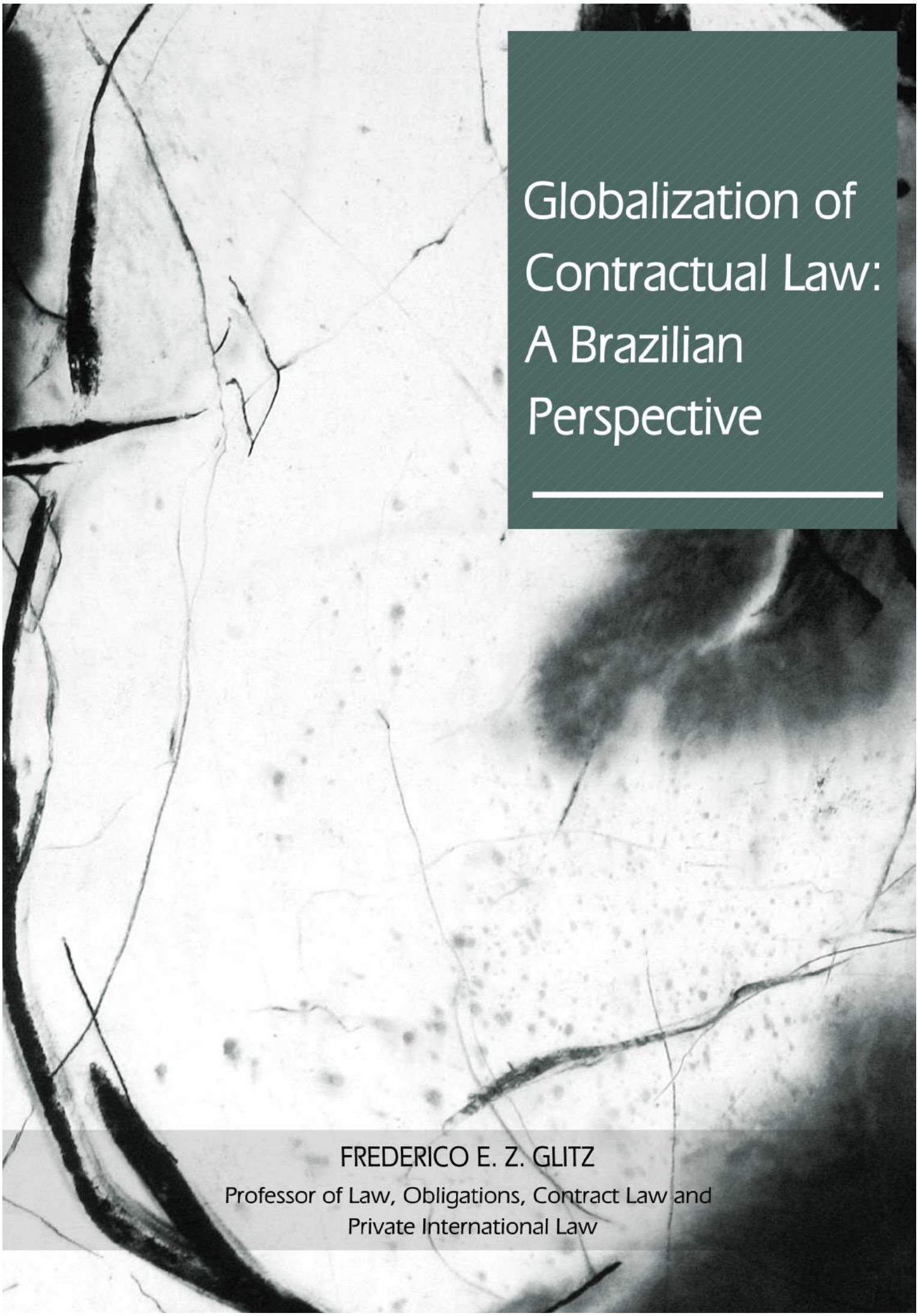

Globalization of Contractual Law: A Brazilian Perspective

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SUMMARY

ABBREVIATIONS

AAA – *American Arbitration Association*.
ICC – *International Chamber of Commerce.*
CPC – *Brazilian civil litigation code.*
CIDIP – *Inter-American Conference of Private International Law.*
CISG – *United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980).*
CDC – *Brazilian consumer Code.*
CPI – *Consumer Price Index.*
DCFR – *Draft Common Frame of Reference.*
DIPRI – *Private International Law.*
EU – *European Community.*
EU – *European Union.*
FOJ – *Federal Official Journal.*
ICA – *International Commercial Arbitration.*
ICDR – *International Center for Dispute Resolution.*
ICJ – *International Court of Justice.*
IMF – *International Monetary Fund.*
INCOTERMS – *International Commercial Terms.*
LCIA – *London Court of International Arbitration.*
LINDB – *Law of Introduction to the Rules of the Brazilian Law.*
MERCOSUL – *Southern Common Market.*
OAS – *Organization of the American States.*
OHADA – *L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires.*
PCCI – UNIDROIT Principles of International Commercial Contracts.
PECL – *Principles of European Contract Law.*
PICC – *Principles of International Commercial Contracts.*
PIL – *Public International Law.*
SCC – *Arbitration Institute of the Stockholm Chamber of Commerce.*
SGECC – *Study Group on an European Civil Code.*

TRIPS – *WTO Trade-related aspects of intellectual property rights.*
UCC – *Uniform Commercial Code*
UCP 600 – *Uniform Customs and Practice.*
ULIS – *Convention relating to a Uniform Law on the International Sale of Goods.*
UNCITRAL – *United Nations Commission on International Trade Law.*
UNCTAD – *United Nations Conference on Trade and Development.*
UNESCO – *United Nations Educational, Scientific and Cultural Organization.*
UNIDROIT – *International Institute for the Unification of Private Law.*
WTO – *World Trade Organization.*

ABSTRACT

This book adopts the proposition that it is possible to the customs to be sources of contractual obligations. To support that premise, it was necessary to seek jurisprudential (arbitration and litigation) and comparative basis. Even more, due to contract law internationalization, customary international sources should be subject of domestic treatment, as they provide contractual obligations as well as they work as contractual interpretation tool. However, one can´t neglect the need to control the customary content. In detailed terms, then, we can say that the role reserved for the custom as contractual law rules source has always been residual in Brazilian law. Accompanying the modern European experience, doctrine and Brazilian legislation emphasize the secondary, when not merely interpretive, role of the contractual custom. In turn, Brazilian case law wasn´t able to give general treatment to contractual custom. Moreover, the process of reducing distances and cultural, social and economic approximation, usually called globalization, influenced the contracts through the incorporation of a number of solutions brought from the international trade practice. Although they might be justified by the age-old principle of freedom, somehow these international "uses" insinuate themselves into Brazil to the point of requiring that the Brazilian Courts themselves to give them treatment and shelter. On one side, if you deny the existence of a creative normative role in contractual custom by another, albeit indirect, is recognized not only their existence but the possibility of foreign origin. This paradoxical treatment reflects, to some extent, another consequence: the Brazilian contract law is in the process of internationalization. Here, then, a new confrontation is announced: a broad creative freedom (a tributary of the so-called *Lex mercatoria*) and the foreign act incorporation control (public policy). Unlike before, however, no simplistic answer would be feasible, particularly because of the complexity of contemporary and regulatory Brazilian contract law.

KEYWORDS: CONTRACT - CUSTOM - INTERNATIONALIZATION – NORMATIVE PLURALISM - LEX MERCATORIA - PUBLIC ORDER.

PART I – THE CUSTOM AS A SOURCE OF NATIONAL AND INTERNATIONAL CONTRACTUAL OBLIGATIONS

> En éste, como en todos los problemas cientificos, la teoria debe ajustarse a los hechos, ser respetuosa com ellos, por más molestos o chocantes que puedan resultar. No son los hechos los que deben ajustarse a nuestras concepciones cientificas, sino, a La inversa, nuestras concepciones cinetificas a los hechos.[1]

I. INTRODUCTION

Those who offer to analyze the contractual phenomenon know that, just like an impressionist painting, its description will be dictated by the individual perception of lights and shadows, more than by a sole social meaning. So, depending on the lens used, it may have several meanings: legal doctrine, social fact, anthropological realization, power structure, cultural representation[2], etc.

From the legal point of view, the contractual phenomenon can be identified as the instrument of an economic operation[3], which aims at facilitating the transit of assets, creating rights and duties, and organizing the credit interests of the contracting parties. Apart from that, contemporaneously, it is recognized that the contractual phenomenon should take into account a certain social aim, even if the content is the subject of some controversy[4].

