss, which is stated that: "(...) The Declaration of the Constitution of the Civil Law as that in the Brussels Regulation (...) ". But according to our opinion to protect non-exclusive agreements even at the time of the court would have been sufficient to insert a thin rule of lis pendens that limited itself to favoring the court seised first.

25. THE ELECTED JUDGE MUST EXERCISE HIS JURISDICTION

The fulcrum of the regulatory system established by the conventional document consists of three fundamental rules, which also represent the result of the commitment to coordinate the various policies in this area followed by the traditional civil law and common law systems: the judge indicated in the exclusive clause must exercise its jurisdiction, the court of another Member State is obliged to suspend or in any case decline its jurisdiction in favor of the judge of the extension and, finally, all judges must recognize and execute the decision issued in the forum elected. Faced with this geometric linearity, there are exceptions that give the system a considerable (and some even excessive) rate of elasticity.

According to art. 5, the judge appointed by the parties[393] in the jurisdiction clause must ("shall") exercise its jurisdiction (effect of extension of jurisdiction) and can not decline it on the basis of an assessment of greater appropriateness of another forum: it is a rudimentary prohibition of application of the doctrine of the forum non conveniens[394], but the result obtained should not be underestimated. The prohibition in question is also a great novelty for the way in which the world of common law (and especially the US) traditionally deals with the choice of court clauses. The judge of common law, in fact, in principle, does not consider itself bound by the indication of the parties, be it an attribution or a deprivation of the power to justify. The clause constitutes only one among the various elements to be taken into consideration in the (discretionary) decision on the exercise of jurisdictional power[395].

The extension of the jurisdiction of the judge elected, exclusive (article 3, letter and binding (article 5, no. 2), does not explain efficiency to the internal rules of distribution of jurisdiction, that is to say, jurisdiction by value, subject or territory is not the individual judge indicated in the clause, but the jurisdiction of the contracting State as a whole, which is inferred not so much from the letter of article 5 (3)[396], which could lead to the conclusion that it was devoid of any efficacy the clause indicating an incompetent judge for the internal procedural law, but from the combined disposition with article 8 (5) that extends the discipline relative to the recognition also to those decisions

[393]The Convention regulates the effectiveness of the clause in relation to the parties that have stipulated it. It is not clear what happens when a third party takes over from one of the original parts of the relationship. A. BUCHER, La Convention de La Haye, op. cit., pp. 42ss, in the silence of the Convention, national law applies. C. WALSH, The role of party autonomy in determining the third-party effects of assignments: Of "secret laws" and "secret liens", in Law and Contemporary Problems, 81, 2018, pp. 185ss.

[394]The editors of the Convention have decided not to take a position on the current dispute between civil law and common law concerning the prevalence of the doctrine of the forum non conveniens or of the litigation with regard to the clauses on the jurisprudence. The principles inspiring the various disciplines, that is, on the one hand substantial justice and the economy of the proceedings-on the other hand the coordination of judgments and the harmony of the judges, are values to which all the texts relating to international jurisdiction tend. However, the editors have preferred not to address the issue, essentially inhibiting the work of both principles and creating a system more focused on the "conscience" of the individual judge. In a completely different way, the CJEU has opted, under the system of Brussels I, for a strict prohibition of the forum non conveniens and for the prevalence of lis pendens, institute codified in art. 27 of Regulation 44/2001. in this spirit see: CJEU, C-281/02, Andrew Owusu v. N. B. Jackson and others of 1st March 2005, ECLI:EU:C:2005:120, I-01383.

[395]In this regard, the discipline envisaged by art. 21 (1) (d) of the UN Convention on the Carriage of Goods by Sea (1978), e.g.. "Hamburg rules", where the choice of the parts hole is just one of the alternative holes for the action.

[396]According to art. 5(3): "The preceding paragraphs shall not affect rules: a) on jurisdiction related to subject matter or to the value of the claim; b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties".

that have been issued following the transfer of the cause[397] to the competent judge different from that indicated in the clause. In the sole case of jurisdiction by territory, if the judge has discretion regarding the transfer of the cause, there are two limitations: the and must take into due consideration ("two consideration") the preference highlighted by the choice of the parties and, by way of what we have just seen, the decision issued by the judge ad quem can not circulate to the detriment of those who opposed the transfer of jurisdiction.

As regards the profile of the possible defects of the clause, in addition to the aforementioned regulation that regulates the notion of an exclusive clause and the related formal profiles, on a substantive level the binding efficacy of the extension of the jurisdiction becomes less only if the agreement is "null and void" the right of the order indicated by the parties in the relevant agreement[398].

26. THE UNSELECTED JUDGE MUST ABSTAIN

The second mechanism, art. 61[399], provides that any other court than the one indicated in the jurisdiction clause (rectius: any court belonging to a different State) is obliged to suspend the proceedings or reject[400] the request that relates to a report covered by the jurisdiction agreement, regardless of simultaneous slope of the dispute before the elected judge; this is the effect of derogation from the jurisdiction. The Convention does not contain lis pendens management mechanisms[401] and each judge is called upon to assess the jurisdiction clause. However, and this is of fundamental importance, it is permitted to disregard the indication of the parties only if one of the mandatory exceptions indicated by the same convention in art. 6. The existence of a

[397]This is the case, for example, in England where the jurisdiction can be distributed on a discretionary basis: the doctrine of the forum non conveniens is forbidden by the Convention, in fact, only with reference to international jurisdiction and not to internal competence. The limitation that is given to the autonomy of the parts with respect to internal rules of jurisdiction.

[398]According to art. 5(1): "The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State".

[399]J. TALPIS, N. KRNJEVIC, The Hague Convention on choice of Court, op. cit., pp. 21ss, which is declared that: "(...) most important provision of the Convention, as it addresses the situation which usually arises in practice, namely when courts, other than the one chosen, must refrain from taking jurisdiction. Article 6 provides commercial certainty by placing the exclusive choice of court agreement beyond the reach of the myriad of national laws designed to prevent abuse arising from differences between the parties' bargaining power (...)".

[400]T. KRUGER The 20th Session of the Hague Conference, op. cit., pp. 453ss, stresses that the absence of specific rules in the Convention on "parallel disputes" active, within the European Union, the Tatry mechanism in case of the CJEU: C-406/92, Tatry v. Maciej Rataj of 6 December 1994, ECLI:EU:C:1994:400, I-05439) which makes the system of lis pendens provided for in Articles 21 and 31 of the CJEU applicable to parallel judgments pending before the courts of the Member States 27 and ss. of Regulation 44/2001/EC. However, the proposed reconstruction is not peaceful. The absence of rules on the institution could indicate more the desire to exclude the mechanism of lis pendens than to leave free choice in this regard. Secondly, activate the art. 27 would mean meaningless the principle of centralization of the assessment of the clause by the elected judge. L.E. TEITZ, The Hague choice of Court Convention, op. cit., pp. 554ss, shows, on the contrary, how the Gasser effect does not occur (CJEU, C-116/02, Erich Gasser GmbH v. MISAT Srl of 9 December 2003, ECLI:EU:C:2003:657, I-14693) typical of the Brussels I system which, through strict adherence to the principle of prevention, blocks the assessment of the clause by the court seised first, although not indicated in the clause. Therefore, he observes, "party autonomy wins over the race to the court house". For more details see: T. KONO, Intellectual property and private international law. Comparative perspectives, Hart Publishing, Oxford & Oregon, Portland, 2012. P. BEAUMONT, M. DANOV, K. TRIMMINGS, Cross-border litigation in Europe, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 564ss.

[401]T.C. HATYLEY, The Hague choice of Court Convention, op. cit., pp. 418ss. This circumstance does not preclude the judge from exercising jurisdiction on the basis of internal rules.

ground for non-compliance with the clause does not, however, establish the jurisdiction of the judge who detects it.

With regard to the content of these exceptions, it is first of all reiterated that the agreement is null and void according to the right of the forum chosen by the parties. Both judges, elected and not elected, are called to evaluate the same clause on the basis of the same right. In the hypothesis of discrepancy of this assessment, the two judges could reach different conclusions about the validity of the agreement, with the consequent risk of denied justice or onset of parallel disputes[402]. Hypotheses of concrete conflict should not be very frequent, especially where the judge not indicated in the clause decides to refer to the evaluation of the elected judge, who is definitely the most suitable to interpret and apply his right. Secondly, the judge can exercise his jurisdiction even in the event that one of the parties lacks the "capacity" necessary to conclude the exemption agreement according to its legal system (lex fori)[403].

Furthermore, art. 6 (d) provides that the jurisdiction clause does not explain its effect when it is not possible to implement the agreement in a reasonable manner due to the occurrence of an exceptional event removed from the control of the parties: these are marginal assumptions (and that such they must remain in the economy of the Convention) such as the outbreak of war, the occurrence of a cataclysm or the modification of the essential characteristics of the judicial body indicated[404]. Pursuant to art. 6 (c) the judge is not obliged to respect the exemption if this is a manifest injustice or is contrary to the public order of the State to which it belongs[405]. As it transpires from the letter itself of the norm, the exception must be interpreted in a particularly restrictive way, being able to invoke only where the lesion of the protected principle is "manifested"[406]. With this specification we want to remind the judge that the functioning of the Convention depends on the cautious application of the exceptions by the judges involved. This is a "relief valve" common in international instruments that must be applied in such a way as not to diminish the trust of international operators in the Convention, namely the certainty and predictability in the application of the choice clause of the forum. Article 6 (e) provides that the court can exercise its jurisdiction in the event that "the court has decided not to hear the case"[407]. It would seem to be an appropriate rule of closure aimed at avoiding hypothesis of denied justice. However, more than one author points out that the possibility of a protective vacuum is already peacefully included in the exception of public order or manifest injustice. The interpretation

[402]Not only that, even the judge appealed in the recognition of the decision issued in the extended forum must, in more limited cases, evaluate the clause according to the parameter now exposed See in argument: L.E. TEITZ, The Hague choice of Court Convention, op. cit., pp. 552ss.

[403]According to art. 6(b): “a party lacked the capacity to conclude the agreement under the law of the State of the court seised”. A part from the validity of the substantive validity, whose parameter consists only of the right of the elected judge, the capacity can be abstractly assessed on the basis of three legal regimes: elected judge (through the "null and void" exception), unelected judge and judge of recognition, pursuant to art. 9 (b), see, A. BUCHER, La Convention de La Haye, op. cit., pp. 42ss.

[404]The mention of expression "manifest injustice" and "public policy" is justified by the fact that certain legal systems limit the notion of public order to situations that call into question a public interest, thus leaving open the cases of individual concrete injustice

[405]Speaking of the addition of the adjective manifested in the art. 34 of Reg. 44/2001/EC, states that: "It is (...) a specification (...) with a mainly pedagogical and suggestive character: a sort of recommendation to the judges to" work well ", without too often resorting to that safety valve, to that Vorbehaltsklausel represented by the contrast with public order (...)".

[406]A. BUCHER, La Convention de La Haye, op. cit., pp. 44ss. A. SCHULZ, The 2005 Hague Convention on choice of Court clauses, op. cit., pp. 255.

[407]A. BUCHER, La Convention de La Haye, op. cit., pp. 44; 48-49. A. SCHULZ, The 2005 Hague Convention on choice of Court clauses, op. cit., pp. 255.

proposed to avoid considering the superfluous norm is that it is activated in the case provided for by art. 5 (3), that is when the specific judicial body indicated in the clause has transferred the dispute to another judge applying the internal rules of jurisdiction[408] . This conclusion, which is not without efficacy on the hermeneutical level, appears to be contrary to the spirit and the effect which the Convention proposes to obtain, namely to the circulation of decisions. In fact, by freeing the unelected judge from the obligation of abstention, the hypotheses of possible conflict between decisions increase, representing one of the main obstacles to the circulation of judicial measures. To further confirm, art. 8 (5) specifically includes in the list of decisions that must also be recognized those issued by the judge other than that specifically indicated by the parties and identified pursuant to art. 5 (3), so that it seems preferable to interpret the law as a specification of the notion of public policy aimed at avoiding situations of denied justice. Finally, art. 19 introduces an element of flexibility in the conventional system since it allows a Contracting State to declare[409] that its judges will have discretion with regard to the exercise of jurisdiction in disputes that, although international pursuant to art. 1 (2), are not related to that State except by election as a competent forum. The rationale of the rule would be to allow States to protect themselves from a possible overload of their judicial structures by foreign litigants, where there is no State interest indicated in the jurisdiction clause.

27. ALL JUDGES MUST RECOGNIZE AND IMPLEMENT THE DECISION

The decision[410] issued by the judge elected in the exclusive jurisdiction clause is intended to circulate in all the legal systems of the Convention: it is the third pillar of the Hague system as well as the useful effect for the parts of the relationship in question. All the provisions of the Convention, including those relating to the jurisdictional moment, tend to fulfill the objective of making the circulation of the decision between different States possible. This circulation is translated into the recognition of the content of the judicial assessment carried out by the sentence and in the execution of the relative command (of condemnation). This is a notable result for the victorious part of the process which can oppose the statute of law contained in the decision and execute the sentence against the unsuccessful in all the States adhering to the Convention.

[408]It is a "power" (may) and not a "duty" (shall). On closer inspection, this is a limited recovery of the doctrine of the forum non conveniens which is otherwise excluded from the convention. See in argument: J. TALPIS, N. KRNJEVIC, The Hague Convention on Choice of Court, op. cit., pp. 20, 32ss; A. SCHULZ, The 2005 Hague Convention on the choice of Court clauses, op. cit., pp. 259. The doctrine agrees that this prediction is strongly contrary to the principles of certainty and predictability for the parts of the contract covered by the jurisdiction clause, and which is even less understandable, as it affects the legitimate aspiration of the parties of a international contract to see its dispute decided in a neutral forum, that is-by definition-without contacts with the dispute.

[409]It is opportune to specify the term "decision": art. 4 states that: "(...) "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment". Except for the specification that it is not a question of "judgment" (...)".

[410]This leaves entirely open the long-standing problem of personal orders (injunction) issued by some courts, generally of common law, to protect jurisdictional agreements. However, the decision to exclude this sensitive sector from the scope of the Convention, far from being criticized, was probably necessary to be able to aspire to the success of the negotiations. The failure to include provisional measures issued by the competent court on the merits is reproached. A. BUCHER, La Haye Convention, op. cit., pp. 46ss, the anti-suit injections are, however, excluded by way of art. 6 but this interpretation clashes with the clear wording of art. 7. On the other hand, judicial settlement, see also art. 12. On the exclusion of the extrajudicial transaction see the criticisms of J. TALPIS, N. KRNJEVIC, The Hague Convention on the Choice of Court, op. cit., pp. 32ss.

The recognition and execution, whose proceedings follow the procedural rules of the requested State, are not automatic but can be refused only on the basis of the mandatory grounds indicated in articles 8 and 9. Of fundamental importance is the prohibition of re-examination of the merits of the question, which gives stability to the assessment contained in the foreign ruling, avoiding that the recognition obligation is circumvented by repeating the entire proceeding here. Furthermore, unless the decision has been issued in absentia, in the verification of the existence of the jurisdiction in question the judge of recognition or enforcement is bound by the assessments made by the judge chosen by the parties. An entirely acceptable norm limits recognition and execution to those decisions that are respectively productive of effects and executable in the state of origin. Hence the right of the judge ad quem to suspend or reject the request for recognition or enforcement if the "review" (appeal or review) of the decision is pending or has not yet expired the deadline for proposing the ordinary appeals[411].

It is not necessary, according to articles 8 and 9, that the referring court has established its jurisdiction on the basis of the Convention or that this is expressly stated in its decision. It is sufficient that the judge ad quem should consider the applicable convention and the decision covered by the agreement on jurisdiction, regardless of the title that the national court has placed at the base of its activity. The real reasons preventing recognition are listed in art. 9[412] and, once again, do not absolutely prevent the judge from recognizing or executing a foreign decision, but merely give him the right to refuse recognition[413]. Some reflect the exceptions seen in the previous paragraph, such as the case of the null agreement according to the law of the State of the elected judge[414], the manifest incompatibility with the public order, even the trial, and the lack of the parties' ability to conclude the agreement according to the right of the State of the judge requested of recognition[415]. Another hypothesis concerns the procedural fraud represented by the collusion of a party with the judge or by cases of serious abuse

[411]Article. 14, in a rather programmatic way, requires the judge to act quickly. As regards the execution of the foreign decision. The execution judge, although he is not obliged to import foreign instruments or institutes that do not find a similar one in his own system, must use all the internal institutes available in such a way as to give the maximum efficacy to the foreign decision.

[412]See, Article. 8 (4) expressly provides that any rejection of the application for recognition or enforcement does not have any preclusive effect on a subsequent application for recognition or enforcement of the same decision, once the circumstances change (for example, the decision becomes immutable in the state of origin).

[413]J. TALPIS, N. KRNJEVIC, The Hague Convention on choice of Court, op. cit., pp. 27ss, who, moreover, indicate that the proposal of some delegates in the Hague Conference to impose the obligation to refuse recognition to the decisions issued in disregard of the jurisdictional agreement was not then upheld by the judge at quem in the final text.