Taking this multiple legal role assigned to the contractual phenomenon as a starting point, its contemporary regime and principles may become understood. It can be noticed, however, that despite the numerous social changes, the more traditional Brazilian legal doctrine insists on understanding the contract just from its legal concept, and inside it, merely by that theoretical concept which lays its roots in the bourgeois liberal

[1] CUETO RUA, Julio. Fuentes del Derecho. Buenos Aires: Abeledo-Perrot, 1999, p. 79.
[2] ROSEN, Lawrence. *Law as culture*: an invitation. Princeton: Princeton Press, 2006.
[3] ROPPO, Enzo. O contrato. Coimbra: Almedina, 1988, p. 08-10; ALPA, Guido. Les nouvelles frontières Du droit des contrats. In Revue Internationale de droit comparé. V. 50, n. 4. Out./dez. 1998. p. 1019.
[4] For part of the doctrine it is about the limitation of freedom to contract associated to public policy, not confusing it with the basis of the exercise of freedom (HIRONAKA, Giselda Maria Fernandes Novaes. Contrato: estrutura milenar de fundação do direito privado. In: Revista do Advogado, n. 68. São Paulo: AASP, dez. 2002, p. 86) or related to third parties' interests and public order, as validity condition (THEODORO JUNIOR, Humberto. O contrato e sua função social. Rio de Janeiro: Forense, 2003, p. 125-131). As for another part of the doctrine, it would be about a mandate of optimization, limited to the legal and factual conditions. (SANTOS, Eduardo Sens dos. O novo Código Civil e as cláusulas gerais: exame da função social do contrato. In: Revista de Direito privado, n. 10. São Paulo: RT, abr./jun. 2002, p. 31) or a general clause which assures that the intent is granted relief when socially useful (not being limited to the restriction of the exercise of the will). GODOY, Cláudio Luiz Bueno de. Função social do contrato. São Paulo: Saraiva, 2004, p. 191.

conquests of the eighteenth and nineteenth centuries[5]. This position privileges the blind performance of clauses as if the contract were an end in itself[6], devoid of internal and external goals to the contracting party. Centered on the individual, the contract becomes, in this way, an expression of individual selfishness[7], even though, paradoxically, it abstracts its human condition.

As a modern construction, the contractual theory reflects the political and liberal economic options of a certain historical period, pronouncedly bound to an understanding of reality. Besides that, its conceptual framework privileges an order of principle that still influences the Christian western way of thinking. There is reason, thus, for several of those concepts (freedom, property, equality, for example) being established by the Constitution of the Federative Republic of Brazil (1988) as fundamental rights.

It is in this scenery and according to these premises that contracts became one of the bases of the liberal legal system, together with family and property. The Contractual Law[8], thus, that became a paradigm, was the one codified by the liberal States[9] and that is established in numerous doctrinal quotations and court precedents. However, there is some reason why this legal understanding of the contractual phenomenon privileges the economic purpose of the contract. Due to the social and historical circumstances predominant in the Western Europe, the assertion of free enterprise became indispensable, and so did the normative protection of individual autonomy. Nevertheless, this vision, which has become traditional, tends to simplify the explanation of the doctrine, highlighting its economic role over the others. When this logic begins to be pointed out, it ends up creating true dogmas[10], exalted by mere uncritical repetition.

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[5] For instance: THEODORO JUNIOR, Humberto. *O contrato e seus princípios*. 2. ed. Rio de Janeiro: Aide, 1999, p. 14-26, 35-38.

[6] LOBO, Paulo Luiz Neto. Contrato Mudança Social. In: *Revista dos Tribunais*, São Paulo: RT, dez. 1995. a. 84, v. 722, p.44.

[7] "The demands of a new model of production, being supported by the private initiative, the competition in the working market and the assets, and the equivalence in the exchanges, determined, in the legal plan, the working out of formal categories that would better adjust to the interests of the economic agents; thus, on the one hand it is defined the autonomy to desire as freedom to contract, freedom to choose the contracting party; and freedom to establish the content of the contract, whose legal effects derive from the simple consensus to which the legal order confers obligatory power; an on the other hand the equivalence of performance, whose equilibrium is agreed by the parties". FIGUEIRA, Eliseu. Renovação do sistema de Direito Privado. Lisboa: Editorial Caminho, 1989, p. 144.

[8] CARBONNIER, Jean. Flexibilidade droit: pour une sociologie du droit sans riguer. 10. ed. Paris: LGDJ, 1998, p. 255.

[9] MARTINS COSTA, Judith. Crise e modificação da idéia de contrato no direito brasileiro. In: *Revista de Direito do Consumidor*. São Paulo: RT, 1992. V. 3, p. 130-131.

[10] It is important to remember that the expression dogma does not refer to the dogmatic character of the legal rule, that is, as Marcos Bernardes de Melo says: "as an order of validity, with no immediate and direct binding to its fulfilment in the scope of the social realities". (MELLO, Marcos Bernardes de. Teoria do fato jurídico: plano de existência. 14 ed. São Paulo: Saraiva, 2007, p. 15). The expression is used in the sense of "fundamental and

Despite that, from the moment it is noticed that several roles can be conferred to the contract as a legal doctrine, one not prevailing over the others, other explanatory normative and creative possibilities which would sound heretic, now become viable.

It is still important to remember that the discrepancy of opinions on the legal role to be performed by the contract is echoed in the political allocation assigned to each State and in the perspective of individual protection.

While on the one hand it is true that the basic rights of first generation were addressed to the private protection before the State[11], on the other hand, it is understood that individual interests should also be refrained[12]. The reflection of this discussion, for example, ends up influencing the role assigned to the so called contractual sources. This way, the more the subject's autonomy is pointed out, the more the creative power is given individual will, to the detriment of the other possible ways of understanding the creation of contractual obligations.

Contracts are still the instrument par excellence of the economic life and the expression of private autonomy[13], but instead the demanding of the globalized[14] and contemporary entities imposed reforms in the ways such phenomenon is understood. In short, it became clear that the economic mechanism would not dispense with the lubrication imposed by the social objective[15], and so, the institute cannot be understood only by the economic operation that it represents.

Despite the debate on the aims attributed to the contract, little or very little has been discussed on the other sources of contractual obligations, apart from individual will.

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unquestionable truth" inspired in the provocations especially presented in: PERLINGIERI, Pietro. Normas constitucionais nas relações privadas. In: Revista da Faculdade de Direito da UERJ, n. 6-7, 1998-1999, p. 63-65.

[11] That is why the reference to the biblical monster Leviathan seems to be brilliant. (HOBBES), Thomas, Leviathan: or matter, from and Power of a Commonwealth Ecclesiastical and Civil. In: BENTON, William (pub.). Britannica Great Books. London: Britannica, 1952, p.47).

[12] GOMES, Orlando. Transformações Gerais do direito das obrigações. 2. Ed. São Paulo: RT, 1980, p.07. That is why it equally seems brilliant the reference to the quote homo homini lupus, which is granted notoriety when employed by HOBBES as a symbol of human cruelty in the state of nature, prior to the State. TOSI, Renzo. Dicionário de sentenças latinas e gregas. São Paulo: Martins Fontes, 2000, p.538

[13] Understood as the room of freedom recognized to the individual to execute contracts, establishing its form, content, effects and duration. Nowadays, such freedom goes through internal and external conditionings (limits), typical of what will be called hereinafter: the social function of the contract. "So far the private autonomy, expression of freedom understood as the possibility of choice by more suitable means to fulfill its interests, as a manifestation of the most general principle of self-determination in Law, is already about to give room to a heteronomy of external regulation imposed by a wider and wider State intervention before the phenomenon of subjection, subornation, exploitation of social strata by imposition of the concentration of capital (workers, users, consumers, lessees, etc. FIGUEIRA, Eliseu. Op. cit., p. 144.

[14] By globalization it is temporarily understood the set of phenomena, social, political, economic and cultural ones, which tend to standardize the human relationships, suppressing cultural distinctions which are strictly local.

[15] "That is, the private economic initiative has to aim, at first, a goal, which is collective progress, that necessarily prevails and does not confuse with the business owner's private objectives." PRATA, Ana. *A tutela constitucional da autonomia privada*. Coimbra: Almedina, 1982, p. 203.

Obviously, there is a consensus on the idea in which the contract is the expression of negotiating freedom and as a consequence, individual will, and even though it is limited today, it is still considered to be the spinal cord, as it will be further demonstrated. In this regard, it seems to be equally important to point out that the contractual freedom is also internally conditioned to the contractual bind, that is, it must be exercised in such a way as to respect the contractual principiology, and especially the contracting parties' interest, without infringing, however, the basic rights and basic guarantees of the individual.

The way the expression of contractual freedom happens is also symptomatic to the understanding of the "new" negotiating model. It is based on that, for example, that lawfulness can be asserted to the agreements by membership (even if freedom means to accept or not it's content), the idea of the relational contracts[16], the tacit expression of intent, the conclusive behavior, or yet, contracts executed by electronic[17] or strictly automated[18] means can be admitted.

Apart from that, such conditioning makes it possible to equally admit that the contracting parties, either individually or collectively, contribute to the requirements list which will compose its own legal relationship. This fact has already been widely accepted.

It is the most traditional way to understand the contractual freedom, and in the Brazilian legislation it is proved in the art. 425 of the Brazilian Civil Code[19]. Nonetheless, something that is not so well accepted is the fact that this definition is given in a way so as to express less negotiating freedom, but recognition of the normativeness of a contractual custom. In other words, the contractual obligations may not occur from

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[16] In short, according to MACNEIL, there would be two kinds of relational contracts: those performed in entities of little specialization and change, that is, primitive ones, and those performed in contemporaneous, more complex entities, with a higher level of specialization. What makes it possible to join these two kinds of contracts in a single concept is the fact that both are supported by cooperation. The contemporaneous contracts, however, because they are more complex, would involve different variables: specialization of production and measure of its value, existence of internal and external sources of solidarity, planning with basis on specialization and measure, sharing of the charge and bonus, existence of subjacent obligations to the contract, and existence of structure of power and command. MACNEIL, IAN R. O novo Contrato social. Rio de Janeiro: Elsevier, 2009, p. 10-34). In Brazil the theory is applied by MACEDO JUNIOR to consumption contracts, explaining the continuing contractual relations from the premises of cooperation and solidarity. (MACEDO JÚNIOR, Ronaldo Porto. Contratos relacionais e defesa do Consumidor. 2. ed. São Paulo: RT, 2007, passim).

[17] GLITZ, Frederico Eduardo Zenedin. A contemporaneidade contratual e a regulamentação do contrato eletrônico.. In: SILVEIRA RAMOS, Carmem Lucia et al. (Orgs.). Diálogos sobre Direito civil: construindo uma racionalidade contemporânea. Rio de Janeiro: Renovar. 2002, v. ,p. 209-246.

[18] As, for example, some sales websites on the Internet in which the initial developed program is based on the needs (reaching pre-determined levels) and also electronically price raised. Inclusively, there are studies on fridges that would be "self-efficient" (smart refrigerators) from this same concept, or yet, the usual soda vending machines and other candies, so common in the subway stations in European countries.

[19] Art. 425. It is lawful to the parties to establish atypical contracts, observing the general rules established in this Code.

consensus and acceptance (tacit or express), but from the social conditioning previously existing.

Maybe, at a certain extent this could seem to be a false questioning[20]. In Brazilian terms, the doctrine has found difficulty in doubting the capacity of the principle of objective good faith to redouble obligations[21], ever since obligation has been understood as an obligational legal relationship, made of interdependent phases, and directed to performance[22]. Such hypothesis, however, is highlighted as being *interna corporis* to the contract, or else, the binding behavior between the contracting parties due to the model of conduct required to each other. It does not explain, nonetheless, either how such conducts would intend to oblige a third party, or how distinct behaviors from those created by the subjects in their relationship (practices or usages) would condition their behavior[23]. In other words, the explanation is not generalized; it always depends on the behavior demonstrated in each business.

It is still convenient to point out that the individual will, strictly considered, is not the only one responsible for the production of obligational effects any longer. This is the reason why any legal explanation of the contract, from a strictly pro-active logic, could no longer be conceived.

On the other hand, the Brazilian contractual law has still been debating the role which can be attributed to "silence"[24], or as it may be preferable, concluding behavior[25]. If

[20] BOBBIO, for example, argues that the dichotomy consuetudinary Law and State Law would be, in fact, originated from higher dichotomies: public Law – private Law and positive natural Law. BOBBIO, Norberto. Da estrutura à função: novos estudos de teoria do Direito. Campinas: Manole, 2007, p. 152-158.

[21] Two functions granted to the principle of good faith, by the Brazilian doctrine, are: the creation of attached duties (transparency, honesty, loyalty, care, etc.), and the protection of the generated expectations. NORONHA, Fernando. O Direito dos contratos e seus princípios fundamentais: autonomia privada, boa-fé, justiça contratual. São Paulo: Saraiva, 1994, p. 152-153, 157-165.

[22] COUTO E SILVA, Clóvis V. do. A obrigação como processo. São Paulo: FGV, 2007. The author literally refers to the satisfaction of the creditor's interest. For example: p. 167.

[23] One exception currently accepted by the doctrine is in relation to the principle of relativity of the effects of the contract, the so-called external relief of credit, through which duty is explained, depending on the author, to respect others' contract, originated in the social function of the contract. AZEVEDO, Antonio Junqueira de. Os princípios do atual direito contratual e a desregulamentação do mercado. Direitos de exclusividades nas relações contratuais de fornecimento. Função social do contrato e responsabilidade aquiliana do terceiro que contribui para inadimplemento contratual. In: _____. Estudos e Pareceres de Direito Privado: com remissões ao Novo Código Civil. São Paulo: Saraiva, 2004, p. 137-147; NORONHA, Fernando. Op. cit., p. 119; PINHEIRO, Rosalice Fidalgo; GLITZ, Frederico Eduardo Zenedin. A tutela externa do crédito e a função social do contrato: possibilidade do caso Zeca Pagodinho. In: TEPEDINO, Gustavo; FACHIN, Luiz Edson. (Orgs.). Diálogos sobre Direito Civil. Rio de Janeiro: Renovar, 2007, v. 2, p. 323-344.

[24] Understood as a way of tacit statement which would correspond to a "will, by means of negative behavior, assumed from concluding circumstances, characterized by the duty and possibility to speak with regards to silence and the other party's conviction, indicating a wrong direction of will incompatible with the expression of an opposing will". (SERPA LOPES, Miguel Maria de. O silêncio como manifestação da vontade. 3. ed. Rio de Janeiro: Freitas Bastos, 1961, p. 165-166). The term silence is technically rejected as a synonym of tacit declaration or concluding behavior by MOTA PINTO, as it would represent complete lack of manifestation. MOTA PINTO, Paulo. Declaração tática e comportamento concludente no negócio jurídico. Coimbra: Almedina, 1995, p. 631.

on the one hand it can be admitted that behavior is a reflection of tacit concordance with the negotiated conditions by the other party, why can't it be admitted, at least hypothetically, that this same behavior were conditioned by the social conduct expressed in the negotiating custom? It is important to remember that this last behavior could really be completely dissociated from the negotiating freedom of the contracting parties.

Thus, if on the one hand, the Brazilian Contractual law admits that the contracting party agrees by means of their own omission (arts. 111[26], 303[27], 326[28], all in the Brazilian Civil Code), on the other hand, it relates the idea of usages (art. 113[29] and 529[30] of the Civil Code) and customs (art. 113, 432[31], 569[32], 596[33] and 615[34], all from the Civil Code) with contractual influence. Some of the examples mentioned, inclusively, demonstrate the capacity of obligational source of customs (remuneration of the rendering of services or leasing, or even acceptance of the contract, for example).

Hence, another significant datum may be concluded: the role of contractual customs is not restricted to the formation of the contract, but to all the inter-dependent phases mentioned by COUTO E SILVA[35]. This is the reason why it is possible to support the contractual custom as a source of obligations in the formation of the contract, during its performance, and also in its extinction[36].

On the other hand, in all the examples that have been mentioned, there is some reference to the absence of legal or contractual disposition, that is, the obligational

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[25] The tacit statement, more comprehensive than mere silence, would have as characteristic the possibility of being followed by acts that point the statement of will without, however, being expressed by symbols or specific signals.

[26] "Art. 111. Silence implies agreement, when the circumstances or the usages authorize it, and the expressed declared will is not necessary".

[27] "Art. 303. The transferee of the mortgaged property may take responsibility for the payment of the secured credit; if the creditor, notified, does not object the transfer of debit in thirty days, it will be understood as consented".

[28] "Art. 326. If the payment is to be done by measure or weight, it will be understood, being the parties silent, that they have agreed with it".

[29] "Art. 113. The legal transaction must be interpreted in accordance with good faith and the usages of the place of its execution."

[30] "Art. 529. In the sale, with regards to documents, the tradition of the thing is replaced by the handing in of its document of title and the other documents required by the contract, or if it is silent, by usages".

[31] "Art. 432. If the transaction whose expressed acceptance is not usual, or the proponent has exempted it, the contract will be concluded, with no time for refusal".

[32] "Art. 569 "The lessee is obliged to: II – punctually pay the rent according to the payment program, and in lack of program, according to the custom of the place".

[33] "Art. 596. If there is no agreement by the parties, the retribution will be decided by arbitration, according to the custom of the place, service time and quality".

[34] "Art. 615. Having agreed with the adjustment or the custom of the place, the owner will have to accept it. However, he/she can reject it if the contractor has driven away from the instruction and plans given, or the technical rules of work of such nature".

[35] COUTO E SILVA, Clóvis V. do. Op. Cit., passim.

[36] For the exact understanding of this statement it must be taken into account that the existence and relevance of the custom are not denied in the pre-negotiating phase (during the transaction, for example, as a support for occasional civil responsibility), or in the post-negotiating phase (after the establishment of the payments, in the interpretation of contradictory behavior); however, such instances will not be necessarily replied by contractual customs, and so, they will not be an object of immediate concern of this work.

content of the custom would still be subsidiary to the law or contract, having a major role in the comprehension of the business[37] (when the determination by free manifestation of consent is absent). The contractual custom, by itself, would only be binding if agreed[38].