[414]Unless the referring court in its decision has affirmed the validity of the clause, art. 9(a). According to our opinion the guaranteed possibility of refusing recognition on the basis of the nullity of the clause is deemed useless since, rectius will always, explicitly or implicitly, evaluate the validity of the clause. If, however, you accept a different reading and that is that the decision of the first judge, as indicated in the clause, circulates independently of the title of jurisdiction from these place at the foundation of its business, you can understand why you can have interest in that the judge of recognition has the possibility to know the validity of the clause. The rule could therefore be summarized as meaning that it prohibits a re-examination of validity when the judge-elect has issued a decision considering himself competent by the choice of the forum (even if only implicitly) but allows it if that judge, without concern clause, decide the dispute by taking jurisdiction on the basis of other profiles.

[415]A. BUCHER, La Convention de La Haye, op. cit., pp. 48-49, strongly criticizes the renewal of the assessment of capacity at the stage of recognition and enforcement, hoping that the second judge will refer to the assessment made by the first judge. The author also indicates the danger that the capacity defect may be used "politically" to justify the non-recognition of an unfavorable decision where part of the dispute covered by the agreement on jurisdiction is precisely the State to which recognition is sought.

or dishonesty[416]. Furthermore, the recognition of a decision may be refused where defects have been notified of the initiation of the procedure or in the case of a decision between the same parties that conflicts with that of which the resolution is requested. In this regard, the regulations of the Convention distinguish according to whether the decision was issued in the requested State of recognition, in which case the existence of a conflict between decisions made between the same parties is sufficient, regardless of the temporal prevention criterion and the case petendi of their respective decisions. If, on the other hand, the sentence belongs to a different state, it is required that this satisfies four parameters, that is, it has been issued before, between the same parties, on the same controversy and is recognizable in the first state. A further possibility of refusal of the request for recognition arises if the referring court has pronounced, even only incidenter tantum, on a matter excluded from the scope of application of the Convention[417].

The assessment made by the referring court on the preliminary question, as is natural, is not intended to circulate in any way, relying on a matter excluded from the Convention itself. On the other hand, the portion of the decision that is placed in a relationship of prejudiciality-dependence with the definition of the preliminary question is subject to a weaker circulation regime, since the ad quem judge has the power to refuse recognition unless he is convinced which would have reached the same conclusion by applying its national law[418]; there remains an obligation to recognize the part of the decision which is not based on that preliminary question.

The subject of intellectual property rights, for the part that is extraneous to the scope of application of the Convention, knows a specific discipline in relation to "preliminary issues". The recognition of the decision on the matter can be refused only if in the State in which the authority entitled to know the validity of the intellectual property right is situated a dispute on that right is pending or on the point a decision incompatible with the decision has already been issued foreigner whom one wishes to acknowledge[419].

[416]This differs from the public prosecution that aims to protect values that can be summarized in the expression "just process" and more dependent on the structure of the process than by a devious behavior of the actors of the concrete story: fraud indicates, therefore, incorrect use of tools that would otherwise satisfy the principle of due process. It is explained that the inclusion of "procedural fraud" was motivated by the fact that for some countries it would not be possible in this case to apply the public order exception and also in some common law countries - United Kingdom and USA for all-this notion constitutes a tested and expressly mentioned category. According to some examples of procedural dishonesty: “Fraud is deliberate dishonesty or deliberate wrongdoing. Examples would be where the plaintiff deliberately serves the writ, or causes it to be served, on the wrong address; where the plaintiff deliberately gives the defendant wrong information as to the time and place of the hearing; or where either party seeks to corrupt a judge, juror or witness, or deliberately conceals key evidence”. See, P. BEAUMONT, M. DANOV, K. TRIMMINGS, Cross-border litigation in Europe, op. cit.,

[417]According to art. 10: “(1) Where a matter excluded under Article 2, paragraph 2, or under Article 21, arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention. (2) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under Article 2, paragraph 2”.

[418]It was necessary to use civil law categories and institutes typical of civil law. Thinking of the common law, A. BUCHER, La Haye Convention, op. cit., pp. 34-35, points out that the equity doctrine of the estoppel (which essentially prohibits a subject from denying what was affirmed by himself or by a judge) lacks the final distinction between the incidental question and the main question typical of civil law: this could be an obstacle to the operation of the law in question and again marks the difficulty of setting uniform rules that apply to heterogeneous systems.

[419]If the judgment on validity is only pending, the recognition and execution of the foreign decision can be suspended in order to await the outcome, art. 10 (3).

A compromise solution is dictated in the matter of a punitive damage award, where the strong perplexities traditionally expressed by the international community are taken into account and a discipline is sought to avoid that the decisions that award such huge reimbursements are systematically blocked by the exception of public order. To this end, art. 11 of the Convention provides that the recognition of a sentence which also attributes non-compensatory damages may be limited to the damage immediately suffered[420]. For the compensatory part of the compensation it remains the duty of the judge to quem to recognize and execute the decision. Furthermore, the judge must also take into consideration the fact that the "punitive" part is intended to cover the costs and legal expenses of the proceedings, recognizing this portion. It remains, of course, the objective difficulty of "discriminating" the various components of compensation, especially where the judge who issued the decision has not clearly identified them[421]. The parties have in any case the power to request partial recognition of the foreign decision, especially if only some of the provisions contained are recognizable according to the Convention[422]. Finally, art. 20, similar to what we saw above for art. 19, allows a Contracting State to declare that, if the dispute is wholly internal[423] to that State, its judges will have the power to refuse recognition of foreign decisions even if they were issued by the foreign judge indicated in the jurisdiction clause[424].

28. THE DECLARATION REGIME

A theme which is not without problems is the power conferred by the Convention on the States to make declarations in relation to certain matters, to which the effects set out in the Convention itself are followed[425]. The declarations provided for by art. 21 that allow a State to exclude from the scope of the Convention the matters in which it has a strong interest[426]. Certainly art. 21 is a precious standard that has allowed, during

[420]See, T.C. HARTLEY, The Hague choice of Court Convention, op. cit., pp. 415: “the question of punitive damages, a commonplace in the USA but generally rejected in Europe, almost destroyed the Convention (...)”. see also in argument: A.L. LOWENFEL, Thoughts about a multinational judgments Convention, op. cit., pp. 293ss. The norm was originally created by Von Mehren during the US/UK bilateral convention.

[421]According to the art. 17 (2) (b) of the Convention, the limitation relating to punitive damages does not apply to insurance or reinsurance contracts in which the coverage is extended to these types of damages.

[422]Art. 15. Consider a ruling ruling on the validity of a trademark and at the same time committing compensation on the basis of a contract: only the second part can circulate.

[423]Internal" in the sense and with reference to the location of the residence of the parties, the contractual relationship and all the other relevant elements in a single State.

[424]Even here it is a power and not an obligation. In fact, the scenario is rebalanced with the provisions of art. 1 (2) matching the category of decisions considered "international" at the time of the exercise of jurisdiction and that of "international" decisions for the purpose of recognition, with the limit, however, that the declaration pursuant to art. 20 does not allow the judge to refuse recognition of a decision based on the fact that a dispute is "internal" but to another State other than its own. See, J. TALPIS, N. KRNJEVIC, The Hague Convention on Choice of Court, op. cit., pp. 8, 32-33ss, they also question the "time" factor regarding the assessment of the existence of the connection with an "external" State. What is the relevant moment, that of the stipulation of the clause, or that of the proposition of the judicial request? Is it sufficient that the requirement exists at one of the two moments, or is it necessary that it be present in both?

[425]The latter is the only type of declaration provided with expansive force compared to the scope of the Convention. In all three cases just mentioned-and particularly for the articles 19 and 20-these are mechanisms whose effects are set out in detail in the text of the Convention. The negative impact, in terms of the functioning of the overall system, does not go beyond what has already been balanced at the time of drafting the text. Otherwise the discipline foreseen for the declarations that we will see soon allows a wide and dangerous freedom of action to the States.

[426]The mechanism provided for by the Hague Convention recalls that provided by the 1969 Vienna Convention on the Law of Treaties, which has not been expressly excluded and is therefore abstractly usable by the States. The latter system allows a State to limit the effectiveness of a treaty by adopting reserves at the time of ratification or by means of subsequent communications. On the other hand, the rules on declarations contained in the Hague Convention have the merit of guaranteeing the flexibility of the normative text, but limiting the

the elaboration of the text, not to excessively lengthen the list of exclusions provided for by art. 2, at the same time guaranteeing autonomy to each State in the identification of matters that it does not intend in any way to subtract from its own jurisdiction. This prevents a state from renouncing to accede to the Convention only to protect a specific sector. At the same time, however, the faculty granted to the States is suitable to reduce, even drastically, the scope of application of the conventional discipline, to undermine predictability for the parties operating in the already uncertain world of international relations and finally to discourage the international accession of other States to the Convention on the basis of an assessment of low "seriousness" by other contractors[427].

Awareness of this negative impact has led the editors of the Convention to take certain precautions. First of all, the same art. 21 prescribes that the reserve must be clearly and precisely defined and must not be wider than necessary. Furthermore, a system of transparency of the declarations is required, to which is added the deferment of the entry into force of the exclusions formulated after the ratification of the Convention for three months from the notification of the reserve. Finally, with greater deterrent effect, the principle of reciprocity of exclusion is prescribed: in the specified matters, the reserving State can do without respecting the derogation clauses of its jurisdiction but every other State, in the same matters, will be released from the obligation. to apply the Convention to any contractual indications in favor of the jurisdiction of the reserving State and to the consequent judicial decisions. The discipline outlined above is related to the "public policy" clause which allows, in specific cases, not to give effect to the jurisdiction agreement or not to recognize the sentence where there is an opposition to the public order of the State.

Between strong interest (article 21) and public policy (articles 6 and 9), there is not much difference. The use of one or the other instrument, which requires correctness (and comity) on the part of the States, depends on the amplitude and systematic nature of the exclusion. The public order clause should be destined to exceptional hypotheses in which an (unforeseeable) irreconcilability of the concrete case is realized with the values of the State to which recognition is requested. On the other hand, where this contrast is of a systemic nature since, for the interests involved, a State tends to protect a certain category of disputes, the road to be followed should be that of the declaration

object and the effects of the same provisions to the specific provisions of the regulations in question. See also: O. CORTEN, P. KLEIN, The Vienna Conventions on the law of treaties. A commentary, Oxford University Press, Oxford, 2011. O. DÖRR, Article 31. General rule of interpretation, in O. DÖRR, K. SCHMALENBACH (a cura di), Vienna Convention on the Law of Treaties. A commentary, ed. Springer, Heidelberg-New York 2012, pp. 536ss.M. SAMSO, High hopes, scant resources: A word of scepticism about the anti-fragmentation function of article 31(3)(c) of the Vienna Convention on the Law of Treaties, in Leiden Journal of International Law, 24, 2011, pp. 5ss. M. FITZMAURICE, O. ELIAS, P. MERKOURIS (eds), Treaty interpretation and the Vienna Convention on the Law of Treaties, 30 years on, ed. Martinus Nijhoff, The Hague, 2010, pp. 9ss. G. NOUTE, Treaties and subsequent practice, Oxford University Press, Oxford, 2013, pp. 224ss. E. BJORGE, The evolutionary interpretation of treaties, Oxford University Press, Oxford, 2014.

[427] W.J. WOODWARD, Saving the Hague choice of Court Convention, op. cit., pp. 667ss., according to the author, also stresses that the Convention is already difficult to implement uniformly in the United States in the face of legislation and jurisprudential practice that for the most part is state-level and leaves even the most experienced traders unimpressed. This could be a disincentive for other states, without the need to add "declarations" to them. In the same spirit also: F. JUENGER, A Hague judgments Convention?, op. cit., pp. 117ss. L.E. TEITZ, The Hague choice of Court Convention, op. cit., pp. 554ss, which states that: “states are paying a price for the decision to remove an area from the scope of the Convention (...)”.

pursuant to art. 21, which, although more expensive, ensures that reciprocity towards other States that someone has called "the bedrock for the entire Convention"[428].

Pending the ratification of the Convention by the States, it has been attempted to indicate what will be some of the probable or possible declarations pursuant to art. 21. In this regard, it is customary to mention Canada on issues related to the trade in amiantus, a material from which the country is still a producer and exporter[429]. The European Union could show an interest in extending the notion of consumer and excluding insurance contracts[430]. For the United States, the possibility exists to exclude franchise agreements and the so-called "mass-market cases"[431] (mainly due to the strong orientation of guidance between the individual states of the Union)[432]. China, according to a commentator, could reserve the exclusive jurisdiction of its courts in the case of joint ventures involving a Chinese party and in case the object of the dispute concerns port operations, succession or real estate[433]. Then there are those who predict a declaration by China, Russia and Australia to exclude from the scope of the Convention the entire field of intellectual property to exclude the application of more restrictive foreign disciplines[434].

[428]W.J. WOODWARD, Saving the Hague choice of Court Convention, op. cit., pp. 712. L.E. TEITZ, The Hague choice of Court Convention, op. cit., pp. 553, which is stated that: "(...9 article 21 does perhaps provide a more predictable and transparent use of public policy (...)". The difficulty to bring back in the scope of the declarations pursuant to art. 21 some categories of contracts in relation to the subjective qualities of the parties (eg consumer contracts), when the standard refers to the text in a "specific matter". It is worth noting, in conclusion, that the art. 10 (4) extends the discipline to the hypothesis in which the referring court has had to preliminarily define an issue that has been the subject of a declaration pursuant to art. 21 by the State to quo or the State ad quem: "Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded pursuant to a declaration made by the requested State under Article 21 (...)".

[429]L.E. TEITZ, The Hague choice of Court Convention, op. cit., pp. 554ss. A. BUCHER, La Convention de La Haye, op. cit., pp. 45ss. H.S. FAIRLEY, J. ARCIBALD, After the Hague: Some thoughts on the impact on canadian law of the Convention on Choice of Court Agreements, in ILSA Journal of International & Comparative Law, 12, 2005-2006, pp. 430ss. The introduction of the provision in question derives precisely from the initiative of the Canadian delegation aimed at avoiding the recognition of US decisions in matters of asbestos damage.

[430]L.E. TEITZ, The Hague choice of Court Convention, op. cit., pp. 554ss. A. BUCHER, La Convention de La Haye, op. cit., pp. 45ss.

[431]Excluding, of course, the insurance of the c.d. "Great risks", see also art. 14 of Reg. 44/2001. Article. 26 of the Regulation governs the relationship of the Hague Convention with other international regional instruments-in particular with the Brussels I system, according to what is called "clause de deconnexion". In argument see also: BORRAS, Le droit international privé communautaire: réalités, problèmes et perspectives d'avenir, in Recueil des Cours de l'Académie de droit international de La Haye, 317, 2005, pp. 490ss. A. BUCHER, La Convention de La Haye, op. cit., pp. 54ss.

[432]W.J. WOODWARD, Saving the Hague Choice of Court Convention, op. cit., pp. 687ss, which the author describes how those contracts related to the mass distribution of goods and services, regardless of the destination given by the purchaser: in many of these cases-often concluded through forms or forms-a serious violation of the "american public policy (...) "when the choice of the hole was denied to buyers the possibility of resorting to the "class action", especially where they were" small claims "that represented a small individual loss for the buyer but a substantial overall gain for the seller.

[433]H. GUANGHIAN, The Hague choice of Court Convention-A chinese perspective, in American Journal of Comparative Law, 55, 2007, pp. 353 ss. The last two exclusions seem already included in the art. 2 (2) of the Convention, lett. (of the). The author as a result of its analysis, hopes for the chinese ratification.

[434]Extending l'art. 2(2)(n) e (o). See also: A. BUCHER, La Convention de La Haye, op. cit., pp. 34ss.

29. CONCLUDING REMARKS

If the attention of the observer is addressed to the many exclusions and exceptions provided for by the conventional document, more than one perplexity may be raised about the real potential of the Convention and the possibilities of its success[435].

The shadows are not lacking, starting from the statements pursuant to art. 21 and from the exceptions of public order, as well as from the prospects of re-examination in the recognition of the decision made by the contractual forum. It also weighs, even if it was unrealistic to imagine a possible agreement, the lack of rules on the subject of liturgy and precautionary measures (especially thinking of the British injections). At the same time, however, the editors' intuition to concentrate their commitment, and thus the object of the Convention, to the clauses on jurisdiction should be appreciated, thus making it possible to positively conclude the long negotiations in the Hague with an instrument that has all the features to be useful for international trade operators[436].

The Convention intervenes on the delicate moment of the exercise of jurisdiction in order to avoid the flowering of parallel judgments which are the fruit of forum shopping and which constitutes one of the main obstacles to the spending on foreign land of the judge obtained in the chosen forum. The text is less vague and compromising than it might seem and, moreover, "it makes litigation a more viable alternative to arbitration because it enforces the enforcement of forum clauses just like the New York Convention guarantees the enforcement of arbitration clauses" and also this is undoubtedly an important result that should not be underestimated[437]. Certainly, the fate of the system depends largely on the number and weight of the accessions that it will find internationally. At the moment there is no "race" to enter the system, but the signing of two great protagonists of the world scene like the United States and the European Union seems to be of a good luck.