Before these considerations, some questions can be raised:

(i) So, would the express consent to the binding to the negotiating custom be necessary, or would its tacit acceptance be enough?

(ii) Would it be possible to imagine that the general contractual custom would generate the presumption of tacit acceptance to those who do not behave the other way round?

(iii) How far can it be sustained that the general negotiating custom conditions the contracting parties' behavior?

(iv) Would it be possible to admit that the contracting party offended the general negotiating custom as long as it did not offend its contractual disposition?

(v) If the consent to the grounds of the contractual custom were to be necessary, wouldn't it start to compose the own condition of contractual practice by the parties? This is why once private autonomy is exercised, the contractual custom would no longer be, for that transaction, relevant as a custom, and it would be interested as an already stated will.

(vi) Wouldn't the contract, this way, deny the existence of the custom while stating its possibility?

According to the traditional national legal understanding, such questionings, nonetheless, are false problems. This is due to the fact that the custom is usually faced as a subsidiary source of the Brazilian Law, with limited incidence in the negotiating relations (art 4[39] of the Law of Introduction to the rules of the Brazilian Law – Decree-law n.4657 of 1942 – LINDB.

It can be observed, however, that the role of the custom in the formation of contract obligations is not something residual. Depending on the legal sphere where the contract is subjected to, a different approach would be employed. Thus, doctrinally, it used to be claimed that its supremacy in the so called Trade Law (or Business Law, according to the theoretical model adopted by the new Brazilian Civil Codification) and International Law[40]. Even though its role in the Labor Law and in the Civil Law is not

[37] LUDWIG, Marcos Campos. Usos e costumes no processo obrigacional. São Paulo: RT, 2005.
[38] GOMES, Orlando. Contratos. 11. Ed. Rio de Janeiro: Forense, 1986, p. 21.
[39] "When the Law is silent, the judge will take a decision according to the analogy, customs, and general principles of Law."
[40] REALE, Miguel. Lições preliminares de Direito. 27 ed. São Paulo: Saraiva, 2002, p. 159-160.

denied, with regards to the Brazilian internal contracts, it would have a limited duty: as a subsidiary source, it could be accepted as a rule of interpretation of the business.

As it will be shown, this option of the Brazilian Law reflects that political choice of centralization, bourgeois-liberal, of the legal construction in the hands of a "national"[41] legislator. From that moment on, the legislation would recognize the custom, denying autonomy in the legal[42] construction, such a tendency that did not become exclusive to Brazil[43].

In the international scenery, however, the inexistence of a "universal" legislator generated the need of legal creation from other sources. One of these privileged sources was, precisely, the international custom.

In the international contractual aspect, for instance, the phenomenon of the intensification of the international business relations (and consequently the contractual ones), the globalization, the making up of a new world order and the formation of economic blocks started to demand greater concern about the so-called "sources of Law". Here initiatives appear, such the ones of the ICC[44] (International Chamber of commerce), the UNIDROIT[45] (International Institute for the Unification of Private Law) and the UNCITRAL[46] (United Nations Commission on International Trade Law) on the working up of the CISG[47] (United Nations Convention on Contracts for the International

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[41] JUSTO, A Santos. Introdução ao Estudo do Direito. Coimbra: Coimbra, 2001, p. 207.

[42] "However, when along with the customary Law there exists a Law of legislative formation, that one needs direct or indirect recognition from this one, so that its obligatoriness is assured". RÁO, Vicente. O Direito e a Vida dos Direitos. 6. Ed. São Paulo: RT, 2004, p. 283-284.

[43] JUSTO, A Santos. Op. Cit., p. 213. For a compared vision of the "monopolization" of the normative production, see: HORTA. Raul Machado. Poder Legislativo e Monopólio da Lei no Mundo Contemporâneo. In: Revista Brasileira de Estudos Políticos, p. 07-28.

[44] The ICC is a private institution, founded in 1919, which has a statuary objective, among others: to represent all the sectors of international economic activity; to contribute for the harmonization and freedom of the trade relations in the legal and economic domains, and to provide specialized and pragmatic services to the international trade community. ICC. Status de La Chambre de Commerce Internationale. Available on: www.iccwbo.org/.

[45] International Institute for the Unification of Private Law, with its headquarters in Rome, is an international and inter-governmental organism founded as an auxiliary organ of the League of Nations (1926) and re-formulated by a multi-lateral agreement in 1940. Its statutory objective is to make it possible the standardization of the material rules of the Private International Law. It was in charge of the preparatory work of the Hague Convention of 1964 on the formation of international contracts of Sales of personal property; the Brussels Convention of 1970 on the contract of tourism; the Washington convention of 1973 on international will; Geneva Convention of 1983 on the representation of international sales, and the Ottawa Convention of 1988 on international leasing. KESSEDJIAN, Catherine. Une exercice de rénovation des sources du droit des contrats du commerce international: les Principles proposés par l'Unidroit. In: Revue Critique de droit International privé, n. 4. Paris: Sirey, out./dez. 1995, p. 641-670.

[46] Created by the General Meeting in 1966, which put forwards measures of standardization and harmonization of the International Trade Law. It consists of 60 (sixty) countries elected for a mandate of six years. Several of its Model laws (e.g., arbitration) or Convention (e.g., CISG) performs an outstanding role in the regulation of international trade.

[47] United Convention adopted on 11 April, 1980 in Vienna, and which entered in force on 1 January 1988, establishes a legal regime applicable to contracts for the international sale of goods. Brazil has completed the process of ratification of the Treaty in October, 2014. Full text: UN. United Nations Convention on Contracts

Sale of Goods – Vienna 1980), citing only the ones of major interest to this piece of work. Apart from that, these initiatives promote the consolidation and standardization of international customs such as when they allowed the principle of primacy of customs and practices, the supremacy of the principle of the objective good faith and the objective equilibrium of the contractual services, among others.

In the international logic scope, thus, there is another paradigm: not only the customs would have a hermeneutic function of the transaction, but they would be equally constructive so as to be embraced at the same hierarchic level as International Treaties[48].

There remains to be understood, that despite the distinct rationalities, would it be possible to approximate them? And if it were possible to approximate them, how would the companionship be among such logic inside the national planning?

This would be, therefore, the key point for the thesis to be outlined in the present work. The starting point will be the premise that not only the approximation would be possible, but it would also be highly recommended. This happens because, due to the phenomenon of internationalization of the Contractual Law, the traditional positioning of the Brazilian Law seems to be untenable in the long term[49]. Signs of cracking in this conceptual building would have first been presented as the contemporary negotiating bases were set up. The Brazilian courts themselves had already been confronted with unexpected, atypical and unknown situations by the law, but massively recognized in the negotiating practice, as it will be further demonstrated.

Apart from that, problems join the insufficiency of precedent parameters due to normative complexity, which can be of four different kinds:

(i) The new Brazilian Civil codification was followed, in great part of the Contractual Law, by the unification between the traditionally civil and business systems. Because of that, contracts, regardless their nature would have an equal legal system in Brazil[50].

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for the international Sale of Goods. Available on: http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

[48] MELLO, Celso Duvivier de Albuquerque. Curso de Direito International Público. 3. Ed. Rio de Janeiro: Freitas Bastos, 1971, v. 1, p. 146-152.

[49] "It involves a phenomenon that on the one hand aims at the renewal of the structure of society, and on the other hand, the adaptation to a new social-economic reality, where the traditional standards were drastically changed with the internationalization of the social and economic relations, making it necessary to rethink the values ideologically established in the legal system and the inter-disciplinary influences suffered by the Law in this phase of change". RAMOS, Carmen Lucia Silveira. A constitucionalização do direito e a sociedade sem fronteiras. In: FACHIN, Luiz Edson. (Coord.). Repensando os fundamentos do Direito Civil Contemporâneo. Rio de Janeiro: Renovar, 1998, p. 11

[50] It is important to point out that several authors claim that, despite the legislative unification, the civil and business contracts would not be subjected to the same regime, especially the contractual principles (e.g., FORGIONI, Paula A. Interpretação dos negócios empresariais. In: FERNANDES, Wanderley. (Coord.). Fundamentos e princípios dos contraltos empresariais. São Paulo: Saraiva, 2007, p. 106). This logic usually seems to be defended to limit or refute the incidence of certain general clauses to business contracts. Not all

(ii) The Brazilian contractual Law does not make distinctions of the applicable legal regime to national and international contracts at the end of the conflicting procedure[51]. In this measure, depending on the solution given by the private International Law, the same device could be indistinctly applied to contracts of national origin and execution and contracts of international origin and execution.

(iii) The Brazilian Contractual Law does not yet rank with absolute accuracy the contracts subjected to the international legal regime. This is due to the intense doctrinal discussion on the concept of international contracts, to the different concepts incorporated by the different treaties enacted (which depend on the historical moment when they were written), by the international treaties not yet ratified[52], but already signed (for example, CISG), and the imprecision of the national legislation.

(iv) Difference in the parameters between the national legislation and the more contemporary international treaties at the time it is asserted the possibility for the contracting parties to agree with the applicable legal regime to the contracts subjected to the international regime.

This way, any legal solution on contractual subject would depend on the nature, national or international, of the transaction. However, such a unified solution should weigh up different aims and functions assigned to each one of the different relations. In other words, even though there exists a common general treatment legally unified, in a simplistic analysis, or unified in a constitutionalized way, in a more complex analysis, what will differ them will be the economic, social and specific regulating aim. The obligation sources, however, become the same.

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of them share this opinion, alleging that the principles regime is the same, even if the criterion of specificity is applied (e.g., FRANCO, Vera Helena de Mello. Contratos: Direito Civil e empresarial. São Paulo: RT, 2009, p. 25-26). Besides, it is also relevant to remember that, anyway, the political regime applicable to both is necessarily constitutional, that is why the reading of the legislative unification also goes by one more filter of value unification. Despite the "specificities" of trade Law, they would not have ability to remain before certain imperatives of constitutional order if not accepted by them, either from the normative point of view (e.g. the classical pyramidal analysis by Kelsen) or value one (e.g., defended by the academic lawyers of the constitutionalization of the private Law).

[51] Traditionally one of the roles assigned to the international Law is to determine which applicable Law is to be granted to a certain legal relation with international connection, that is, in a factual way bound to more than one legal system. Even though it appears to be a paradox, this determination is based on a choice carried out by the national legislator (RECHSTEINER, Beat Walter. Direito internacional privado: teoria e prática. 7. Ed. São Paulo: Saraiva, 2004, p. 03-04). Once the applicable Law is indicated to the instance subjected to analysis, the incidence of the Lex fori (Law of the Forum) is ceased for that theme. This way, if, by hypothesis, it is applicable to the Brazilian Law to govern and qualify a contract (determination by the Lex fori), the judge will apply the Brazilian Civil Code to define on its nature, inherent credits, transmission of risks, etc.

[52] Ratification is an international act through which a State is internationally obliged to execute international treaties. (art. 2 of the Vienna Convention of 1969 – BRAZIL decree n. 7.030 of 14 December 2009, which enacts the Vienna Convention on the Law of Treaties, completed on 23 May 1969, with special attention to the articles 25 and 66. DOU of 15 December 2009). In accordance with the Brazilian Constitutional Law, it is the competence of the head of the Executive Power, before approval of the Legislative Power (art. 84, VIII of the Constitution of Republic).

What can be noticed is that the "boundaries" of the Contractual Law do not coincide any longer with the boundaries of the sovereign State, or with the conceptual "boundaries" of the national and international contract. At a great extent the own concept of contract, before its regime being national or international, has been internationalized[53].

The "incorporation" of the international regime into the national legislation makes it impose the weight of other circumstances, needs and problems. In order to fulfill them, the relatively "provincial" standards of the national contractual understanding are too narrow. In this sense, the mere and empty assertion of sovereignty restricts the application of justice to the concrete case. It is important to remember, besides that, that this "import" does not happen in the traditional sense of the nationalization of the international norm, being its legal and doctrinal discussion confined, in Brazil, to the international treaties[54].

It is in this scenery that the so called "internalization"[55] of contracts is being defended, that is, in given circumstances solutions internationally established would be

[53] In the meaning employed by DELMAS-MARTY, Mireille. Por um direito comum. São Paulo: Martins Fontes, 2004, p. 47-53.

[54] In short, in very simple words, it can be said that it was about how to explain the relationship between the State and the legal ordination from two doctrinal chains: monists (for those who think there is only one system, only one of them prevailing) and dualists (for those who think there is independence between the national and international systems, prevailing the national one. The Brazilian leading case was decided in 1977 by the Federal Brazilian Supreme Court when reached an agreement that an international treaty could be abrogated by a subsequent and extraordinary law (BRAZIL. Federal Supreme Court. Extraordinary Appeal n.80/004/se. GENEVA CONVENTION, UNIFORM LAW ON BILLS OF EXCHANGE AND NOTES – ACCOMODATION ENDORSED TO NOTES NON-REGISTERED IN THE LEGAL TIME – IMPOSSIBILITY TO BE A DEFENDEDNT ACCOMODATION MARKET, EVEN BY THE ORDINARY MEANS. VALIDITY OF THE LAW-DECREE N. 427, OF 22.01.1969. EVEN THOUGH THE GENEVA CONVENTION, WHICH PROVIDED FOR A UNIFORM LAW ON BILLS OF EXCHANGE AND NOTES IS APPLICABLE IN THE INTERNAL BRAZILIAN LAW, IT DOES NOT PREVAIL OVER THE LAWS OF THE COUNTRY, DERIVING FROM IT THE CONSTITUTIONALITY AND CONSEQUENT VALIDITY OF LAW-DECREE N. 427/69, WHICH INSTITUTES THE COMPULSORY REGISTER OF BILL OF EXCHANGE IN TAX AUTHORITY, UNDER THE PENALTY OF NULITY OF THE TITLE. BEING THE ACCOMODATION MAKER AN INSTITUTE OF EXCHANGE LAW, IT WILL BE INEXISTENT IF IT IS RECOGNIZED THE NULITY OF THE EXCHANGE TITLE TO WHICH IT WAS ENDORSED. KNOWN AND PROVIDED EXTRAORDINARY APPEAL. Belmiro da Silveira Goes versus Sebastião Leão Trindade. Rapporteur Min. Xavier de Albuquerque. Full Court. Trial on 01/06/1977). One the other hand, the Federal Supreme Court already argues the need to reformulate this orientation, as is the vote of Min. Gilmar Mendes in Extraordinary Appeal nº 466.343-1/SP: "It is necessary to think, however, if in the current context, when it can be observed a better and better acceptance of the supra-national legal orders of protection to human rights by the constitutional State, this legal system would not have become completely out-of-date". (BRAZIL. Federal Supreme Court. Extraordinary Appeal n. 466.343-1/SP. CIVIL COMMITMENT. Deposit. Depositary that unjustifiably refuses to return the thing deposited to the depositor. Fiduciary sale adjudication of coercive measure. Absolute inadmissibility. Inexistence of constitutional provision and of subordinate rules. Interpretation of art. 5, inc. LXVII e §§ 1, 2 and 3, of the CF, in the light of art. 7, §7, of the American Convention of Human Rights (pact of San José da Costa Rica). Denied Appeal. Trial by both RE n. 349.703 and the HCs n. 87.585 and n. 92.566. The civil commitment of unfaithful depositary is illicit, whatever the modality of deposit is. Bradesco Bank S/A versus Luciano Cardoso Santos. Rapporteur Min. Cezar Peluso. Full Court. Trial on 3 December 2008).

[55] CASELLA, for example, refers to the "progressive fulfillment of the internationalization of Law, but incipient among us, simultaneously subscribes to the reconsideration of the modalities and the extension of the relations between internal Law and international Law. In this chapter, Brazil has equally taken relevant steps and may

applied to national contracts (of origin or treatment), specially by the international custom. Thus, for instance, it would be possible to say that some rules of the PCCI[56] (UNIDROIT Principles of International Commercial Contracts) could be used as the basis to reinforce a local decision, especially when contract conditions are at stake (clauses, content, kind or model), or yet, the pattern of arbitration clause of the ICC could be employed by Brazilian judges as the basis for the solution of a certain case involving interpretation of arbitration clause, or even on the transfer of risk (INCOTERMS)[57].

From this scenery it is extracted the major problem of the present work, which can be stitched up in the following path of questionings: (I) is the negotiating custom an absolute source of contractual obligations?; (II) Is the custom as a source of contractual obligations restricted to the national mechanisms of the normative genesis?; (III) how is the custom, as a source of contract obligations, internationalized? And (IV) what are the boundaries which the negotiating custom is subjected to as a source of contractual obligations?

In order to answer all these questionings it is necessary to understand the "new" role ascribed to the contractual custom, establishing it as an absolute negotiating source, in other words, not only restricted to the role of interpretative elucidation, but also creative of obligations, so as to pass over to the international forms of its establishment and its reflections in the contemporary Brazilian Law.

At a second stage, the way in which such source of contractual obligations is internationalized will be demonstrated, in addition to how it relates to the contract in the Brazilian legal system, so as to, eventually, assert not only its normative power, but also its boundaries and possibilities.

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have considerable advancement. (CASELLA, Paulo Borba. Introdução: ratificação pelo Brasil da convenção de Nova Iorque de 1958 – internacionalização do Direito Internacional e Direito Interno. In WALD, Arnoldo; LEMES. Selma Fereira (Coord.). Arbitragem comercial internacional: a Convenção de Nova Iorque e o Direito Brasileiro. São Paulo: Saraiva, 2011, p. 23) and adds that "the theme of the relationship between internal and International Law gives rise to consider a discussion between the international and internal sources; rather than opposition, it should be talked about combined efforts, to assure the concomitance and complementarities of international and internal plans of existence, validity and efficacy of Law, as well as the existence and the operation of procedural mechanisms, adequate to assure effectiveness and operational readiness". CASELLA, op. Cit., p. 25).