According to our opinion the enforcement of jurisdiction agreements by private law remedies within a multilateral system will necessarily distort the allocative or distributive function of private international law rules by giving precedence to the redistributive will of the parties premised on principles of corrective justice inter partes of questionable applicability. International structural order is compromised in the unilateral private law enforcement of jurisdiction and choice of law agreements as such enforcement gives rise to a clash of sovereign legal orders and also the possibility of "regime collision" by interfering with the jurisdiction, judgments and choice of law apparatus of foreign courts which a multilateral conception of private international law is

[435]J. TALPIS, N. KRNJEVIC, The Hague Convention on Choice of Court, op. cit., 33ss, which is stated that: "(...) the end result is that there is too much room for domestic policies and domestic law which limit the Convention's ability to attain its objective of uniformity of treatment (...) the end product is simply not an instrument that will create transnational law. Furthermore, permitting frequent recourse to conflict of laws rules (...) is simply too long and complex for the narrow subject of choice of court agreements (...)".

[436]A. SCHULZ, The 2005 Hague Convention, op. cit., pp. 269ss, which is stated that: "(...) what initially seemed to be a small step as compared to the more ambitious general Convention, may soon become a major milestone of international civil procedure (...)". A. BUCGER, La Convention de La Haye, op. cit., pp. 62ss. MA ADLER, ZARYCHTA, The Hague Convention on Choice of Court Agreements: The United States joins the enforcement band, in Nortwestern Jounral of International Law & Business, 27, 2006-2007, pp. 2ss, read the Convention as "a great leap forward for the protected few", and in another sense, "an admission of failure for a larger international initiative".

[437]L.E. TEITZ, The Hague Choice of Court Convention, op. cit., pp. 556ss, which is also states that the Convention: "addresses a real need and helps facilitating global transactions (...) it can be understood as a contract drafting tool" for the international commerce.

supposed to prevent in the first place. However, has argued that outside the confines of the EU private international law regime, the variable geometry that is characteristic of the international civil and commercial litigation sphere may not impede the separation of functions within such agreements. Whether an English court ought to grant a private law remedy enforcing such agreements is of course another matter. in light of the emergence of a new paradigm for party autonomy, the linguistic distinction between the phrases private international law agreements/non agreements and private international law rules by agreement/non agreement may better orient and prepare us for the challenges that lies ahead in the paradigmatic shift. Private international law agreements may be said to operate within the substantive law paradigm whereas the private international law rules by agreement may be considered to operate within the internationalist paradigm. Pacta sunt servanda may be an appropriate term to describe the enforceability national private law rights arising from jurisdiction and choice of law agreements. However, it is submitted that these clauses are primarily concerned with the multilateral or international allocative relationship between the courts (prorogation and derogation function)[438]. As a result, both the principles of pacta sunt servanda and the freedom of contract may be justified by the substantive law paradigm of party autonomy but the employment of such terminology and their ramifications in terms of primary and secondary remedies for breach of jurisdiction and choice of law agreements may damage the reputation of the internationalist paradigm of party autonomy and private international law what counts as a "contract" is a matter of perspective or legal culture and it would be unfair to classify the operation of a procedural contract as a formal waiver of jurisdictional privilege which does not depend upon the existence of a private contract. If consent or agreement rather than the mutual exchange of promises is considered to be the theoretical basis of a contract then there is no reason to deny a procedural contract the status of a contract. The use of the word agreement, the provision for the technique of severability and the utilization of the applicable law to assess the material validity indicate that Article 25 of the Recast Regulation is concerned with a contract but one that only gives rise to procedural consequences A weaker conception of comity and the role of public international law imperatives is characteristic of the English substantive law paradigm which focusses on the vertical relationship between the court and the parties. As a result, the notion of comity is nearly irrelevant in the private law enforcement of choice of court agreements. The use of a system transcendent notion such as freedom of contract or pacta sunt servanda to justify the private law enforcement of choice of court agreements because such a concept still cannot justify the unilateral nature of the English court's interpretation of the rights of the parties and their enforcement without regard to the rights of other states. the jurisdictional and choice of law rules under the Brussels I Regulation and the Rome II Regulation will be a substantial impediment and they may preclude the claim because of the localization of the damage in the forum where the abusive proceedings or the inducement of the breach of contract took place. Significantly, the principles of mutual trust and

[438]A. MILLS, The confluence of public and private international law: Justice, pluralism and subsidiarity in the international constitutional ordering of private law, Cambridge University Press, Cambridge, 2009, pp. 78ss, according to the author: "(...) the principle of pacta sunt servanda cannot coexist with a view that rules of conflict of laws are rules of a public law character (...)". J. BASEDOW, The law of open societies: Private ordering and public regulation in the conflict of laws, ed. Brill/Nijhoff, Leiden, 2015, pp. 135-136, 145-146, notes that the binding effect of choice of law agreements flows from the universal legal principle of pacta sunt servanda. G. BLACK, Woolman on contract, W Green, Edinburgh, 2010, pp. 5-6.

the effectiveness of EU law (effet utile) may render the claim for tortious damages incompatible with the european private international law regime. Doubts have been expressed about both the existence of a substantive equitable right not to be sued abroad vexatiously and whether this right is capable of supporting a claim of equitable damages. Even though the contemporary trend is to apply choice of law principles to equitable obligations, it has been argued that if non contractual anti-suit injunctions are classified as procedural matters then the choice of law problem does not arise in the first place[439]. The choice of law consequences of a procedural classification of an anti-suit injunction to a claim for equitable damages. The procedural classification has the knock on effect of truncating the substantive right and not extending it to a claim for damages in equity. Thus, it is at best doubtful, whether the non-contractual avenues explored in this thesis will yield the required result and be more than a dead end. in every conceivable situation damages cannot be claimed in the European Judicial Area. *Starlight Shipping Co v. Allianz Marine & Aviation Versicherungs AG and others*[440] is a decision to the contrary but it is submitted that it is a controversial authority which has not reconciled the countervailing demands of the principle of mutual trust and the effet utile of EU law adequately. This was arguably a case where a reference to the CJEU on the matter should have been sent. It is highly unlikely that the CJEU will adjudicate that the private law remedy is compatible with the principles of mutual trust and the effectiveness of EU law (effet utile). Indeed, it may be viewed as yet another attempt to reassert the role of the common law of conflict of laws and to bypass the operation of the uniform codified rules of the Brussels I Regulation. The damages remedy post *Starlight Shipping Co v. Allianz Marine & Aviation Versicherungs AG*[441] has been bequeathed a new lease of life under the Recast Regulation, at least until the issue is finally determined and laid to rest by the CJEU on a preliminary reference from the English courts or from the courts of another Member State in cases where the judgment creditor is seeking to rely on an English judgment awarding the controversial remedy. In this interim phase, it is arguable that the damages remedy may be applied to plug the lacunas in the legal regulation of choice of court agreements by the English courts. the decisions in *Ace Insurance v. Moose Enterprise Pty Ltd*[442] and *Navig8 Pte Ltd v. Al-Riyadh Co for Vegetable Oil Industry (the Lucky Lady)*[443] support the conventional declaratory function of choice of law agreements. It is submitted that the enforcement of choice of law agreements by the damages remedy within the EU will compromise the mutual trust principle and the effet utile of EU law in relation to the European choice of law regulations (Rome I and II Regulations) and also question the assumption of jurisdiction by the court seised and the eventual judgment rendered by that court under the Brussels I Regulation[444].

[439]D. LIAKOPOULOS, C. HEINZE, Choice of Court agreements, coordination of proceedings and provisional measures in the reform of the Brussels I Regulation, op. cit.
[440]Starlight Shipping Co v. Allianz Marine & Aviation Versicherungs AG and others [2014] EWHC 3068 (Comm) of 20 December 2012.
[441]Starlight Shipping Co v. Allianz Marine & Aviation Versicherungs AG [2014] EWHC (Comm) 3068 of 26 September 2014.
[442]Ace Insurance v. Moose Enterprise Pty Ltd [2009] NSNSC 724 of 31 July 2009.
[443]Navig8 Pte Ltd v. Al-Riyadh Co for Vegetable Oil Industry (The Lucky Lady)-QBD (CommCt) (Andrew Smith J) [2013] EWHC 328 (Comm) of 22 February 2013.
[444]D. LIAKOPOULOS, C. HEINZE, Choice of Court agreements, coordination of proceedings and provisional measures in the reform of the Brussels I Regulation, op. cit.

ALGUNAS REFLEXIONES SOBRE LOS PROCESOS DE FAMILIAS EN PERSPECTIVA DE GÉNEROS EN ARGENTINA

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RESUMEN

El Código Civil y Comercial de la Nación comprende dentro de su normativa una serie de principios procesales que poseen como criterio hermenéutico de interpretación el principio de igualdad en el abordaje de los diversos conflictos y procesos de familias. Se materializan así nuevos cauces en dichos procesos que visibilizan un renovado Derecho procesal, cuya axiología encarna el principio de convencionalidad. A partir de ello se proyectan desfraccionamientos de la justicia que comprende una mirada convencional y humanista del proceso de familia, requiéndose de manera ineludible poner en acto la perspectiva de géneros como marco teórico obligatorio.

Por ello, dentro de este análisis se abordarán diferentes ejemplos para ilustrar la realidad y los desafíos de los procesos de familias en perspectiva de géneros, visibilizándose la constante desigualdad estructural y la necesidad de penetrar en las subalernidades ocultas en las familias. El proceso constituye un marco propicio y necesario para sacarlas a la luz, y tomar decisiones que avancen en el camino de la igualdad.

Palabras Clave: PROCESO DE FAMILIA. PERSPECTIVA DE GÉNERO

SOME REFLECTIONS ON FAMILY PROCESSES FROM A GENDER PERSPECTIVE IN ARGENTINA

ABSTRACT

The Civil and Commercial Code of the Nation includes within its regulations a series of procedural principles that have as a hermeneutic criterion of interpretation the principle of equality in the approach to the various conflicts and family processes. Thus, new channels materialize in these processes that make visible a renewed procedural Law, whose axiology embodies the principle of conventionality. From this, defractionations of justice are projected that include a conventional and humanistic view of the family process, requiring in an unavoidable way to put into action the gender perspective as a mandatory theoretical framework.

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Therefore, within this analysis, different examples will be addressed to illustrate the reality and challenges of family processes from a gender perspective, making visible the constant structural inequality and the need to penetrate the hidden subalternities in families. The process constitutes a propitious and necessary framework to bring them to light, and make decisions that advance on the path of equality.

Keywords: FAMILY PROCESS. GENDER PERSPECTIVE

PALABRAS INTRODUCTORIAS

El Código Civil y Comercial de la Nación[3] comprende dentro de su normativa una serie de principios procesales que poseen como criterio hermenéutico de interpretación el principio de igualdad en el abordaje de los diversos conflictos y procesos de familias. De modo tal que se materializan nuevos cauces en dichos procesos que visibilizan un nuevo Derecho procesal, cuya axiología encarna el principio de convencionalidad. A partir de ello se proyectan desfraccionamientos de la justicia[4], que se concretan en la sistematización de determinados principios aplicables a todos los procesos de familia[5], comprendiéndose desde la accesibilidad y tutela efectiva, la valoración y ponderación de la prueba[6], hasta la adjudicación de potencia o impotencia mediante la tarea de aplicación y sintesis de la norma.

El artículo 710 del CCyCN establece respecto de los principios relativos a la prueba, que "Los procesos de familia se rigen por los principios de libertad, amplitud y flexibilidad de la prueba. La carga de la prueba recae, finalmente, en quien está en mejores condiciones de probar". Se advierte que la actividad judicial cobra un protagonismo diferente conteste con la Constitucionalización del Derecho Privado, morigerándose las reglas del principio dispositivo, con la pretensión de que el juez pueda alcanzar la verdad real. Se consagra así el principio de las cargas probatorias dinámicas, en virtud de lo cual el deber de probar ya no reside en quien invoca un hecho determinado, sino en cualquiera de las partes que se encuentre en mejores condiciones de acreditar la circunstancia controvertida[7]. De esta manera se desplaza el esfuerzo probatorio hacia la parte más fuerte en la relación procesal (en la actividad probatoria), basándose en el principio de solidaridad y colaboración de las partes, no sólo en relación al órgano, sino fundamentalmente para la consecución de la verdad objetiva[8]

Conteste con este hilo conductual, uno de los principios que subyace hoy en el nuevo Derecho procesal de familia implica que se deben flexibilizar los criterios ante la

[3] En adelante CCyCN
[4] GOLDSCHMIDT, Werner. *Introducción Filosófica al Derecho*. Sexta edición. Quinta reimpresión. Buenos Aires; Depalama, 1987.
[5] FAMÁ, María Victoria. Alcances del principio de oficiosidad en los procesos de familia. *Derecho de Familia. Revista interdisciplinaria de doctrina y jurisprudencia,* Abeledo Perrot, Nro. 69, 2015, AR/DOC/4818/2015. p. 151.
[6] MORELLO, Augusto. Hacia una visión solidarista del proceso, *ED,* 132-953; ARIANNA, Carlos - GROSMAN, Cecilia. Los efectos de la negativa a someterse a los exámenes biológicos en los juicios de filiación paterna extramatrimonial, *LL* 1992-B-1196
[7] GONZÁLEZ DE VICEL, Mariela. Comentarios del artículo 710, en HERRERA, Marisa - CARAMELO, Gustavo – PICASSO, Sebastián. *Código civil y comercial de la Nación comentado*, T. II, 1a ed., Buenos Aires: Infojus, 2015. p. 573 y ss.
[8] GONZÁLEZ DE VICEL, Mariela. Comentarios del artículo 710, en HERRERA, Marisa - CARAMELO, Gustavo – PICASSO, Sebastián. *Código civil y comercial de la Nación comentado*, T. II, 1a ed., Buenos Aires: Infojus, 2015. p. 574.

dicotomía entre la verdad formal y material, renovándose así la confianza en el proceso judicial. Indica Famá que

> "esta necesaria transformación del proceso de familia conlleva la humanización de las formas y principios procesales tradicionales que responden al sistema adversarial o litigioso... Uno de los principios más arraigado en el viejo orden procesal que es puesto en crisis en aras de esta humanización es el principio dispositivo, o, mejor dicho, el aprovechamiento de la aplicación estricta de este principio por parte de los litigantes, dando lugar a situaciones abusivas que entorpecen el proceso, potencian la hostilidad entre las partes e inciden negativamente en la búsqueda de la ´verdad´ para la solución justa del caso"[9].

Esta mirada convencional y humanista del proceso de familia, requiere ineludiblemente poner en acto la perspectiva de géneros, como los marcos teóricos que implican

> "i) reconocer las relaciones de poder que se dan entre los géneros, en general favorables a los varones como grupo social y discriminatorias para las mujeres; ii) que estas relaciones han sido constituidas social e históricamente y son constitutivas de las personas, y iii) que ellas atraviesan todo el entramado social y se articulan con otras relaciones sociales, como las de clase, etnia, edad, preferencia sexual y religión"[10].

Las líneas que siguen pretenden efectuar una sintética revisión de algunos de las principales expresiones de este fenómeno.

1. EL ACCESO A LA JUSTICIA Y EL PROCESO DE FAMILIAS EN PERSPECTIVA DE GÉNERO

Como hemos observado, el CCyCN comprende principios y reglas procesales de un derecho de familias en clave convencional y constitucional, cuyo eje de protección es la persona humana y fundamentalmente la persona en contextos de vulnerabilidad. Por ello, el art. 706 del CCyCN toma un rol protagónico en esta protección especial a través de la enunciación de los principios rectores en el proceso de familia y respecto de la labor del Juez como operador clave para la materialización real de la tutela judicial efectiva.

Dentro de este quehacer de la labor judicial, se torna vital aplicar la perspectiva de género, exigiendo un permanente análisis y revisión de las valoraciones y creencias a fin de detectar cuándo inciden en las decisiones los estereotipos que impensadamente están incorporados en el acervo personal y colectivo[11]. En el contexto de las normas procesales, el Código Procesal del Fuero de Familia de Río Negro por ejemplo, explicita la perspectiva de género entre sus principios, destacando Rotonda que "ciertamente, resulta un factor relevante la expresión en tanto, a partir de ello, se visibiliza la

[9] FAMÁ, María Victoria. Alcances del principio de oficiosidad en los procesos de familia. *Derecho de Familia. Revista interdisciplinaria de doctrina y jurisprudencia,* Abeledo Perrot, Nro. 69, 2015, AR/DOC/4818/2015. p. 154.