[56] It should be remembered that the PICC, according to their preambles, are applied only to international trade contracts. VILLELA, João Baptista et al. (Eds.). Princípios Unidroit Relativos aos Contratos Comerciais Internacionais/2004. São Paulo: Quartier Latin, 2009, p. 01.

[57] "INCOTERMS" refers to the so-called International commercial terms, or, in the vernacular use, international trade conditions. They are, in fact, standard contractual conditions of international trade. They refer to international sales contracts in which it is essential the identification of the moment of transfer of risks (and so, expenses) on the product, in the absence of specific regulation". GLITZ, Frederico Eduardo Zenedin. Transferência do risco contratual e incoterms: breve análise de sua aplicação pela jurisprudência brasileira. In: CORTIANO JUNIOR, Eroulths; ET AL. (Coords.). Apontamentos críticos para o Direito civil brasileiro contemporâneo II. Anais do Projeto de Pesquisa Virada de Copérnico. Curitiba: Juruá, 2009. P. 118-119.

However, before stepping into the specific theme of customs, it is made necessary the establishment of some methodological premises indispensable to the conclusions drawn here.

II. METHODOLOGICAL PREMISES

> Excesivas prácticas consuetudinarias, por un lado, y demasiado pocas, por el otro, perturban la vida social del hombre. Es indispensable encontrar un equilibrio armónico entre ambas[58].

2.1. BASIC PREMISES

Preliminary, it is important to point out a brief introductory note, which may clarify the aims of the present text more efficiently.

On the contrary to what it apparently may seem, this is not a book which will describe the current outlines of international contracts[59]. It is not either a work whose aim is to discuss the "Civil" Law from the point of view of international eyes. It is intended to carry out the true revision of "sources", taken in a more literal and less bibliographical way. The proposal of the work is, above all, interdisciplinary[60], and not limited to the traditional legal ramifications. This fact, however, does not impede some thematic clippings, especially because they will be necessary from the point of view of the focus of the research.

[58] CUETO RUA, Julio.. Op. cit., p. 109.

[59] KASSIS warns us that to conceptualize the international contact is not simple and indeed he demonstrates that when analyzing all the complexity of the French Law (KASSIS, Antoine. Le nouveau droit européen dês contrats internationaux. Paris: LGDJ, 1993. passim). However, temporarily, we will adopt as a concept of international contract the quote by BAPTISTA, that is, "the contract, which contains elements that allow it to be bound to more than one legal system, has a as object an economic transaction that implies the double flow of assets by the border". BAPTISTA, Luiz Olavo. Dos contratos internacionais: uma visão teórica e prática. São Paulo: Saraiva, 1994, p. 24.

[60] "From the interdisciplinary reading of Law, thus, the analysis of each concrete event, in its point in history, is compulsory in any circumstances: The culture of a people has to be understood and interpreted, as well as their value and psychology, in order to assess the interest in the pointed solution, before the probable reaction to emerging situations by the citizens, involving crisis and difficulties, or even success.". RAMOS, Carmem Lucia Silveira. Op. cit., p. 14.

First of all, it is important to point out that the research took into consideration the contracts executed between private parties, and so, its conclusions are restricted to the legal regime applicable to these relationships[61].

Thus, the particularities involving conventional relationships between States will not be approached (this is the reason why International Public Law, in its traditional sense, will only be invoked as a support to the general premises, and not as an essential argumentative basis), neither will the contracts executed between political and private agents (having no mention to the so called Management Law).

Another clipping will also be necessary inside the inter-private relations, since they will be relevant to the conclusions proposed only to those legal relations which involve people in equal legal treatment. Thus, the contractual relationships where vulnerability is assumed are excluded from the research and its conclusions, such as what is called Labor Law and Consumers Law. It is convenient to be warned, nonetheless, that not all the legal systems compared present similar, thematic clippings.

As a consequence, it is relevant to highlight the fact that the conclusions and statements of the present work will not include any reference or concern over contractual relationships kept between themselves or with privates (when the relationship is not ruled by the so-called Private Law), or contractual relationships kept between subjects of Private Law with unequal legal treatment (or protective), being it national or international. The thesis outlined here is intended to be applied exclusively to private negotiating relationships, national or international, kept by individuals of Private Law, in equal legal treatment, regardless their nature (civil or business, domestic or international). In ever brief words, a questioning on the origin of the commitment of those contracts will take place, starting from the category of the contractual custom. It should be noticed, thus, that at a certain point the conclusions drawn may be useful to the Private International Law or the Trade Law, to the Civil Law or the International Trade law, which justifies why a previous categorization should be inconvenient.

[61] Inter-private relations are those in which the parties are, generally speaking, equally treated by the legal system, that is, having as a starting point the notion of freedom and being able to relate themselves in apparent equal conditions. It is excluded, thus, from this concept, the relation involving the State agent, unbalanced by nature.

With such pretension, at the same time in which it can be put aside the ambition to define the legal classification and its ramifications from the conclusions outlined here (public *versus* private, civil *versus* business, national *versus* international), which would have a tendency to limit its applications, it should also be kept in mind the fact that in some way, from examples and tools of the National Private Law to the logic of the Private International Law and the International Economic Law, they will be useful to the intended research. This will certainly be backed by the conviction that currently the categorizations mentioned have higher value as a pedagogical tool, precisely because of the descriptive advantage they provide.

Apart from that, at a second moment, it will be necessary to resort to the method[62] of comparative law, especially with regards to Contractual Law[63].

The legal comparison, according to DAVID, would be nothing else but the comparison between different legal systems and which would be suitable to several aims: I) improvement of Domestic Law; II) promotion of legal standardization; III) clarification of solutions or prominence of tendencies, and IV) historical or philosophical investigations. In fact, the author points out its methodological role[64].

[62] DAVID, René. Tratado de Derecho Civil Comparado: introducción al estúdio de los derechos extranjeros y al método comparativo. Madrid: Revista de Derecho Privado, 1953, p. 05; SANTOS, José Nicolau dos. Direito comparado e geografia jurídica. In: Revista da Faculdade de Direito da UFPR, v. 3. 1955, p. 349; RIVERO, Jean. Curso de Direito Administrativo comparado. São Paulo: RT, 1995, p. 17: CASTRO JÚNIOR, Osvaldo Agripino. A relevância do Direito comparado e Direito e Desenvolvimento para a reforma do sistema judicial brasileiro. In: Revista de Informação Legislativa, n. 163, Brasilia, jul./set. 2004, p. 53; MOROSINI, Fábio. Globalização e Direito: além da metodologia tradicional dos estudos jurídicos comparados e um exemplo do Direito internacional privado. In: Revista de Informação Legislativa. N. 172, Brasília, out./dez. 2006,, p. 121; VICENTE, Dário Moura. Direito comparado: introdução e parte geral. Coimbra: Almedina, 2008, v. 1, p. 20-21. Opposed to it, defending to be an "autonomous science", see: DEMOGUE, René. Les notions fondamentales du Droit privé. Paris: Editions La Mémoire Du Droit, 2001, p. 269; DANTAS, Ivo. Direito comparado como ciência. In: Revista de Informação Legislativa, n. 134, Brasilia, abr./jun.1997, p. 242-243; COELHO, Luiz Fernando. O renascimento do Direito comparado. In: Revista de Informação legislativa, n. 162. Brasilia, abr./jun. 2004. P 249; SACCO, Rodolfo. Introdução ao Direito comparado. São Paulo RT, 2001, p. 33-34; SOARES, Guido Fernando Silva Soares. Common Law: introdução ao Direito dos EUA. 2. Ed. São Paulo: RT. 2000, p. 19, 21: SGARBOSSA, Luís Fernando; JENSEN, Geziela. Elementos de Direito comparado: ciência, política legislativa, integração e prática judiciária. Porto Alegre: Sergio Fabris, 2008, p. 35. At last, to CONSTANTINESCO and DOLINGER it is method and science. CONSTANTINESCO, Leontin-Jean. Tratado de Direito Comparado: introdução ao Direito comparado. Rio de Janeiro: Renovar, 198; DOLINGER, Jacob. Direito internacional privado: parte geral. 7. Ed. Rio de Janeiro: Renovar, 2003, p. 45. However, it is all about useless discussion that that adds little to the meaning employed in the proposed methodology.

[63] Some authors understand that the expression "Comparative Law" is inadequate, since it is not clear what it is about (DAVID, René. Tratado de Derecho..., p. 05), others support it under the perspective that it names the effective comparison of legal systems. DANTAS, Ivo. Op. cit., p. 234.

[64] DAVID, René. Tratado de Derecho..., p. 03-08.