[10] GAMBA, S. (coord.) (2007), Diccionario de estudios de género y feminismos, Buenos Aires, Biblos, como se cita en RODRÍGUEZ ENRÍQUEZ, Corina. La cuestión del cuidado: ¿El eslabón perdido del análisis económico? *Revista CEPAL* N° 106, abril 2012, p. 24. https://www.cepal.org/es/publicaciones/37365-revista-cepal-no106

[11] ROTONDA, Adriana. Comentarios al Capítulo 1 del Título VIII Procesos de Familia, en HERRERA, Marisa y DE LA TORRE, Natalia, *Código Civil y Comercial de la Nación y Leyes especiales. Comentado y anotado con perspectiva de género,* Buenos Aires: Editores del Sur. p. 556

necesidad de su ejercicio en la labor y se genera la toma de conciencia a su respecto"[12]. Por ello como apunta el Protocolo para juzgar con perspectiva de género de la Suprema Corte de México

> "tomar conciencia de que los estereotipos de género perjudiciales existen es una medida necesaria para su eliminación; de lo contrario, operan sin ser detectados, lo cual permite que sean fácilmente reafirmados por el statu quo (Cook y Csack, 2010, p.43). En el ámbito jurídico, lo que se requiere es, en esencia, desarrollar la capacidad para advertir cuándo una ley, política o práctica aplica, impone o perpetúa un estereotipo de género. El proceso de identificar y poner al descubierto este tipo de estereotipos ayuda a comprender cómo están integrados en las estructuras y significaciones sociales, además de favorecer la toma de conciencia sobre sus efectos nocivos y, con ello, aumentar la presión para que se modifiquen los patrones socioculturales de conducta (Cook y Cusack, 2010, p.62)"[13].

Como explica De los Santos, la tutela judicial efectiva comprende, entre otros aspectos, el acceso a la justicia[14]. Tal como expresan las Reglas de Brasilia sobre Acceso a la Justicia de las Personas en condición de Vulnerabilidad, "Se impulsarán las medidas necesarias para eliminar la discriminación contra la mujer en el acceso al sistema de justicia para la tutela de sus derechos e intereses legítimos, logrando la igualdad efectiva de condiciones". A efectos de ilustrar la necesidad de poner en acto estos preceptos, hemos seleccionado para el análisis dos supuestos que involucran a convivientes que acuden a la justicia a solicitar compensación económica[15]. Más allá de que la propia figura comporta una medida que entre sus funciones procura corregir los desequilibrios propios de una estructura patriarcal de distribución de roles familiares, el acceso a la justicia para solicitarla debe leerse en clave de género, de modo de acudir a remover aquellos obstáculos que las mujeres tienen al momento de reclamar tales prestaciones. La garantía de acceso a la justicia para hacer efectiva la compensación económica, ha tenido desarrollo jurisprudencial cuando se planteó el tema de la caducidad prevista

[12] ROTONDA, Adriana. Comentarios al Capítulo 1 del Título VIII Procesos de Familia, en HERRERA, Marisa y DE LA TORRE, Natalia, *Código Civil y Comercial de la Nación y Leyes especiales. Comentado y anotado con perspectiva de género,* Buenos Aires: Editores del Sur. p. 555,

[13] Disponible en: https://www.scjn.gob.mx/derechos-humanos/sites/default/files/protocolos/archivos/2020-11/Protocolo%20para%20juzgar%20con%20perspectiva%20de%20género%28191120%29.pdf., citado por ROTONDA, Adriana. Comentarios al Capítulo 1 del Título VIII Procesos de Familia, en HERRERA, Marisa y DE LA TORRE, Natalia, *Código Civil y Comercial de la Nación y Leyes especiales. Comentado y anotado con perspectiva de género,* Buenos Aires: Editores del Sur. p.555

[14] DE LOS SANTOS, Mabel A. Los procesos de familia en el Proyecto de Código Civil y Comercial. *Revista Derecho Privado,* Año II, N° 6. Ediciones Infojus, 2013. p. 17.

[15] ARTICULO 524.- Compensación económica. Cesada la convivencia, el conviviente que sufre un desequilibrio manifiesto que signifique un empeoramiento de su situación económica con causa adecuada en la convivencia y su ruptura, tiene derecho a una compensación. Esta puede consistir en una prestación única o en una renta por un tiempo determinado que no puede ser mayor a la duración de la unión convivencial.

Puede pagarse con dinero, con el usufructo de determinados bienes o de cualquier otro modo que acuerden las partes o en su defecto decida el juez.

ARTICULO 525.- Fijación judicial de la compensación económica. Caducidad. El juez determina la procedencia y el monto de la compensación económica sobre la base de diversas circunstancias, entre otras:

a) el estado patrimonial de cada uno de los convivientes al inicio y a la finalización de la unión;

b) la dedicación que cada conviviente brindó a la familia y a la crianza y educación de los hijos y la que debe prestar con posterioridad al cese;

c) la edad y el estado de salud de los convivientes y de los hijos;

d) la capacitación laboral y la posibilidad de acceder a un empleo del conviviente que solicita la compensación económica;

e) la colaboración prestada a las actividades mercantiles, industriales o profesionales del otro conviviente;

f) la atribución de la vivienda familiar.

La acción para reclamar la compensación económica caduca a los seis meses de haberse producido cualquiera de las causas de finalización de la convivencia enumeradas en el artículo 523.

en el artículo 525 del Código Civil y Comercial[16]. En particular, el decisorio referido como ejemplo, parte de una situación fáctica en la que mediaron situaciones de violencia contra la mujer que determinaron el retiro del hogar y el cese de la convivencia, y donde la solicitud de la compensación económica acaeció ya extinto el plazo de caducidad establecido legalmente. La sentencia neuquina entendió que las disposiciones del CCyCN en materia de caducidad deben interpretarse en un diálogo de fuentes, que no puede desprenderse de las directivas dadas en las Reglas de Brasilia sobre Acceso a la Justicia de las Personas en Condición de Vulnerabilidad y con la Convención sobre la eliminación de todas las formas de discriminación contra la mujer y, en especial, con la Convención interamericana para prevenir, sancionar y erradicar la violencia contra la mujer. En función de ello resolvió que

> "En este caso, si bien la actora se presentó en el expediente sobre violencia familiar con el patrocinio letrado de la Defensora Pública, se observa que tal intervención se limitó al marco de la denuncia allí efectuada, a peticionar ante la apremiante necesidad económica de obtener un ingreso para su hija y a recuperar sus efectos personales (hojas 17 y 34). Ello, también da cuenta de la situación que atravesaba y de su aludido estado de vulnerabilidad. En consecuencia, haciendo una interpretación armónica de la normativa protectoria referida y el régimen aplicable a las compensaciones económicas por finalización de la convivencia, corresponde hacer lugar al recurso de apelación deducido por la actora, en tanto, en el caso y frente a las circunstancias que rodearon la separación, la interpretación efectuada en la instancia de origen, conduce a un resultado que se desentiende de la protección a una mujer en situación de violencia, con separación de los postulados protectorios supralegales".

En suma, conforme estima Pellegrini, "El nudo de la cuestión sería: dado que en las uniones convivenciales el inicio del cómputo del plazo de caducidad "tiene la instantaneidad de lo fáctico" del cese, ¿debe considerarse si se produce en un contexto de violencia de género? El art. 525, ap. 3º, del Cód. Civ. y Com. no lo establece. Sin embargo, ¿existen razones jurídicas que obliguen a tener en cuenta dicho contexto? Ambas preguntas tienen una única respuesta: sí"[17].

Frente a casos como el referido, la pregunta que se ha hecho a doctrina es si dicho estado impeditivo para accionar debe durar todo el plazo de caducidad. La situación de violencia de género puede postergar el inicio del cómputo del plazo de caducidad, pero no resulta justificada la exigencia de la perdurabilidad de las condiciones de vulnerabilidad reconocidas en la actora durante todo el plazo de caducidad de la acción[18].

Otro supuesto que pone en acto la necesidad de apreciar en perspectiva de géneros el acceso a la justicia de la conviviente para reclamar derechos económicos, está dado por habilitar la posibilidad de que inicie el proceso sucesorio a efectos de

[16] Camara de Apel. en lo Civil, Comercial, Laboral y de Mineria. Neuquen, Neuquén, autos M. F. C. c/ C. J. L. s/ compensación económica, 06/07/2018, http://www.saij.gob.ar/camara-apel-civil-comercial-laboral-mineria-local-neuquen---compensacion-economica-fa18070001-2018-07-06/123456789-100-0708-1ots-eupmocsol-laf?utm_source=newsletter-semanal&utm_medium=email&utm_term=semanal&utm_campaign=jurisprudencia-provincial

[17] PELLEGRINI, María Victoria. Compensación económica: caducidad, violencia y perspectiva de género. *TR LA LEY* AR/DOC/3301/2020, p.6.

[18] PELLEGRINI, María Victoria. Compensación económica: caducidad, violencia y perspectiva de género. *TR LA LEY* AR/DOC/3301/2020.

peticionarlos en su marco. Convencidas de que en tales casos opera el fuero de atracción sucecosio, cabe reconocerle legitimación para iniciarlo en calidad de acreedora de la compensación económica así como de las prestaciones que pudieron haberse fijado en un pacto de convivencia[19]. Cuando el cese de la convivencia tiene por causa la muerte, nos presenta una particularidad: aquello que no fue un conflicto en vida de los convivientes, puede devenir en uno cuando la muerte determina el fin de la relación de pareja pero el inicio de otros vínculos que forzada y transitoriamente deberán forjarse para dar lugar a la satisfacción patrimonial pretendida[20]. El escenario de desarrollo de los mismos será el proceso sucesorio, y abrir paso a que la conviviente dirima allí sus pretensiones parte de considerarla acreedora del causante, legitimada entonces para iniciar el proceso sucesorio, esto es, garantizarle el acceso efectivo a la justicia para hacer valer sus derechos[21].

2. LA PONDERACIÓN DE LA PRUEBA CON PERSPECTIVA DE GÉNERO. EL ENFOQUE DINÁMICO DE LA JUSTICIA[22]

Desde la construcción integrativista trialista partimos de la idea de que "… lo justo no es necesariamente universal ni eterno, sino que ha de establecerse respecto de cada situación. Un reaseguro metodológico ante la crisis de las reglas generales de justicia es la atención a la justicia del caso concreto, es decir la equidad"[23]. No podemos considerar a la justicia desde una perspectiva estática, sino que su comprensión exige interpretarla desde la dinámica que visibiliza su complejidad, ya que "por ser un valor, la justicia exige que el "ser" en sentido estricto llegue a satisfacer el "deber ser". Tiene en consecuencia un sentido dinámico, que en su caso se acentúa porque no es (como la belleza, por ejemplo), un valor "de resultado", sino un valor que incluye también su desenvolvimiento"[24]. De allí que, para la comprensión dinámica de la justicia, se deben contemplar la **justicia de partida, de trámite y de llegada**[25]. Por ello, como resalta Kaufman es necesario

> "poner en jaque a la justicia tal y como es concebida, reclamando una capaz de transformar los símbolos y normas que dan lugar y perpetúan las relaciones injustas de poder, los dogmas patriarcales y androcentristas y las inequidades tanto simbólicas como materiales… Propedéuticamente, la justicia de género ha de ser la meta y el proceso mediante el cual se logrará poner fin a

[19] ARTICULO 514.- Contenido del pacto de convivencia. Los pactos de convivencia pueden regular, entre otras cuestiones:
a) la contribución a las cargas del hogar durante la vida en común;
b) la atribución del hogar común, en caso de ruptura;
c) la división de los bienes obtenidos por el esfuerzo común, en caso de ruptura de la convivencia.

[20] SCHIRO, María Victoria. Implicancias patrimoniales del cese de las uniones convivenciales por causa de muerte. en *Cuestiones patrimoniales en el derecho de familia* / María Mercedes Brandone ... [et al.]; coordinación general de Yamila Cagliero - 1a ed.- Ciudad Autónoma de Buenos Aires: La Ley, 2019. p. 121.

[21] Puede verse: "T., A. B. C/ M., S. M. y otro/a s/ materia a categorizar". Juzgado de familia Nº 5 - La Matanza

[22] Para el desarrollo de estas ideas se a tomado como hilo conductor el marco teórico desarrollado por ROTONDA, Adriana. Comentarios al Capítulo 1 del Título VIII Procesos de Familia, en HERRERA, Marisa y DE LA TORRE, Natalia, *Código Civil y Comercial de la Nación y Leyes especiales. Comentado y anotado con perspectiva de género,* Buenos Aires: Editores del Sur. p. 634

[23] CIURO CALDANI, Miguel Ángel. *Metodología Dikelógica,* 2da. Edición, Rosario: Fundación para las Investigaciones Jurídicas, 2007. p. 80.

[24] CIURO CALDANI, Miguel Ángel. Hacia una comprensión dinámica de la justicia (justicia y progreso), *ED* 123 – 715 y ss.

[25] CIURO CALDANI, Miguel Ángel. Hacia una comprensión dinámica de la justicia (justicia y progreso), *ED* 123 p. 715.

> las desigualdades sociales basadas en el sexo a partir de una respuesta apoyada en la transversalización (mainstreaming)"[26]

Entonces,

> "lo justo ha de descubrirse reconociendo cómo debe resolverse el caso según su realidad actual (en su situación de partida) y cuál ha de ser el resultado de la solución con miras a un mundo mejor (en su situación de llegada). A estas perspectivas dinámicas por la referencia cabe agregar la perspectiva de la justicia de trámite, en la que la dinámica esta en la manera de establecerse lo que se ha de hacer"[27].

Transitamos categorías de tiempo y espacio donde se generan tensiones y desafíos entre lo visible e invisible que recepta el mundo jurídico, requiriéndose penetrar en los contornos solapados para adjudicarles visibilidad. Por ello, urge contemplar la complementariedad que existe entre los enfoques sincrónicos y diacrónicos de la justicia, visibilizándose la ponderación existente sobre la perspectiva diacrónica que comprende la partida, el trámite y la llegada de la justicia[28]. Desde este marco conceptual consideramos relevante destacar la tarea de interpretación realizada en la decisión judicial proyectada en los autos caratulados "G.I., G.F.c/S.A. y otros s/ ordinario", en Esquel el 6 de septiembre de 2022, en relación a la valoración de la prueba testimonial jerarquizándose las declaraciones testimoniales de la progenitora de la actora, de la actora, así como de las otras mujeres que indican la posibilidad de distinguir a los gemelos, al señalarse en la sentencia que

> "Prioridad, porque es el modo en que debe operar el derecho procesal en su faz probatoria para la efectivización de los derechos sustanciales con la mirada puesta en los derechos de las mujeres involucradas en esta historia por conformar una categoría sospechosa. Con esto quiero decir, que también se imprime la mirada de género en la apreciación de esta prueba dado su carácter estructural y transversal en todos los ámbitos y relaciones interpersonales. Las declarantes fueron y son parte de estas últimas. Deviene ineludible "verlas" lo cual implica en este punto atender sus relatos después de 40 años y ajustarlos a los enunciados puestos a comprobar libres de todo enlace enraizado en relaciones de poder, micromachismos y preconceptos basados en patrones socioculturales que se encontraban hasta acá naturalizados, silenciados y casi imperceptibles…".

Como indica Scaglia la valoración de la prueba con perspectiva de género es clave para dar una respuesta integral ante la vulneración de derechos, comprendiéndose entonces, además de la justicia de llegada, la de trámite y partida. En tal sentido la autora expresa que

> "La prueba es lo crucial del proceso, más si pensamos al proceso como un derivado de una ciencia de la indagación, como la historia. La valoración de la prueba se inicia desde el momento mismo de la alegación de los hechos, independientemente del sistema vigente, ya sea el de la prueba legal o el de

[26] KAUFMAN, Gabriela. El acceso a la justicia en clave de género. *La Ley* 11/06/2021, 1. Cita: TR LALEY AR/DOC/1646/2021
[27] CIURO CALDANI, Miguel Ángel. Hacia una comprensión dinámica de la justicia (justicia y progreso), *ED* 123, p. 716
[28] CIURO CALDANI, Miguel Ángel. Hacia una comprensión dinámica de la justicia (justicia y progreso), *ED* 123. p. 716 y 721.

> la sana crítica, y será siempre posible para el juez fallar conforme la convicción que el conjunto del proceso haya generado en él… La incorporación de la perspectiva de género al mundo jurídico implica la posibilidad de efectuar un análisis crítico e integral del fenómeno que comprende el análisis de la discriminación y sus efectos en la vida en sociedad. No sólo se trata de interpretar y aplicar leyes, convenciones y tratados internacionales de derechos humanos, y de valorar las circunstancias fácticas de cada caso, se necesita, en mayor medida, de la interpelación de todos los operadores jurídicos acerca de las valoraciones que hacemos en todo el iter del proceso judicial. Para ello será necesario la remoción de patrones socio culturales que promueven y sostienen la desigualdad y la discriminación por cuestiones de género. Ello implica un proceso de transformación que se ha comenzado a transitar desde la crisis y que depende totalmente de nosotros, su resultado"[29].

Enmarcados en este hilo teórico, sostenemos con Rotonda que solo la interpretación armoniosa de estas normas guiadas por la humanización de los procesos y la elaboración de las prácticas jurisdiccionales respetuosas de los derechos humanos concretará el objetivo del CCyCN en la búsqueda de igualdades reales, mediante un abordaje de los casos que se defina teniendo en cuenta los contextos particulares y el respeto ético por las personas en condiciones de vulnerabilidad[30]. La defensa de los derechos humanos comporta inexorablemente un cambio simbólico que sitúa a la persona en un lugar emblemático, requiriéndose una necesaria revisión de todos los sistemas jurídicos[31], perfilándose como criterio rector en materia de interpretación el principio "Pro Homine"[32], en razón del cual el intérprete y el operador han de buscar y aplicar la norma que en cada caso resulte más favorable para la persona humana, para su libertad y sus derechos, cualquiera sea la fuente que suministre esa norma[33]. Entonces, las particularidades del contexto merecen ser visibilizadas y destacadas para poder enfatizar cómo las condiciones y los escenarios de vulnerabilidad deben ser elementos que definen la ponderación y valoración probatorias[34]. En tal sentido, a la luz de estos criterios orientadores, debe acudirse a la norma o a la interpretación más amplia o extensa, cuando se trata de reconocer derechos protegidos, e, inversamente, a la norma o a la interpretación más restringida cuando se trata de establecer restricciones permanentes al ejercicio de derechos o su suspensión extraordinaria[35]. Además, debe propenderse a una accesibilidad de la justicia en igualdad de condiciones, observándose que "El derecho de acceso a la justicia es pluridimensional. Abarca la justiciabilidad, la

[29] SCAGLIA, Romina. La prueba con perspectiva de género*, MJ-DOC*-14892-AR I MJD14892
[30] ROTONDA, Adriana. Comentarios al Capítulo 1 del Título VIII Procesos de Familia, en HERRERA, Marisa y DE LA TORRE, Natalia. *Código Civil y Comercial de la Nación y Leyes especiales. Comentado y anotado con perspectiva de género,* Buenos Aires: Editores del Sur. p. 559
[31] LLOVERAS, Nora. Los derechos humanos en las relaciones familiares: una perspectiva actual*,* en LLOVERAS, Nora (Directora), BONZANO, María de los Ángeles (Coordinadora), *Los Derechos de las Niñas, Niños y Adolescentes*, Córdoba: Alveroni, 2010. p.16; LLOVERAS, Nora – SALOMÓN, Marcelo J. *El derecho de familia desde la Constitución Nacional*, Buenos Aires: Universidad, 2009. p. 31 y ss.
[32] Y sus derivados, tales como el "Principio Pro Active", el "Principio de Progresividad de los Derechos Humanos", el " Principio de la Irreversibilidad de los Derechos Humanos", el "Principio Favor Debilis", etc.
[33] BIDART CAMPOS, Germán J. Las fuentes del Derecho Constitucional y el principio ´Pro Homine´*,* en BIDART CAMPOS, Germán J. – GIL DOMÍNGUEZ, Andrés (Coordinadores), *El Derecho constitucional del siglo XXI, Diagnóstico y perspectiva,* Buenos Aires: Ediar, 2000, p.31 y ss.
[34] ROTONDA, Adriana. Comentarios al Capítulo 1 del Título VIII Procesos de Familia, en HERRERA, Marisa y DE LA TORRE, Natalia. *Código Civil y Comercial de la Nación y Leyes especiales. Comentado y anotado con perspectiva de género,* Buenos Aires: Editores del Sur. p. 641; CSJN, 15/03/2016, "G.A.N. c/S.R. S/Filiación", en L.L. 2016-B-509, La Ley online: AR/JUR/5545/2016
[35] PINTO, Mónica. *Temas de Derechos Humanos,* Buenos Aires: Editores del Puerto, 1999. p. 81.

disponibilidad, el acceso, la buena calidad, el suministro de recursos jurídicos para las víctimas y la rendición de cuentas de los sistemas de justicia"[36].

Estas aristas están presentes en la sentencia indicada ut supra[37], contemplándose una profundización en los alcances de la prueba producida ante la existencia de gemelos con idéntico patrón genético. Observa Rotonda que "la amplitud y la flexibilidad probatoria evocan, asimismo, el principio del llamado favor probationes, o visión judicial tendiente a. favorecer la admisión, producción y valoración de la prueba, por cuanto en los procesos familiares una gran cantidad de hechos o situaciones son de difícil acreditación"[38]. El artículo 710 del CCyCN establece respecto de los principios relativos a la prueba, que "Los procesos de familia se rigen por los principios de libertad, amplitud y flexibilidad de la prueba. La carga de la prueba recae, finalmente, en quien está en mejores condiciones de probar". La actividad judicial cobra un protagonismo diferente conteste con la constitucionalización y convencionalización del Derecho Privado, morigerándose las reglas del principio dispositivo, con la pretensión de que el juez pueda alcanzar la verdad real. Se consagra así el principio de las cargas probatorias dinámicas, en virtud de lo cual el deber de probar ya no reside en quien invoca un hecho determinado, sino en cualquiera de las partes que se encuentre en mejores condiciones de acreditar la circunstancia controvertida[39]. De esta manera se desplaza el esfuerzo probatorio hacia la parte más fuerte en la relación procesal, en vinculación con la actividad probatoria, basándose en el principio de solidaridad y colaboración de las partes, no sólo en relación al órgano, sino fundamentalmente para la consecución de la verdad objetiva[40].

> "Entre los efectos concretos y palpables que debe otorgar la perspectiva de géneros en el proceso, se plantea el de morigerar las cargas probatorias, o llegar aún a su inversión, en determinados supuestos. Las personas vulnerables requieren de un esfuerzo adicional para gozar de sus derechos fundamentales en un pie de igualdad, esfuerzos que en ciertos supuestos puede demandar una inversión en la carga de la argumentación y de la prueba"[41].

Una de las manifestaciones actuales de este cambio de perspectiva al momento de la producción de la prueba, que ponen en evidencia las consecuencias disvaliosas de una distribución de roles que responden a un contexto patriarcal y colocan a una de las partes en situación de vulnerabilidad frente al proceso, está dado por la producción de la prueba en el marco de los procesos de liquidación de comunidad de ganancias. Un decisorio del Juzgado Nacional de Primera Instancia en lo Civil Nro. 92 penetra en el entramado del vínculo y en las circunstancias que lo rodearon, para evaluar los

[36] Comité CEDAW, 03/08/2015, Recomendación general Nº 33 sobre acceso de las mujeres a la justicia, CEDAW/C/GC/33.
[37] "G.I., G.F.c/S.A. y otros s/ ordinario", en Esquel el 6 de septiembre de 2022
[38] ROTONDA, Adriana. Comentarios al Capítulo 1 del Título VIII Procesos de Familia, en HERRERA, Marisa y DE LA TORRE, Natalia. *Código Civil y Comercial de la Nación y Leyes especiales. Comentado y anotado con perspectiva de género,* Buenos Aires: Editores del Sur. p. 629; citando a KIELMANOVICH, Jorge. *Procesos de familia,* Buenos Aires: Abeledo Perrot, 1998. p. 21.
[39] GONZÁLEZ DE VICEL, Mariela. Comentarios del artículo 710, en HERRERA, Marisa - CARAMELO, Gustavo – PICASSO, Sebastián. *Código civil y comercial de la Nación comentado*, T. II, 1a ed., Buenos Aires: Infojus, 2015. p. 573 y ss.
[40] GONZÁLEZ DE VICEL, Mariela. Comentarios del artículo 710, en HERRERA, Marisa - CARAMELO, Gustavo – PICASSO, Sebastián. *Código civil y comercial de la Nación comentado*, T. II, 1a ed., Buenos Aires: Infojus, 2015. p. 574.
[41] ROTONDA, Adriana. Comentarios al Capítulo 1 del Título VIII Procesos de Familia, en HERRERA, Marisa y DE LA TORRE, Natalia. *Código Civil y Comercial de la Nación y Leyes especiales. Comentado y anotado con perspectiva de género,* Buenos Aires: Editores del Sur. p. 630

dichos y probanzas de las partes en un proceso de esta naturaleza[42]. El fallo estima como la parte más vulnerable del matrimonio a la cónyuge, vulnerabilidad que se proyecta en el proceso y en la capacidad de producir prueba, por lo que corresponde analizar desde tal perspectiva la prueba aportada. Así, la sentencia expresa que nos hallamos frente a un matrimonio que se estructuró sobre la base de un esquema tradicional de poder donde el dinero era administrado e invertido unilateralmente por el hombre, sin participar ni rendir cuenta alguna de su empleo a la mujer, siendo una muestra de ello el destino de las rentas percibidas por el alquiler de un local calificado como propio del ex esposo. Una serie de indicadores reseñados en el fallo, analizados a la luz de los principios de la carga probatoria dinámica y la necesidad de juzgar con perspectiva de género, permiten a criterio de la juzgadora desvirtuar la presunción en la que se ampara el demandado de haber consumido los alquileres en gastos de la comunidad (de hecho, la jueza advierte que "El demandado se ampara en dicha presunción adoptando -al igual que frente al resto de los reclamos de autos- una posición de relajo probatorio, en contra del principio de las cargas probatorias dinámicas, hoy reconocido expresamente por el art. 710 del CCyC…"); por el contrario, resulta a su criterio evidente que el demandado atesoró para sí las sumas percibidas en concepto de alquiler durante la convivencia y tras la separación de los cónyuges, sin participar a la actora de su derecho sobre los frutos gananciales. Por tanto, entiende que corresponde incluir dentro del acervo ganancial a liquidar todas las sumas percibidas en concepto de alquiler.

Conteste con este hilo conductual, uno de los principios que subyace hoy en el nuevo derecho procesal de familia implica que se deben flexibilizar los criterios ante la dicotomía entre la verdad formal y material, renovándose así la confianza en el proceso judicial. Indica Famá que

> "esta necesaria transformación del proceso de familia conlleva la humanización de las formas y principios procesales tradicionales que responden al sistema adversarial o litigioso... Uno de los principios más arraigado en el viejo orden procesal que es puesto en crisis en aras de esta humanización es el principio dispositivo, o, mejor dicho, el aprovechamiento de la aplicación estricta de este principio por parte de los litigantes, dando lugar a situaciones abusivas que entorpecen el proceso, potencian la hostilidad entre las partes e inciden negativamente en la búsqueda de la ´verdad´ para la solución justa del caso"[43].

Subraya Ciuro Caldani que "para mejorar las valoraciones es posible emplear el método de las variaciones, que en este caso consiste en cambiar imaginariamente el caso para apreciar cuáles son las razones por las que se sostiene la justicia o injusticia de una respuesta"[44]. Así pues, al utilizar este método se puede contemplar que los criterios que emanan de una valoración no son absolutos sino relativos a cada situación fáctica concreta. El método de las variaciones nos conduce a reflexionar sobre los posibles fraccionamientos y desfraccionamientos que se suscitan en el devenir de cada

[42] Juzg. Nac. Civ. N° 92, 29/03/2021, "M. L. N. E. c/ D. B. E. s/liquidación de régimen de comunidad de bienes" (sentencia no firme). Recuperado de: https://victoriafamafamilias.blogspot.com/2021/05/liquidacion-de-la-comunidad-de-bienes.html Fecha de obtención: 04/05/2021.

[43] FAMÁ, María Victoria. Alcances del principio de oficiosidad en los procesos de familia. *Derecho de Familia. Revista interdisciplinaria de doctrina y jurisprudencia,* Abeledo Perrot, Nro. 69, 2015, AR/DOC/4818/2015. p. 154.

[44] CIURO CALDANI, Miguel Ángel. *Metodología Dikelógica,* 2da. Edición, Rosario: Fundación para las Investigaciones Jurídicas, 2007. p. 79.

proceso, visibilizándose la variabilidad en los criterios de valor en la ponderación de la prueba ante la complejidad y diversidad de escenarios fácticos que se pueden suscitar, exigiéndose operadores jurídicos inquietos y atentos frente a las exigencias de justicia que reclama cada proceso de familia.

3. TUTELA JUDICIAL EFECTIVA Y DEBIDA DILIGENCIA FRENTE A LA VIOLENCIA ECONÓMICA

En estas elaboraciones nos centramos reiteradamente, como lo haremos en lo que sigue, en la perspectiva de género en los procesos de Derecho de familias de naturaleza patrimonial. Y ello, en el convencimiento que las instituciones familiares no son inocuas para el presente y destino económico de las mujeres. El Comité para la Eliminación de la Discriminación contra la Mujer, ha mostrado preocupación

> "por las consecuencias económicas para la mujer del matrimonio, el divorcio, la separación y la muerte ha ido en aumento. Los estudios realizados en algunos países han puesto de manifiesto que, mientras que los hombres suelen experimentar pérdidas de ingresos pequeñas, incluso mínimas, después del divorcio o la separación, muchas mujeres experimentan una reducción sustancial de los ingresos del hogar y una mayor dependencia de la asistencia social, cuando existe. En cualquier parte del mundo, los hogares encabezados por mujeres tienen más probabilidades de ser pobres (…) Pese a las contribuciones de la mujer al bienestar económico de la familia, su inferioridad económica se refleja en todas las etapas de las relaciones familiares, debido a menudo a las responsabilidades que asumen respecto de los dependientes"[45].

La diversidad de circunstancias de afectación de la situación patrimonial de las mujeres en contexto familiar, puede presentar situaciones que configuran violencia de género. Como expresa Molina de Juan, una de las formas en que se manifiesta este complejo y polifacético fenómeno, quizás la más oculta y silenciosa, es la que se desenvuelve en el terreno económico[46]. Conforme la ley 26.485, la violencia económica y patrimonial es

> "la que se dirige a ocasionar un menoscabo en los recursos económicos o patrimoniales de la mujer, a través de: a) La perturbación de la posesión, tenencia o propiedad de sus bienes; b) La pérdida, sustracción, destrucción, retención o distracción indebida de objetos, instrumentos de trabajo, documentos personales, bienes, valores y derechos patrimoniales; c) La limitación de los recursos económicos destinados a satisfacer sus necesidades o privación de los medios indispensables para vivir una vida digna; d) La limitación o control de sus ingresos, así como la percepción de un salario menor por igual tarea, dentro de un mismo lugar de trabajo" (art. 5, inc. 4°).

La Convención de Belém do Pará en su artículo 7 inc. b), fija la obligación del Estado de "actuar con la debida diligencia para prevenir, investigar y sancionar la violencia contra la mujer"[47]. Las acciones fundamentales que dicho deber implica son

[45] Comité para la Eliminación de la Discriminación contra la Mujer, *Recomendación general relativa al artículo 16 de la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer (Consecuencias económicas del matrimonio, las relaciones familiares y su disolución),* párr. 4.

[46] MOLINA DE JUAN, Mariel F. Justicia penal, perspectiva de género y violencia económica. *LA LEY* 28/06/2017, 4 - *LA LEY* 2017-D, 15. Cita Online: AR/DOC/1586/2017.

[47] A efectos de visualizar la construcción jurídica del deber de debida diligencia por parte de la Corte IDH en los casos de violencia de género, la sentencia dictada en el Caso González y otras ("Campo algodonero") vs. México (Sentencia de 16 de noviembre de 2009), nos ilustra acerca del Corpus Iuris que rige en la materia.

prevenir, investigar, reparar, sancionar. Por lo que una tutela judicial efectiva en estos supuestos se emparenta necesariamente con el concepto de deber de debida diligencia estatal reforzada frente a las situaciones de violencia por razones de género que pueden emerger en aquellos procesos de familia donde se dirimen cuestiones de naturaleza patrimonial. Un ejemplo de lo dicho podemos hallarlo en la sentencia del Tribunal Colegiado de Familia Nro. 7 de Rosario [48], se dicta a partir de la solicitud de tutela anticipatoria solicitada por la cónyuge de lo que en definitiva le corresponda en la liquidación final de los bienes pertenecientes a la comunidad de ganancias habida con quien fuera su esposo, del que se encuentra divorciada desde el 02/06/2016. Se separó de hecho en el año 2013 y desde ese momento la administración y disposición de los bienes de la comunidad de ganancias se encontraron exclusivamente en manos de su cónyuge. El Tribunal advierte "claramente una posición dominante, una relación desigual de poder por parte del ex esposo respecto de quien fuera su esposa y madre de su descendencia, la cual afecta su integridad psicológica y económico-patrimonial". Tal posición dominante, afirma el fallo, se desprende del accionar del demandado a lo largo de los procesos[49], tanto desde el punto de vista fáctico como discursivo. De sus dichos

> "se desprende una visión de la mujer estereotipada que restringe su libertad, su capacidad, su desarrollo, cercenando claramente el derecho de toda mujer a elegir libremente y tener una vida digna de acuerdo con sus principios y valores (…) Juzgar el modus vivendi adoptado por el matrimonio, en relación con las tareas del hogar, la comida, etc., como responsabilidad única de la señora L. pone en evidencia el lugar al que la misma quedó relegada a lo largo de 25 años de matrimonio y la función de "proveedor", detentador del poder económico y general del grupo familiar en la cual se asentó el señor M. Por otra parte, la crítica que éste realiza sobre el modo en que la señora L. resolvió las labores que quedaron a su cargo, revela su visión de que ha de ser la

[48] Tribunal Colegiado de Familia Nro. 7 de Rosario, 18/08/2017, autos L., S. M. c. M., C. D. s/ tutela anticipada. Publicado en: La Ley Online; Cita Online: AR/JUR/70695/2017.