Such aims, however, are not the object of unanimous understanding. While some authors deny being a mere comparison of distinct legislations[65], others emphasize the need for understanding the environment in which those Laws are inserted, highlighting, this way, a more complete understanding of the appreciated institutes[66] and the other sources involved[67].

As practical effects of the method, the ones with special prominence would be the support to decisions of legislative politics (especially the legislation reform)[68], the regional integration[69], the legal application of Foreign Law and the international legal co-operation[70], the guarantee for better efficacy to the International Law (either for the employment by international courts, for the establishment of *standards*, or the determination of the origin of the solutions of International Law)[71], the academic-pedagogical[72] development, the increment of the legal practice[73], the update of court precedents[74], as a guide for the understanding of political consequences due to legal decision and development

[65] COELHO, Luiz Fernando. Op. cit., p. 249

[66] CASTRO JÚNIOR, Op. cit., p. 53. GEERTZ points out that comparison cannot be used to seek " identical phenomena disguised under different names", and it would not be a question of turning concrete differences into abstract similarities. According to the author: the knowledge is local. GEERTZ, Clifford. O saber local: novos ensaios em antropologia interpretativa. Petrópolis: Vozes, 1997, p. 325-327.

[67] BERGEL, Jean-Louis. Teoria Geral do Direito. 2. Ed. São Paulo: Martins Fontes, 2006, p. 176.

[68] VICENTE, Dário Moura. Op. cit., p. 24-25; CRUZ, Peter de. Comparative Law in a changing world. 3. ed. London: Routledge-Cavendish, 2007, p. 20; SGARBOSSA, Luís Fernando; JENSEN, Geziela. Op. cit., p. 55-57; DOLINGER, Jacob. Op. cit., p. 46; GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Transnational Commercial law: texts cases and materials. Oxford: Oxford press, 2007, p. 152; DAVID, René. Os grandes sistemas do Direito contemporâneo. 4. ed. São Paulo. Martins Fontes, 2002, p. 06-07 (with the aim of improvement). GLEEN states that the comparative Law is a western invention with an outstanding role to serve the legislative reform. GLENN, H. Patrick. Vers un droit compare integré? In: Revue international de droit compare. v. 51 n. 4.. oct./dez, p.843.

[69] SGARBOSSA, Luís Fernando; JENSEN, Graziela. Op. cit., 2008, p. 57-64.

[70] SOARES, Guido Fernando Silva Soares. Op. cit., p. 19-21; SGARBOSSA, Luís Fernando; JENSEN, Graziela. Op. cit., p. 64-75; BERGEL, Jean-Louis. Op. cit., p. 181-183; GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 158.

[71] TRINDADE, Antônio Augusto Cançado. Reflexões sobre o método comparado no Direito Internacional. In. O Direito Internacional em um Mundo em Transformação. Rio de Janeiro: Renovar, 2002, p. 148.

[72] RIBEIRO, Marilda Rosado de Sá. Importância do Direito comparado. In: TIBURCIO, Carmen; BARROSO, Luís Roberto. (Orgs). O Direito Internacional comtemporâneo: estudos em homenagem ao Professor Jacob Dolinger. Rio de Janeiro: Renovar, 2006, p. 691-692; GLENN, H. Patrick. Op. cit., p. 144-145.

[73] GLENN, H. Patrick. Op. cit., p. 848-850.

[74] GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 150.

of transnational[75] trade Law, standardization, legal harmonization[76] and the verification of the consistency of the international custom[77].

SACCO, based on the tradition of scientific neutrality, still asserts that the scope of comparison would be the collection of data, regardless its final usage, describing it as potentially impartial, meaning that the analysis would not bear a positive or negative[78] value.

As techniques of legal unification and harmonization[79], the ones which can be highlighted are the efforts by public and private institutions, in a national or international scope, such as UNCITRAL, ICC and UNIDROIT in the international private Law scope. It is still relevant to point out that, even though this has been the comparative project since the end of the first world war, SACCO does not either agree that it would be misinterpreted with its necessary aims, or that the comparison would be the previous condition of unification[80]. DAVID questions, yet, the convenience of this kind of aim[81]. So, although it may be the object of some doctrinal controversy, the comparative Law has also been useful to these aims at a great extent.

Without going too deeply into the discussion on the conceptual limits of comparison, it has been chosen to adopt it as an instrument of improvement of the contractual legal technique, turned to the consecution of a socially useful and relevant aim, in other words, make a better solution (or explanation) possible for the concrete case. This way, this method will be useful not only for the

[75] Ibidem, p. 154-158.

[76] VICENTE, Dário Moura. Op. cit., p. 29-30; SGARBOSSA, Luís Fernando; JENSEN, Graziela. Op. cit., p. 75-82; CRUZ, Peter de. Op. cit., p. 23-25; DAVID, René. Os grandes sistemas... p. 11-12; BERGEL, Jean-Louis. Op. cit., p. 177-181; SANTOS, José Nicolau dos. Op. cit., p. 349. In some subjects, mainly obligational and commercial: DEMOGUE, René. Op. cit., p. 248-285; GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 159-165.

[77] GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Transnational commercial law: texts cases and materials. Oxford press, 2007, p. 165.

[78] SACCO, Rodolfo. Op. cit., p. 27-34.

[79] While harmonization aims at the normative approximation through the adequacy of the internal legislation of the different countries, the standardization aims at the normative identity by the creation of sole international tools which congregate the highest possible number of part States. As an example of attempt to legislative harmonization, it can be cited: the model Law of arbitration of UNCITRAL; as for examples of treaties of standardization, the best ones are the Inter-American Convention recently ratified by Brazil, which will be mentioned in the second part of this work, and the Vienna Convention of 1980 (CISG).

[80] SACCO, Rodolfo. Op. cit., p. 30.

[81] DAVID points out that it would only interest the jurists to identify the possibility of standardization of Law, whereas politics would define if this same standardization would be desirable or not. The opinion reflects the preoccupation to define the comparison as a scientific method, supposedly neutral. DAVID, René. Os grandes sistemas..., p. 138.

understanding of how customs may generate contractual obligations, but also how such thing ends up influencing legal, doctrinal and court precedent works.

It is understood that the demand of this approach for the thesis outlined here happens due to: (I) the Brazilian legislative option which denies a more creative role to the contractual custom, to the detriment of the merely interpretative traditional option; (II) this same option is not the only known legal solution, even though it is shared by several countries of the *Civil Law*; (III) in the international contractual relations, a normative outstanding role is driven to the custom; (IV) the measures of harmonization of unification of the contractual Law, especially Business, privilege the role of custom as an obligation source; (V) the national courts have been confronted with situations originated from trivial practices, but which are not supported by means of the employment of strictly formal logic and ritualistic of law (for instance, clauses in the *no show*, obligation to renegotiate[82], INCOTERMS, etc.); (VI) the phenomenon of internationalization of the contracts which apparently make typical solutions of international business ends up alleging to internal business due to the practicality or usefulness of its mechanisms (clauses of *hardship*, rules of transfer of risks based on the INCOTERMS, writing techniques[83], new negotiating kinds[84], techniques of the building up of economic transactions[85], etc.)

For these reasons it seems to be more reasonable to pursuit the sufficient origin to understand and justify the new role elsewhere, which,

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[82] Known in the international transactions as clauses of hardship which create the obligation to negotiate when fulfilled given circumstances previously anticipated by the contracting parties and that deeply alter the objective conditions of the contract, being by the increase of costs or by the decrease of the value of the counter-performance. The relevance of the contract, in international Law, is due to the inexistence of a universal legislative support which would be the basis for an occasional pretension of revision by the aggrieved party. On the other hand, even if it seems paradoxical, its origin is precisely the conservation of the contract, that is, the pacta sunt servanda (not blind to the conditions of balance) is invoked to justify the need of amendment of the conditions to execute the contract. In this sense: GLITZ, Frederico Eduardo Zenedin. Contrato e sua conservação: cláusula de hardship. Curitiba: Juruá, 2008, p. 137-178 e GLITZ, Frederico Eduardo Zenedin. Favour contractus: alguns apontamentos sobre o princípio da conservação do contrato no direito positivo brasileiro e no direito comparado. In: CONRADO, Marcelo; PINHEIRO, Rosalice Fidalgo (Coord.). Direito privado em discussão: ensaios para uma recomposição valorativa da pessoa e do patrimônio. Curitiba: Juruá, 2009, p. 265-267.

[83] As examples there can be mentioned the increase in the use of "Glossaries" and "recitals", so typical in the international and Anglo-Saxon contractual practice.

[84] There can be mentioned as examples negotiating kinds previously unknown from the Brazilian negotiating practice, but which were given strong support like the confidentiality agreements, memoranda of intentions (MoU), joint ventures, etc., all of them derived from Anglo-Saxon or international practice.