[49] Citamos el complejo de causas que trae a colación el fallo:
"1) Causa "L.S. c. M.C s/ alimentos", iniciado en fecha 01/08/2014, en la cual recayó sentencia Nro. 4970 de fecha 11/12/2015, en la que se fijó una cuota alimentaria definitiva a favor de dos hijas en la suma de $6.000 mensual a cada una de ellas y a favor de la cónyuge separada de hecho la suma de $3.000 mensual. Debe señalarse que una vez dictado el divorcio vincular, el señor M. solicitó el cese de los alimentos con resultado favorable, iniciando la señora L. la compensación económica.
2) Causa "M.C. c. L.S s/ divorcio vincular", iniciado el 21 de setiembre de 2015, con sentencia Nro. 2145 de fecha 2 de junio de 2016, en la que se establece que la comunidad de ganancias se extingue en fecha 11 de marzo de 2016. En dicho proceso se fijaron tres audiencias conforme lo normado por el art. 438 del Cód. Civ. y Com. de la Nación, a los que el señor M. nunca compareció (…)
3) Causa "L.S. c. M.C.", iniciada el 24 de octubre de 2016, en turno de urgencia, habiéndose ordenado la medida de prohibición de acercamiento del señor M. hacia la señora L. por la Jueza Dra. Graciela Carciente. Resulta importante destacar que la denunciante manifiesta que en le marco de una reunión familiar "para ver el tema de la partición de bienes, yo le dije que de mi casa no me iba a ir, que me correspondía la mitad, él respondió que si no me iba de mi casa me sacaba con los pies para adelante, es decir muerta" (fs. 3). La Psicóloga Belmonte, integrante del equipo Interdisciplinario observa que la problemática es esencialmente económica y la forma en como cada parte resarcirá a la otra de acuerdo a lo que sienta le corresponde como derecho adquirido o como producto del esfuerzo propio (fs. 30/32).
4) Causa "L.S s/ atribución de vivienda" (…)
5) Causa "L.S. c. M.C. s/ compensación económica" (…)
6) Causa "L. S. s/ medidas cautelares y preparatorias" (…)
7) Causa "L.S. c. M.C. s/ administración y disposición de bienes" (…)
8) Causa "M. C. c. L.S. s/ medidas cautelares y precautorias" (…)
9) Causa "M.C. c. L. S. s/ venias y dispensa" (…), para la venta del inmueble asiento del hogar conyugal"

esposa quien cargue, en el sentido de la responsabilidad y del trabajo físico, con todas las tareas"[50].

Entiende que la demandante es una pretensora diferenciada, que conforma el grupo de personas denominadas vulnerables, que exigen una tutela de protección especial, otorga la tutela anticipada solicitada y encuadra normativamente la decisión en el plexo normativa que brinda protección para prevenir, sancionar y erradicar la violencia contra la mujer.

REFLEXIONES FINALES

Para cerrar estas breves reflexiones sobre un tema que por su importancia y vastedad requiere que insistamos en su visibilización y abordaje, volveremos a los estándares del Derecho internacional de los Derechos Humanos, en el convencimiento que tales criterios generales orientadores deben obrar de guía permanente para que los derechos consagrados normativamente no se diluyan en el proceso, sino que se reafirmen y expandan en él.

El Comité para la Eliminación de la Discriminación contra la Mujer, en su Recomendación general número 33 sobre el acceso de las mujeres a la justicia, ha entendido en particular en relación a los procesos de familia que "45. La desigualdad en la familia subyace en todos los demás aspectos de la discriminación contra la mujer y se justifica a menudo en nombre de la ideología, la tradición o la cultura. El Comité ha destacado repetidas veces la necesidad de que el derecho de familia y los mecanismos para aplicarlo se ajusten al principio de equidad consagrado en los artículos 2, 15 y 16 de la Convención". Dar cima a ello implica reconocer los entramados sociales reproductores de desigualdades, a efectos de revelarlos y avanzar en dirección a una real garantía de derechos. En función de lo dicho, una de las recomendaciones del Comité a los Estados partes es que "b) Consideren la posibilidad de crear, en el mismo marco institucional mecanismos judiciales o cuasi judiciales sobre la familia que tengan en cuenta la perspectiva de género y que se ocupen de cuestiones como los arreglos de restitución de bienes, el derecho a la tierra, la herencia, la disolución del matrimonio y la custodia de los hijos dentro del mismo marco institucional (…)".

Muchos de los ejemplos que utilizamos para ilustrar la realidad y los desafíos de los procesos de familias en perspectiva de géneros, se vincularon con tales tópicos pues evidentemente en dichas materias se revela la desigualdad estructural y la necesidad de penetrar en las subalernidades ocultas en las familias. El proceso constituye un marco propicio y necesario para sacarlas a la luz, y tomar decisiones que avancen en el camino de la igualdad.

[50] Pueden citarse algunas de las manifestaciones del demandado al contestar traslado que trae a colación el fallo y que denotan tal visión estereotipada de roles y funciones familiares *"…la señora L. durante los días de semana no cocinaba, sino que compraba viandas ya preparadas, que suelen tener mayor costo que las elaboradas por sus propias manos, que contaba con una persona que hacía tareas de limpieza a la que se suele abonar entre $60 y $100 la hora, cuenta con una persona que hace tareas de jardinería al que abona entre $250 y $320 según la superficie de césped que corte (…) Manifiesta que no le sorprendería que al estar actualmente haciendo dieta bajo órdenes del médico endocrinólogo Dr. P. lo sea para acreditar en autos que bajó de peso por no alimentarse".*

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Ripensare la democrazia rappresentativa. Aldilà del "mito" populista

Ginevra Cerrina Feroni[1]

RIASSUNTO

Il diritto costituzionale comparato ci insegna che negli ordinamenti giuridici contemporanei si è avuto uno sviluppo significativo degli istituti di democrazia diretta, anche in sistemi che solo raramente, se non mai, li hanno praticati. Sembra emergere l'esigenza di incarnare una cittadinanza attiva, che significherebbe l'esercizio di poteri consultivi, ma anche decisionali da parte dei cittadini, al di là dei tradizionali canali di mediazione politica. Il presente articolo, dunque, ancorando la propria analisi principalmente ai Paesi dell'Unione Europea, ripensa e riflette sulla democrazia rappresentativa, intesa sia in senso "politico" sia in senso "politico-giuridico", soprattutto in merito alla questione se la rappresentanza politica debba essere intesa anche come legale. Anche in un contesto di crisi della rappresentanza, la democrazia diretta, intesa sia come partecipazione strutturale del popolo alle decisioni politiche più importanti, sia come attenzione dei governanti alla "percezione popolare", difficilmente può assumere la forma di un soggetto politico nella democrazia moderna. Si conclude che il problema soggiacente allo scontro tra democrazia diretta e rappresentativa, nonché le relative patologie, continua ad essere un aspetto indipendente dalla bontà o meno dei due sistemi nel garantire i fini cui sono destinati. C'è, infatti, alla radice un problema di educazione alla cittadinanza, che è allo stesso tempo formazione politica e civica degli elettori e degli eletti. Un problema che, quindi, parte da lontano e che non può essere risolto, anzi si aggrava, cercando di escludere i cittadini dalle decisioni politiche più delicate. Ogni percorso educativo, sia per chi lo insegna sia per chi lo riceve, deve passare attraverso una prassi virtuosa, ma soprattutto una prassi (senza aggettivi).

REPENSANDO A DEMOCRACIA REPRESENTATIVA. ALÉM DO "MITO" POPULISTA.

RESUMO

O direito constitucional comparado nos ensina que nos sistemas jurídicos contemporâneos houve um desenvolvimento significativo dos institutos da democracia direta, mesmo em sistemas que apenas raramente, ou nunca, os praticaram. Parece emergir a necessidade de dar corpo a uma cidadania ativa, o que significaria o exercício de poderes consultivos, mas também de decisão por parte dos cidadãos, para além dos canais tradicionais de mediação política. O presente trabalho, portanto, ancorando sua análise principalmente nos países da União Europeia, repensa e reflete sobre a democracia representativa, entendida tanto no sentido "político" quanto no sentido "político-jurídico", sobretudo quanto à questão de saber se a representação política também deve ser entendida como legal. Mesmo em um contexto de crise de representação, a democracia direta, entendida tanto como participação estrutural do povo nas decisões políticas mais importantes, quanto como atenção dos governantes à "percepção popular",

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dificilmente pode assumir a forma de sujeito político propriamente dito na democracia moderna. Conclui-se que o problema subjacente ao embate entre a democracia direta e a representativa, bem como as suas patologias relativas, continua a ser um aspeto que independe da bondade ou não dos dois sistemas na garantia dos fins a que se destinam. Há de fato na raiz um problema de educação para a cidadania, que é ao mesmo tempo formação política e cívica dos eleitores e dos eleitos. Um problema que, portanto, começa de longe e que não se resolve, antes se agrava, tentando excluir os cidadãos das decisões políticas mais sensíveis. Todo caminho educativo, tanto para quem o ministra como para quem o recebe, deve passar por uma práxis virtuosa, mas sobretudo, de uma práxis (sem adjetivos).

1. LACUNE DELLA FORMA STORICA DELLA RAPPRESENTANZA TRA CONSOCIATIVISMO E CONDISCENDENZA

1. Il diritto costituzionale comparato ci insegna che negli ordinamenti contemporanei vi è stato un significativo sviluppo degli istituti di democrazia diretta anche in sistemi che solo raramente, o addirittura mai, li avevano praticati[2]. Sembra emergere l'esigenza di dare sostanza ad una cittadinanza attiva, intendendo con essa l'esercizio di poteri consultivi, ma anche decisionali, da parte dei cittadini, aldilà dei canali tradizionali della mediazione politica. Ciò sulla base della considerazione che l'esercizio della sovranità non può, né deve, esaurirsi al momento del voto con la scelta dei propri rappresentanti. Come si avrà modo di argomentare nelle conclusioni, ancorando l'analisi ai Paesi della Unione Europea, il nodo cruciale ha riguardato, ovviamente, i Trattati e il processo di integrazione.

Il concetto di rappresentanza proprio della moderna democrazia, pur nella sua incertezza di fondo, presenta elementi di innovatività. Esso vede la presenza della volontà popolare, dichiarata sovrana, che si declina attraverso la scelta di un certo numero di rappresentanti, i parlamentari, ai quali spetta il compito di approvare le leggi. I parlamentari non sono i mandatari di coloro che li hanno nominati, non hanno obblighi di adeguarsi alle direttive eventualmente ricevute da chi li ha eletti, né di rispettare gli impegni assunti per ottenere il consenso. E neppure l'elettore è un mandante in senso proprio, scegliendo i propri rappresentanti non perché difendano interessi particolari (propri o della comunità di riferimento), ma sul presupposto che possano dare voce, meglio di altri, all'interesse della Nazione. Nella democrazia rappresentativa non operano due volontà - del mandante e del mandatario secondo il tradizionale schema privatistico - ma una sola, quella della Nazione[3].

Sulla necessità di un ripensamento della democrazia rappresentativa, intesa sia in senso "politico" che "politico-giuridico", si è aperto - come è noto - un dibattito dottrinale importante, soprattutto sull'interrogativo se la rappresentanza politica sia da intendere anche come giuridica. A partire dalla riflessione di Leon Duguit ed Elmer Eric Schattschneider, il dovere dei rappresentati di aderire alla volontà dei rappresentati ha assunto forme diverse: un primo approccio, più sfumato, tende a ritenere che gli eletti debbano conformarsi «il più possibile» alle tendenze degli elettori, in base al cd.

[2] Ne parla diffusamente, in un recente volume, E. Palici Di Suni, in E. Garcia, E. Palici di Suni, M. Rogoff, *Gli istituti di democrazia diretta nel diritto comparato*, Milano, Wolters Kluwer, 2018, 2 ss.

[3] Si veda, per una lucida sintesi, L. Compagna, voce *Democrazia*, in *Dizionario del Liberalismo italiano,* tomo I, Soveria Mannelli, Rubbettino, 2011, 317 ss.; v. anche L. Carlassare, *Rappresentanza e responsabilità politica*, in N. Zanon, F. Biondi (a cura di), *Percorsi e vicende attuali della rappresentanza e della responsabilità politica*, Milano, Giuffrè, 2001, 21.

principio di solidarietà[4]; secondo l'approccio più marcato, invece, che rispecchia la concezione anglosassone, il rappresentante riceverebbe tramite l'elezione una sorta di mandato ad agire basato sul programma politico contrattato con i suoi elettori (cd. *mandate theory*)[5]. Una discussione, quella sul riconoscimento della sindacabilità sui limiti della rappresentanza democratica, dalla portata inesauribile e che rischierebbe di trascinarci fuori tema[6]. Essa però ci è utile nella misura in cui cerca di districare il rapporto che lega elettori ed eletti. È importante a questo proposito ricordare che anche ai teorici classici del costituzionalismo era ben chiaro come la nozione di democrazia dovesse essere concepita come la presenza fisica dei cittadini in occasione delle deliberazioni sulla cosa pubblica, cioè come democrazia diretta[7]. Usando il termine di democrazia diretta intendiamo riferirci qui non tanto agli istituti puntuali ed occasionali attraverso i quali l'elettorato è chiamato, di tanto in tanto, ad intervenire nelle decisioni più prettamente politiche, bensì alla pratica strutturata e istituzionalizzata di un governo (anche) del popolo, cioè di una dimensione di dialogo in cui «istituzioni e società compartecipano alla formazione di una decisione o atra attività pubblica con un ruolo forte di entrambe»[8].

Il confronto tra democrazia diretta e rappresentativa si è sempre posto in termini antitetici. Oggi però non si tratta di esprimere opzioni di favore per l'una o per l'altra, essendo del tutto evidente che la democrazia dei moderni è ovviamente la democrazia rappresentativa. Ma è pure acclarato che se c'è un tema sul quale tutti concordano questo è la crisi della rappresentanza[9]. Una crisi che viene da talmente tanto lontano che ci si è chiesti in quale momento della nostra storia costituzionale si sia davvero potuta esprimere la mitica età dell'oro del Parlamento e del parlamentarismo[10]. Una crisi che ha alle sue spalle la perdita di centralità della politica, la crisi dei partiti, la delegittimazione del Parlamento e che ha determinato da parte dello stesso Parlamento il favore

[4] L. Duguit*, Traité de droit constitutionnel*, Paris, Fontemoign, 1932, vol II, 546 ss.
[5] E. E. Schattschneider, *Party Government*, New York, Farrar and Rinehart, 1942, 14 ss.
[6] Tra la dottrina italiana, V. Gueli*, Il concetto giuridico della rappresentanza politica e la rappresentatività degli organi di governo*, ora in *Scritti giuridici*, Milano, Giuffré, 1976, 146 ss., per cui la rappresentanza (giuridica) deve tenersi ben distinta dalla rappresentatività (politica), quest'ultima intesa come fenomeno politico-sociale di interpretazione delle aspirazioni del popolo; N. Zanon, *Il libero mandato parlamentare*, Milano, Giuffré, 1991; più recentemente, sul carattere indeterminabile della rappresentanza politica, V. Angiolini, *La difficile convivenza tra responsabilità politica e responsabilità giuridica*, in N. Zanon, F. Biondi (a cura di), *Percorsi e vicende attuali della rappresentanza e della responsabilità politica*, cit. 3-20.
[7] In tal senso, ad esempio, il pensiero di Benjamin Constant (*Corso di politica costituzionale*) o di Jean-Jacques Rousseau (*Il contratto sociale*), così come l'intervento di Emanuel Sieyés alla Costituente rivoluzionaria (*Dire de l'abbé Sieyes, sur la question du veto royal: à la séance du 7 septembre 1789*). Da tali prospettive emerge che la vera contrapposizione si poneva non tra democrazia diretta e rappresentativa, ma tra «democrazia» (*tout court*) e «governo rappresentativo», poiché solo dove c'era decisione popolare diretta c'era democrazia, e dove c'era rappresentanza non c'era democrazia. In tal senso H. Kelsen, *Teoria generale del diritto e dello Stato* (1945), Milano, Ed. Comunità, 1954, 296, che afferma come l'idea che i rappresentanti esprimano la volontà degli elettori sia «una finzione» che ha il solo scopo «di mantenere l'illusione che il legislatore sia il popolo». Cfr. anche M. Luciani, *Il paradigma della rappresentanza di fronte alla crisi del rappresentato,* in N. Zanon, F. Biondi (a cura di), *Percorsi e vicende attuali della rappresentanza e della responsabilità politica*, cit., 2001, 109 ss. Sull'idea originaria della democrazia politica come autogoverno, v. anche L. Ferrajoli, *La democrazia costituzionale*, in *Journal of Constitutional Theory and Philosophy of Law*, vol. 18, 2012, 69-124, in particolare 73 ss.
[8] Così U. Allegretti, *La democrazia partecipativa in Italia e in Europa*, in *Rivista AIC*, n.1, 2011, 3.
[9] Tra i numerosissimi contributi sul tema della crisi della rappresentanza e sull'ascesa della democrazia diretta, basti ricordare N. Bobbio, *Quali alternative alla democrazia rappresentativa?*, in *Mondoperaio*, 1975, n. 10, 40 ss.; pensiero sviluppato in ID., *Il futuro della democrazia*, Torino, Einaudi, 1984 e più tardi ID., *I dilemmi della democrazia partecipativa*, in *Democrazia e Diritto*, n.4, 2006, 1-16; G. Sartori, *Rappresentanza*, in G. Sartori, *Elementi di teoria politica*, Bologna, Il Mulino, 1993, 285-327; G. Pasquino (a cura di), *Rappresentanza e democrazia*, Roma-Bari, Laterza, 1988; U. Allegretti, *Democrazia partecipativa*, Firenze, Florence University Press, 2010.
[10] M. Luciani, *l paradigma della rappresentanza di fronte alla crisi del rappresentato*, in AA.VV., *Percorsi e vicende attuali della rappresentanza e della responsabilità politica*, cit., 2001, 109-117.

per processi di «neutralizzazione» del politico[11] anch'essi ormai risalenti nel tempo, come ad esempio lo sviluppo delle autorità amministrative indipendenti. La risposta partecipazionista, che può certamente anche assumere connotazioni populiste, risponde al bisogno di soccorrere alle evidenti difficoltà in cui si dibattono le istituzioni rappresentative.

L'attenzione alle richieste del "sentire comune", indicatore di quella volontà popolare alla base di ogni idea di rappresentanza, esprime una parte importante dell'idea autentica alla base della democrazia contemporanea. Se è vero quello che sosteneva Gerhard Leibholz, che cioè nella società di massa, i partiti consistono sostanzialmente in una manifestazione razionalizzata della democrazia plebiscitaria[12], allora il maggiore spazio lasciato alle istanze provenienti dal popolo non dovrebbe essere visto in contrapposizione al sistema rappresentativo, bensì come il presupposto del suo funzionamento e il rafforzamento della sua logica interna. In altri termini, si avrebbe uno spostamento progressivo verso una democrazia che tenga conto direttamente delle esigenze dell'elettorato, a meno che non si voglia tornare ad una democrazia consociativa sul modello liberale, dove il sistema dei partiti era rappresentativo solo di una classe dominante formata da "optimates", i cui interessi coincidevano con quelli della Nazione solo per il fatto di essere tali. Che per il pensiero liberale classico l'idea democratica del popolo che si autogoverna fosse insieme un inganno e una contraddizione è riscontrabile nell´opera di uno dei primi teorici della democrazia rappresentativa di stampo liberale: Gaetano Mosca[13]. Due le linee di pensiero del giurista palermitano: in primo luogo, il ruolo della classe politica non dovrebbe essere quello di puro interprete degli interessi soggettivi, ma dovrebbe costituire una vera e propria minoranza organizzata che detiene la *leadership* del sistema politico. In secondo luogo, l'applicazione del principio di maggioranza viene superato dalla prassi istituzionale dove le *élite* giocano il loro vero ruolo di esecutori: in tal modo viene a verificarsi la «negazione pratica dell'utopistica identità tra volontà popolare e titolarità della decisione»[14]. Un pensiero, questo, che per quanto ricco di pratiche verità e di autorevolezza, non può che fare i conti con il tempo in cui è stato elaborato. Con ciò non si vuole significare che la democrazia non debba mai conoscere mediazione, tuttavia non possiamo non notare che l'esigenza di un riavvicinamento tra visioni politiche ed esigenze della società civile è oggi più che mai sentita, soprattutto dopo che per anni abbiamo assistito, nel nostro Paese, ad un processo di totale distacco dei partiti rispetto alla società, ad un loro appiattimento sulla gestione del potere, alla perdita di ogni riferimento di idealità e valori. Una pericolosa autoreferenza del ceto politico che è stata speculare al declino della partecipazione civile. Una estraneità di intere parti della società dalla vita delle istituzioni, come dimostrano i dati consolidati, e a dir poco allarmanti, dell'astensionismo in Italia, e non solo[15]. Ciò è dipeso anche dal fatto che il cosiddetto sistema dei partiti abbia espresso fino ad ora, oltre che la manifestazione dell'assetto democratico del

[11] Così C. Schmitt, *Le categorie del politico*, Bologna, Il Mulino, 1972, 167 ss.
[12] Così G. Leibholz, *Stato dei partiti e democrazia rappresentativa*, in ID., *La rappresentazione della democrazia*, Milano, 1989, in particolare 389 ss.
[13] G. Mosca, *Elementi di scienza politica*, ora in G. Sola (a cura di), *Scritti politici di Gaetano Mosca*, Vol. II, Torino, Utet, 1982, in particolare 712 ss.
[14] Così C. Martinelli, *L'organizzazione del potere nel pensiero di Gaetano Mosca*, in *Giornale di storia costituzionale*, n. 17, 2009, 177-205, 188.
[15] Sulla dimensione globale di quella che è sentita come un'anomalia di sistema, v. S. Lieto, *La crisi dei partiti politici nella duplicità paradigmatica globale e locale*, in *Rivista AIC*, n. 4, 2012.

pluralismo, anche la realtà, ben meno idilliaca, del consociativismo[16]. Non possiamo nasconderci che il dualismo tra apparato e corpo sociale abbia preso troppo spesso le forme di una vera e propria separazione, pericolo dal quale lo stesso Vezio Crisafulli mise in guardia allorché si espresse sull´importanza del «collegamento stabile ed efficiente tra lo Stato e la collettività popolare»[17]. Non è nemmeno superfluo ricordare che concetti come quello di «democrazia permanente»[18], intesa come la reale e continua rispondenza della volontà dei rappresentanti alla reale volontà del popolo, qualunque essa fosse, pur nei limiti del quadro costituzionale, siano idee pienamente dibattute fin dall´inizio della nostra storia costituzionale. Eppure, nonostante la consapevolezza della dottrina sull'attuale crisi della rappresentanza e i suoi timori verso una deriva verticistica della democrazia, ci sembra di riscontrare una sempre maggiore diffidenza verso ogni forma di coinvolgimento popolare o di attenzione al sentire collettivo. Non è un caso che ogni qual volta si riapre il dibattito sulla opportunità di potenziare istituti di democrazia diretta, *in primis* il referendum, si ripropongono le medesime obiezioni. Talora sostenendo che la scelta secca - si o no - a favore o contro una certa proposta di un leader o di un gruppo impedirebbe il compromesso, la mediazione, il pluralismo. Talaltra, sottolineando l'impossibilità, per chi è chiamato al voto, di comprendere le questioni che gli vengono sottoposte, poiché tecnicamente complesse, di talché solo i rappresentanti sarebbero in grado di assumere la decisione più appropriata. Talaltra, ancora, evidenziando come il corpo elettorale attraverso il voto, più che sulla questione in discussione, si pronuncerebbe a favore o contro il leader o il gruppo che ha formulato il quesito. Sulle ragioni che sostengono la decisione in concreto, verrebbero cioè a prevalere il carisma del capo e le sue capacità comunicative[19]. Ora queste obiezioni non paiono particolarmente convincenti e, d'altronde, ad esse si possono contrapporre altrettante argomentazioni. Vi sono scelte che implicano necessariamente un sì o un no. Non tutte le questioni possono essere risolte con un compromesso o con una mediazione. Non solo. Il ricorso alla democrazia diretta serve ad assumere decisioni che, in un senso o in un altro, le forze politiche non riescono ad assumere attraverso i canali istituzionali tradizionali. Lasciare che sia il corpo elettorale a decidere è, sovente, la migliore soluzione possibile. Quanto all'ignoranza o all'insufficiente conoscenza del corpo elettorale sulle questioni pubbliche non si tratta di un problema della democrazia diretta, ma semmai della democrazia *tout court*[20] Come ricorderemo, nella riforma Renzi-Boschi gli istituti di partecipazione popolare venivano potenziati. Al di là della vaghezza e della problematicità di molti istituti introdotti nella fallita riforma, vi era un principio ragionevole: il rafforzamento della partecipazione popolare. Nella fattispecie, la diffidenza verso il c.d. referendum di indirizzo (con il quale sarebbe stato possibile esprimersi sulla permanenza nella UE o sull'eurosistema), conteneva alla sua base un

[16] In tal senso, F. Barbano, *Pluralismo. Un lessico per la democrazia*, Torino, Bollati Boringhieri, 1999, il quale aggiunge, con specifico riferimento al cd. sistema di partiti, che esso, almeno in Italia, «si risolse in una sorta di regime spartitorio, razionalizzato con una morale proterva, dei costi economici della politica» (87). Non si dimentichi poi, per l'Italia, la problematica legata alla mancata attuazione dell'art. 49 Cost. Sul punto, si v. la dottrina a partire da C. Esposito, *I partiti nella Costituzione italiana*, in ID., *La Costituzione italiana. Saggi*, Padova, Cedam, 1954 e da V. Crisafulli, *I partiti nella Costituzione*, in *Jus*, 1969, fasc. I-II, 3 ss.

[17] V. Crisafulli, *La sovranità popolare*, in ID., *Stato popolo governo. Illusioni e delusioni costituzionali*, Milano, Giuffré, 1985, 449 ss.

[18] C. Lavagna, *Il sistema elettorale nella Costituzione italiana*, in *Rivista Trimestrale di Dirittto Pubblico*, 1952, 856 ss.

[19] Ancora E. Palici Di Suni, in E. Garcia, E. Palici di Suni, M. Rogoff, *Gli istituti di democrazia diretta nel diritto comparato,* cit., 4 ss.

[20] *Ibidem*, 5.

malcelato disprezzo, non solo per la capacità di valutazione degli elettori, ma per lo stesso concetto di sovranità del popolo.

2. Evidentemente dietro alle obiezioni c'è la paura, dal carattere talvolta un po' ossessivo, del "mostro" populista, il mantra ripetuto (il più delle volte, impropriamente) da politici e mezzi di comunicazione, cui viene associata l'idea di un pericolo per la tenuta della democrazia. Ed anche qui merita fare un po' di chiarezza. Anche perché, una volta che si astrae il concetto dal suo contesto originario[21], a dir poco sfuggenti sono gli elementi che lo costituiscono. E' una ideologia, un sistema di pensiero, una visione del mondo? Oppure è soltanto uno stile, una tecnica, un modo di parlare "alla pancia della gente"?[22] .

L'argomento è suggestivo e di grande richiamo. Su ciò si interrogano da anni storici, filosofi, politologi, sociologi, senza peraltro arrivare a risultati condivisi[23]. Probabilmente perché non esiste un'unica risposta. Potrebbe infatti trattarsi - come sostenuto[24]- di una specifica "mentalità" compatibile con diversi contenuti ideologici e, di conseguenza, adattabile a forze politiche estremamente lontane tra loro, sia di destra come di sinistra (come pure a forze politiche non specificamente caratterizzate).

Questa adattabilità/versatilità starebbe alla base, appunto, dei numerosi fenomeni di populismo che sono dati rinvenire nella storia più o meno recente.

Seguendo questa impostazione, tra gli elementi indefettibili della mentalità populista[25], vi sarebbero: 1) una concezione di popolo come comunità omogenea dotata di qualità etiche. Una società civile fatta, soprattutto, di gente comune, di persone normali dotate di buonsenso e di etica del lavoro; 2) una rappresentazione della classe politica, al contrario, come incapace e, tendenzialmente, corrotta; 3) l'idea che il popolo sia l'unica fonte legittima del potere, che si esercita anche tramite strumenti di democrazia diretta (esempio il referendum), o comunque con vincoli stretti tra rappresentanti e rappresentati (come il mandato imperativo).

Se queste sono i sintomi della patologia, le sue conseguenze possono consistere nella degenerazione in modelli di partecipazione plebiscitaria o, ancor più pericolosamente, in forme politiche autoritarie. La demonizzazione della classe politica nella sua interezza come *élite* incapace e corrotta e a contrapporre ad essa, idealizzandola, una società civile virtuosa ed eticamente irreprensibile è un argomento dannoso o,

[21] Si colloca nella Russia zarista di fine '800 e lo si qualifica come quel movimento che cercava di ottenere il miglioramento delle classi più povere ed emarginate. Così G. Cigliano, *Il populismo russo*, in *Ricerche di Storia politica*, n.3, 2004, 407-424.

[22] Tra coloro che considerano il populismo come "stile", B. Moffitt, S. Tormey, *Rethinking Populism: Politics*, *Mediatisation and Political Style*, in *Political Studies*, vol. 64, n. 2, 2014, 381-397; come "tecnica" A. Voßkuhle, *Populismo e democrazia*, in *Diritto Pubblico*, n. 3, 2018, 785-804;

[23] Tra gli Autori che più si sono occupati del tema a livello internazionale, ma senza alcuna pretesa di completezza, Y. Mény, Y. Surel, *Populismo e democrazia*, Bologna, Il Mulino, 2001; P. Taggart, *Il populismo*, Troina, Città aperta, 2002; C. Mudde, *The Populist Zeitgeist*, in *Government and Opposition*, vol. 59, n. 4, 2004, 542-563; I. Kraztev, *The Age of Populism*, in *European View*, vol. 10. N.1, 2011, 11-16; J. W. Müller, *What's Populism?*, Philadelphia, University of Pennsylvania Press, 2016; Per la dottrina italiana, *ex multis*, tra i contributi più recenti, L. Zanatta, *Il populismo*, Roma, Carocci, 2013; D. Palano, *Populismo*, Milano, Ed. Bibliografica, 2017.

[24] Su tutti, M. Tarchi, *Italia populista,* 2° ed., Bologna, Il Mulino, 2015.

[25] Tra i vari tentativi di sistematizzazione, oltre agli Autori su citati, si v. anche M. Rooduijn, *The Nucleus of Populism: In Search of the Lowest Common Denominator*, in *Government and Opposition*, vol. 49, n. 4, 2014, 573-599; G. Baldini, *Populismo e democrazia rappresentativa in Europa*, in *Quaderni di Sociologia*, vol. 65, 2014, 11-29.

quantomeno, molto debole[26]: non è infatti privo di ragionevolezza il vecchio adagio che ogni società ha la classe politica che la rispecchia.

Ciò detto, e senza negare che i pericoli appena citati possano essere reali, la vulgata che condanna senza appello il concetto di populismo è in sé a dir poco contraddittoria. Un giudizio sul populismo parte in primo luogo dal contenuto che si vuole dare a questo termine e non è raro che, nello slancio ideale, si lasci per strada il percorso argomentativo. Si sceglie cioè, più o meno consapevolmente, di cadere nel paralogismo secondo cui se si è in presenza di populismo allora siamo in presenza di un atteggiamento di per sé stesso anti-democratico. Non sempre, invece, l'approccio cd. populista comporta un pericolo per la tenuta dell'ordine democratico. È importante sottolineare questo punto, perché è ciò che ci consente di dare il giusto valore alle cose e di misurarle anche e soprattutto in un'ottica critica nei confronti di un fenomeno che, in alcune sue manifestazioni, merita la condanna più netta, ma che in altre si rivela interessante e forse persino utile.

Innanzitutto, in via generale, il ricorso al popolo come fonte legittima del potere, il suo coinvolgimento nella gestione delle decisioni fondamentali di natura politica che riguardano la *res publica*, è l'approccio di base su cui si fonda il moderno concetto di democrazia. Sotto questo profilo, cospicue aperture al cd. "populismo" possono essere rintracciate proprio negli stessi enunciati costituzionali di ordinamenti democratici[27]. Emblematico l'art. 1 della Costituzione italiana ai sensi del quale "*La sovranità appartiene al popolo*": un popolo come principio, origine, asse fondante di tutta l'architettura costituzionale. Ma un popolo che esercita la sovranità, non soltanto la possiede. Diversamente si farebbe consistere la sovranità popolare in questione meramente formale. Invece la sovranità popolare si attua concretamente allorché si proceda in direzione di una sempre minore distanza tra possesso ed esercizio di essa[28].

Questa rinnovata esigenza di centralità del popolo non è, in linea di principio, in contrasto con i principi classici della democrazia rappresentativa, su cui si reggono tutte le società complesse[29]. Anche la teoria democratica classica - pensiamo a Ernst Fraenkel - non ha mancato di rilevare la necessità di una combinazione, (o almeno di un avvicinamento), tra il sistema rappresentativo e quello plebiscitario, per evitare che entrambe queste concezioni comportino una discrepanza tra volontà popolare empirica e volontà popolare ipotetica[30]. Fraenkel, in particolare, pur rilevando i pericoli che il sistema plebiscitario porta con sé e cioè «l'assunzione tacita dell'esistenza di una volontà popolare

[26] Sul tema N. Urbinati, *Dalla democrazia dei partiti al plebiscito dell'audience*, in *ParoleChiave*, vol. 47, 2012, 7-21.
[27] E' d'obbligo il ricco e originale saggio di R. Chiarelli, *Il populismo nella Costituzione italiana*, in Id., *Il populismo tra storia, politica e diritto,* Soveria Mannelli, Rubbettino, 2015, 177 ss.
[28] G. Fenoaltea, *Il popolo sovrano. Realtà ed illusioni della sovranità popolare in Italia (1948-1958),* Firenze, Nuova Italia editrice, 1958, 17 ss.
[29] Per A. Morrone, *Sovranità*, in *Rivista AIC*, 2017, 80 «I partiti politici, rappresentando una parte degli interessi sociali, non si sostituiscono al popolo sovrano, perché è dal processo costitutivo di un popolo e, quindi, dalla sua costituzione, che derivano i fini essenziali, è per questi fini che esiste il sistema di governo, sono questi fini la misura della legittimità delle istituzioni e quindi dell'azione degli stessi partiti politici. Dalla considerazione per cui i partiti sono e continuano ad essere un fondamentale strumento (appunto) di partecipazione democratica non deriva, almeno per la Costituzione scritta, che il contenuto del *politico* si risolva negli interessi dei partiti».
[30] Cfr. E. Fraenkel, *La componente rappresentativa e plebiscitaria nello Stato costituzionale democratico*, Torino, Giappichelli, 1999.

unitaria che è identificata con l'interesse collettivo»[31], mostra di essere ben cosciente del pericolo che i partiti si convertano in strutture chiuse lontane dalla idea di cittadinanza e che la democrazia possa sfociare in un dominio dell'oligarchia[32].

Vogliamo dire che bisognerà avere il coraggio di mettere le mani direttamente nella materia viva del disagio, nella crisi della democrazia - che è crisi di rappresentanza, crisi di legittimazione, crisi di sovranità - molto più grave di quanto non si voglia ammettere.

In secondo luogo esso ci aiuta a comprendere meglio la grave crisi democratica in atto che sta sempre più facendo assumere alla nostra democrazia caratteri oligarchici. Una crisi insieme politica, sociale ed economica grave al punto che si è già cominciato a parlare di post-democrazia[33]. In questa prospettiva, per alcuni, lo stile populista va inserito nell'alveo di un atteggiamento malato, causato dalla frustrazione di cittadini irrazionali e imbarbariti. Da una parte, vi sarebbero la vendetta, il rancore, l'intolleranza, tutto ciò che comporta declassamento e disgregazione; dall'altra, il politicamente corretto, lo spirito di mediazione e di parlamentarizzazione del dissenso, cioè un atteggiamento democraticamente autentico e sano. In realtà, come è stato giustamente detto, il populismo è «l'ombra permanente della democrazia rappresentativa» [34], cioè una materializzazione - sempre *in nuce* ed insita nel concetto di democrazia stessa - dell'inceppamento dei meccanismi essenziali della rappresentanza democratica. Esso non solo è sempre presente in qualsiasi forma democratica[35] ma, pur costituendone una stortura, ne rappresenta anche una risorsa: un tasso "fisiologico" di populismo[36], in misura tale che una democrazia matura sia in grado di contenerlo, funge da valvola di sfogo sociale e aiuta l'intero sistema politico ad riequilibrarsi.

Un altro aspetto da tenere in considerazione consiste nei possibili esiti che questo stato d'animo, questo *mood*, questa forma "populista" può dare al disagio politico della contemporaneità: nel vuoto prodotto dalla dissoluzione della capacità dei partiti di intercettare prima, e di veicolare poi, il disagio sociale, gli strumenti di protesta dell'elettorato non possono che diventare gli strumenti di democrazia diretta. Così, se il popolo acquista una maggiore e più diretta rilevanza, esso dovrà anche essere messo in grado di comprendere, di valutare le scelte di politica generale che proprio in quanto tali interessano - e cioè coinvolgono - tutti i cittadini. Il ricorso alla democrazia diretta favorisce tale educazione, costringe i cittadini ad adottare una coscienza politica, costringe la classe politica a spiegare, al maggior numero di persone e nel modo più chiaro possibile, le ragioni che si pongono a favore di questa o quella decisione, educa alla cittadinanza attiva ed è fattore di trasparenza delle scelte pubbliche. In sintesi, se in

[31] G.M. Teruel Lozano, *La riforma della democrazia: una rilettura della teoria di Fraenkel di fronte all'attuale crisi del sistema rappresentativo*, in *Forum di Quaderni Costituzionali,* n. 1, 2013, 3, online su www.forumcostituzionale.it.
[32] E. Fraenkel, *La componente rappresentativa*…, cit., 44 ss., dove afferma, in merito al parlamentarismo britannico: «un sistema rappresentativo che non sappia far fronte alla ferrea legge dell'oligarchia è condannato all'autodistruzione».
[33] C. Crouch, *Postdemocrazia*, Roma-Bari, Laterza, 2003. È poi sotto gli occhi di tutti il disagio sociale in atto, dove all'impoverimento di strati fino a ieri ascendenti, si riscontra una nuova ascesa di vecchi privilegiati.
[34] Così M. Revelli, *Populismo 2.0*, Torino, Einaudi, 2017, che a sua volta richiama J.W. Müller, op. cit.
[35] Lo stesso J.W. Müller, *What's Populism?*, cit., nel suo capitolo introduttivo si chiede quanti, in realtà, possano oggi sfuggire all'etichetta di populista, per sottolineare tanto l'indeterminatezza di tale definizione, quanto il fatto che il populismo è diventato il carattere principale della politica contemporanea.
[36] M. Ciampi, *Populismo e democrazia*, in R. Chiarelli (a cura di), *Il populismo tra storia, politica e diritto*, cit., 29.

democrazia il popolo è sovrano, ciò implica ritenere che il popolo possa decidere con cognizione di causa sia sui leader e sui partiti, attraverso le elezioni, sia sulle singole questioni cui fosse chiamato a pronunciarsi con altri istituti di democrazia diretta.

Ecco perché non si può demonizzare il populismo, se inteso nel senso su specificato: non perché esso persegua, sul piano teorico, scopi condivisibili, ma perché, da un punto di vista funzionale, si ha la convinzione, o forse solo la speranza, che possa servire ad invertire la rotta. Ovvero che possa cioè essere un tonico efficace per lo Stato costituzionale, purché ovviamente si mantenga nei limiti fisiologici di una democrazia matura. Un populismo democratico è, infatti, da intendersi come quell'attenzione, talvolta estrema, al coinvolgimento del popolo nelle decisioni di natura politica In questo modo la strategia populista può essere vista come una strada per recuperare, in maniera radicale, la democrazia. Non è un caso che anche filosofi e politologi progressisti, in tempi recenti, abbiano preso atto del populismo, quale nuovo atteggiamento politico e ne abbiano teorizzato, strategicamente, un suo utilizzo anche da parte della sinistra: il libro di Chantal Mouffe "*Per un populismo di sinistra*" ne è l'esempio più eclatante[37]. Forse questo modello partecipativo estremo potrebbe rappresentare il segno della nascita di un nuovo modello democratico che, depurato dalle sue storture plebiscitarie, vada a rafforzare la sovranità popolare e con essa il suo senso di responsabilità[38]. Sotto questo profilo il cd. populismo, anche solo per eterogenesi dei suoi fini, può giocare un ruolo molto importante, di democratizzazione del sistema, che si può concretizzare, appunto, in una maggiore partecipazione alle decisioni politiche fondamentali e in forme più stringenti di rappresentanza politica.

Restiamo convinti, riprendendo il pensiero di Alain de Benoist, che nella democrazia il concetto chiave sia la partecipazione. Intesa come prendere parte, il che è espressione di appartenenza ad una comunità ed assunzione di un ruolo attivo negli affari pubblici. Non solo attraverso il momento del voto e della scelta dei rappresentanti, ma anche attraverso la possibilità di manifestare o rifiutare il consenso ed esplorando tutte le possibilità che permettano di legare più direttamente il popolo ai propri governanti. Democrazia, insomma, da declinarsi né con il massimo di libertà e neppure con il massimo di eguaglianza, ma con il massimo di partecipazione. Perché la democrazia - in una definizione diventata famosa - è esattamente questo: «la partecipazione di un popolo al proprio destino (…). E ciò che fa la democrazia non è la forma dello Stato, ma la partecipazione del popolo allo Stato»[39].

3. L'ultimo aspetto che vorremmo trattare è quello dell'Europa e del suo rapporto con la rappresentanza. Da un'indagine di stampo politologico effettuata da Ben Crum in chiave comparata su un *range* temporale che va dal 1972 al 2016 sui principali referendum in materia di affari europei indetti negli Stati membri, si evidenzia chiaramente

[37] Ci riferiamo a C. Mouffe, *Per un populismo di sinistra*, Bari-Roma, Laterza, 2018, la quale sottolinea: «[….] La divisione dei poteri, il suffragio universale, il sistema multipartitico, i diritti civili […]. Opporsi alla postdemocrazia non consiste nell'abbandonare quei principi, ma nel difenderli e radicalizzarli».

[38] Di «modello nuovo» che disegni una nuova idea di «democrazia forte» ha parlato F. Robbe, *Introduzione*, in F. Robbe (a cura di), *La démocratie partecipative*, Paris, L'Harmattan, 2007, 18 ss., in riferimento alla democrazia diretta.

[39] A. de Benoist, *Democrazia. Il problema,* Firenze, Arnaud, 1985, 91 ss., anche per la citazione che è di Moeller van den Bruck.

un *trend* fortemente euro-scettico[40]. Sembra, infatti, di poter affermare che, almeno negli ultimi anni, i referendum non sono quasi mai stati pro-integrazione, mentre quando hanno dato esito positivo, la percentuale era strettissima. I dati ci dicono, dunque, che c'è una certa insofferenza nei confronti dell'Europa. Eppure le classi dirigenti, anziché porsi in termini critici e domandarsi le ragioni di questa perdita di credibilità, hanno addotto giustificazioni varie a tale tendenza. E che se i cittadini europei sono così irresponsabili da ignorare i saggi consigli offerti dalle élite, allora il problema sarebbe la mancanza di informazione, di consapevolezza o di educazione politica. Con la conseguenza che non vi sarebbe altra strada se non ricondurli sulla "retta via". Emblematici il caso irlandese e quello greco[41], così come la più recente vicenda Brexit, in cui sono tuttora all'ordine del giorno tentativi di superare il voto popolare attraverso manovre di palazzo. Ecco perché - come dicevamo all'inizio - la dicotomia democrazia diretta *versus* democrazia rappresentativa è una falsa rappresentazione se riferita all'Europa, così come sarebbe un errore sottovalutare il disagio cd. antieuropeista banalizzandolo quale fenomeno transitorio della storia[42]. Al contrario, senza un tentativo di superare il deficit democratico, che non è solo all'interno alle istituzioni dell'Unione, ma anche tra istituzioni dell'Unione ed elettorati nazionali, il bisogno di ricorrere al *modus operandi* tipico della forma più diretta della democrazia, o perfino del populismo, non potrà che aumentare.

La democrazia diretta, intesa sia come partecipazione strutturale del popolo alle decisioni politiche più importanti, sia come attenzione dei governanti alla "percezione popolare", può nella moderna democrazia difficilmente prendere le forme di un soggetto politico in senso proprio. La tesi dell'autogoverno del popolo come fondamento assiologico della democrazia - pensiero tipico delle teorie procedurali – è ormai stato dimostrata inverosimile o perfino illiberale[43]. Ma è chiaro che in questo caso il nostro riferimento alla "democrazia diretta" come strumento di governo non significa intendere il popolo come un «corpo politico» unitario (Rousseau), o come «totalità politica» organica (Schmitt)[44] capace di una propria volontà omogenea ed insopprimibile. Significa invece soltanto non disconoscere quanto Kelsen ci ha insegnato sul popolo quale «soggetto collettivo»[45] e non sminuire l'apporto immediato dei cittadini nelle decisioni politiche. In tal senso non è sbagliato (ri)valutare l'introduzione di ulteriori elementi

[40] In Danimarca il voto negativo relativo alla ratifica del Trattato di Maastricht del 2 giugno 1992 è stato superato da un nuovo referendum positivo tenutosi il 18 maggio 1993 mentre il referendum del 2000 in merito all'adesione all'Euro ha dato risultato negativo. In Francia il referendum del 1992 sulla ratifica del Trattato di Maastricht è stato approvato a strettissima maggioranza (51%), mentre il referendum del 2005 in relazione alla ratifica del Trattato costituzionale è stato bocciato così come nei Paesi Bassi (referendum del 2005). Anche in Svezia nel 2003 il referendum in merito all'adesione all'Euro. Regno Unito ha avuto risultato negativo. Da ultimo si veda il referendum sulla Brexit del 26 giugno 2016. Cfr. B. Crum, *Saving the Euro at Cost of Democracy?*, in *Journal of Common Market Studies*, vol. 51, n. 4, 614-630.

[41] Quanto all'Irlanda, il voto negativo del referendum del 7 giugno 2001 relativo all'adozione del Trattato di Nizza è stato superato in occasione del successivo referendum del 19 ottobre 2002. Il voto contrario sancito dal referendum del 12 giugno 2008 concernente il Trattato di Lisbona è stato superato l'anno seguente (con il referendum del 2 ottobre 2009). Quanto alla Grecia, come si ricorderà, nell'estate 2015 con un rigido pacchetto di salvataggio sul tavolo, Tsipras aveva due alternative: piegarsi a Bruxelles, ovvero al piano proposto dalla Commissione europea, dalla BCE e dal FMI o condurre la Grecia al caos economico. Di fronte ad una scelta così importante, il tentativo di Tsipras di indire referendum popolare consultivo suscitò dure reazioni all'interno delle istituzioni dell'Unione e della Germania, e fu definito "irresponsabile". Nonostante il voto contrario del 61% dei cittadini greci, Tsipras fu costretto dalla c.d. "Troika" a tornare al tavolo delle trattative e ad accettare un accordo ancora più pesante di quello originariamente prospettatogli.

[42] Si veda l'analisi di Y. Mounk, *Popolo vs. Democrazia*, Milano, Feltrinelli, 2018.

[43] L. Ferrajoli, *La democrazia costituzionale*, cit., 76 ss.

[44] Tale tesi è stata elaborata in particolare in ID., *Il custode della Costituzione* (1931), Milano, Giuffré, 1981.

[45] H. Kelsen, *Teoria generale del diritto e dello Stato*, cit. 297.

che rendano possibile una qualche forma di controllo popolare e di responsabilità dei rappresentanti anche nel corso della legislatura. Resta ovviamente il problema della diffidenza sulla capacità di giudizio dell'elettorato, che però rappresenta una contraddizione profonda del pensare democratico. Se si reputa che quest'ultimo non sia in grado di assumere consapevolmente la decisione su un punto specifico, come si potrà ritenere che lo stesso popolo sia in grado di scegliere, consapevolmente, alle elezioni per un candidato o un gruppo che si facciano portatori di una certa linea politica, di scelte generali e specifiche? Ci pare di poter concludere che il problema alla base dello scontro tra democrazia diretta e rappresentativa, così come delle loro relative patologie, resti un aspetto che prescinde dalla bontà o meno dei due sistemi ad assicurare gli scopi per i quali essi sono pensati. Come già aveva intuito Bobbio fin dagli anni Quaranta, nell'elaborare il suo concetto di "democrazia sostanziale", alla radice vi è infatti un problema di educazione alla cittadinanza[46], che è educazione politica e civile insieme degli elettori e degli eletti. Un problema che parte quindi da molto lontano e che non si risolve, ed anzi si aggrava, cercando escludere i cittadini dalle decisioni politiche più sensibili. Ogni percorso educativo, tanto per chi lo dispensa quanto per chi lo riceve, deve passare da una prassi virtuosa, ma prima di tutto, da una prassi [senza aggettivazioni].

[46] Vale la pena riportare una sua citazione estesa: «Solo l'uomo libero è responsabile; ma l'uomo non nasce libero se non nelle astrazioni degli illuministi; l'uomo diventa libero in un ambiente sociale in cui condizioni economiche, politiche, culturali siano tali da condurlo, anche suo malgrado, ad acquisire coscienza del proprio valore di uomo […] Per conseguire questo fine occorrono istituzioni democratiche che siano in grado non soltanto di dare all'individuo l'esercizio della libertà (per esempio attraverso il diritto di voto), ma anche di radicare e di sviluppare in lui il senso della libertà» Così N. Bobbio, *Uomini e istituzioni* (1945), ora in *Tra due Repubbliche*, Roma, Donzelli, 1996, 29 ss. Sul punto anche E. Grosso, *Democrazia rappresentativa e democrazia diretta nel pensiero di Norberto Bobbio*, in *Rivista AIC,* n. 4/2015, 3, dove, riguardo alla funzione pedagogica che la democrazia aveva per Bobbio, afferma: «la democrazia esige un accurato e continuo sforzo di formazione e di educazione. Anzi, l'"educazione dei cittadini" è un compito fondamentale per qualsiasi regime democratico».