[85] For example, corporate holdings as a way to keep controlling interest or familiar property, or yet, "umbrella" agreements devised to govern future complemented relations, regularly, by contractual amendments..

according to the contractual custom, may be performed in the Brazilian Law. In this sense, the comparative method is neither neutral, nor dilettante.

Thus, based on that method, it is intended to identify the instrumental-material function executed by the institute (contractual custom) in other national legal systems and in the international regime, comparing them to the model established in Brazil[86]. So, it is important to point out that this comparison will not happen inside the same system of positive law, but with the support of the international construction. As long as possible, this way, a comparison that outweighs the strictly dogmatic limits[87] will be pursued. However, there will be no statistical preoccupation with the international sources. They are all mentioned only as argumentative support, and mainly, to appoint tendencies.

Also, there will be no intention of historical comparison, worried about the identification of the roots of each one of the appreciated systems, especially because the researcher would not have enough authority on the appropriate methodology. It is still convenient to highlight the fact that the historical analysis, when adequately carried out, would allow the understanding of the moves of the making up of power of the national State, but not its crisis. The starting point, this way, will be a known datum: the crisis of the monopolist model of normative production. That is why there will be, very soon, an analysis of the crisis of the feudal model (which allows the understanding of the change to the modern paradigm[88]) and the crisis of the liberal model, with no older inferences which are usual in this approach (such as the Chinese, Hindi or the Roman law[89])

Just as in every methodological option, this approach will have pros and cons. RIVERO, for instance, understands that the advantage of this method is

[86] It should also be pointed out that comparative Law is not a mere study of a foreign Law, or else, the quotation to foreigner references (doctrinal or legislative), but comparing them to the best understanding of the options adopted by the Brazilian Ordination. In this sense, DAVID, René. Os grandes sistemas..., p.138; DANTAS, Ivo. Op. cit., p. 235

[87] COELHO, Luiz Fernando. Op. cit., p. 249.

[88] KUHN explains the development of science, claiming that the disorganized activity before the science (pre-science) is structured when a certain "scientific community" adopts a sole paradigm. A paradigm would be a standard model accepted in that community (KUHN, Thomas. As estruturas das revoluções científicas. 5. Ed. São Paulo: Perspectiva, 1998, p.43.) The adoption of this paradigm is the "normal science". The events would be explained according to this paradigm, but when doing so, there would appear difficulties and false explanations. If it was no longer possible to explain it inside the paradigm, so, a crisis would come up, and such crisis would only be solved when a new paradigm appeared.

[89] As an example: MAINE, H. Sumner. El antiguo derecho y la costumbre primitiva. Madrid: España moderna, [1800?] e WIEACKER, Franz. História do Direito privado moderno. 3. ed. Lisboa: Fundação Calouste Gulbenkian, 2004.

obvious[90]: one can understand themselves better by studying others. In a certain way, it is the result reflected from the search for alterity. The importance of this paradoxical conclusion is reinforced, separately, by VICENTE, DOLINGER, DAVID and KRONKE *et al*[91]. In this way:

> Comparative law, ironically, provides for a distance to the domestic legal order, while it redirects the analytical focus back onto it. Studying law in a foreign system, analyzing the ambiguity of legal and social and political and economic rule, reminds us of law's other, social nature. This has a strong impact on our understanding of the emergence and creation of law, as it will likely illuminate the alternatives to legal order as well. This will ultimately not only open our eyes for the complex regulatory scheme in the studied foreign jurisdiction but also for the ambiguities of hard and soft law, official and non-official law in our domestic legal regime.[92]

Another outstanding point is highlighted, independently, by VICENTE, GLENN and CRUZ: the comparison has the possibility to help the local precedent court in the search for adequate solutions to the concrete case[93], in other words, the method has functionality to an extent further than as an instrument of reform, update, harmonization or unification of the legislation. Apart from that, CRUZ points out that the comparison would also be used as a tool to fill in gaps, since numerous institutes would end up being imported from different legal systems[94]. This more active role could, this way, contribute to:

> Change a local or national vision turned to the past, to which we paid tax, in a worldwide perspective guided to the future. This fact eventually contributes to change the angle of observation and to substitute the uni-dimensional knowledge and which is limited to a national scope by a pluri-dimensional thought open and widened to the world horizon.[95]

Such conclusion is especially relevant if we take into consideration two of the premises in the present work: the internationalization of contracts and the incidence of Human Rights as a way to control contractual customs. However,

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[90] RIVERO, Jean. Op. cit., p. 20

[91] VICENTE, Dário Moura. Op. cit., p. 23-24; DOLINGER, Jacob. Op. cit., p. 45; DAVID, René. Os grandes sistemas..., p. 04; GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 148.

[92] ZUMBANSEN, Peer. Comparative Law's Coming of Age? Twenty Years after Critical Comparisons. In: German Law Journal, v. 6, n. 7, 2005, p.1080.

[93] VICENTE, Dário Moura. Op. cit., p. 24-25; GLENN, H. Patrick. Op. cit., p. 844-848; CRUZ, Peter de. Op. cit., p. 21.

[94] CRUZ, Peter de. Op. cit., p. 22-23.

[95] CONSTANTINESCO, Leontin-Jean, Op. cit., p. iv.

because they are central, these themes will depend on a more detailed description throughout the course of this research.

On the other hand, the adoption of a method is not always facilitated with regards to jurists and court sources, and neither is this difficulty a peculiarity of the Brazilian Academy[96]. This happens because the curriculum structures are not usually organized in such a way as to absorb the complexity of the understanding of global and plural normative companionship, reflecting just the "traditional divisions that separate the public and the private"[97], being structured around the national positive law.

In other words, the option for critical sources of the study of law will be demanded, in an attempt to escape from the "functional"[98] discourse, that is, institutionalized and formal discourse which ends up giving privilege to the false sensation of sufficiency in the national capacity of satisfactorily exercise its sovereignty in the normative production, without resorting to the foreign experience or to a dialogue with the international community, being them States, private entities or organisms of varied nature. Apparently, the belief in the normative autopoiesis is still rooted in the national legal imaginary.

Thirdly, it will also be essential to seek the understanding the way in which the transposition of the negotiating custom happens, in a strictly non-jurisdictional language to the ways of the traditional understanding of jurisdiction. Thus, whenever viable, the legal and arbitral court precedents (national and international) will be employed. It is important to point out, nonetheless, that due to the outlines of this theme, there will be instances of limitation of appreciation by the local judges, and for confidentiality reasons, of access to arbitral reports by experts. These limitations, nevertheless, will not compromise the general conclusions of the book, but instead will represent the difficulty for statistical order and compilation so as to indicate safe tendencies.

[96] ZUMBANSEN mentions the marginalization of the studies of Comparative Law in academic research. ZUMBANSEN, Peer. Op. cit., p. 1073.
[97] COELHO, Luiz Fernando. Op. cit., p. 250.
[98] ZUMBANSEN mentions the existence of two paradigms in the Comparative Law. On the one hand, there is great concern in justifying an objective approach of the themes and institutions subjected to comparison ("juxtaposition plus"), on the other hand, the comparison is made in a "functional" way, that is, in a way to reduce the analysis to those institutions and themes which are formally institutionalized, denying those other forms of normative creation. This last paradigm would reveal, in fact, " Its reactionary content and its alleged objectivity's "false modesty" (...) when the language of legal problem is translated into the language of the universal problems". ZUMBANSEN, Peer. Op. cit., p. 1074-1076.

It is also relevant to highlight the fact that in the hypotheses where consultations to the Brazilian court understanding are possible, they will happen in a limited way (being them precedents, periods or courts). This option is due to the need to keep the focus of the research, since the consultation will normally be useful to clarify the punctual issues of the thesis or argumentative support.

Finally, it is worthy of notice the fact that when methodological options adopted in the present research are justified by their usefulness and social relevance, it is not intended to adopt any defense positioning of pragmatism, in the sense employed by PERLINGIERI[99], or praxis meaning excessive value of the practical activity. Instead, first of all it is based on the premise that theoretical development must be followed by the awareness on its "public"[100] servitude of what it is intended to be studied, especially due to the circumstances of scarcity of resources for the investment on the development of legal research.

Secondly, it is understood that the practical usage of law cannot be spared, even if it is greatly theoretical. This conclusion seems to be pungent when the defense of a new role to be performed is intended by the negotiating custom. It is not, however, about writing to readers who live in "ivory towers". Besides that, the law itself is not an end in itself, it is not an exclusive language of beginners in the secret rituals of some legal "oracle", lost in its reflections. It is about an instrument created by Men to solve real problems related to living people[101], and as such, it is necessary that it is social, historical and culturally adequate to those it is applied to. It seems to be proper to take it for granted that any thesis, which is created with a displaced pretension of time and space of where it is originated, becomes dead.

This kind of detachment, for instance, has already created situations in the recent History of Mankind, when the application of the coded rule could be confirmed to deny full citizenship or social segregation with basis on racial or

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[99] "The pragmatism is based on effectiveness: it is this way because it is so. This is the denial of Law, as Law is the "has to be". The Law promotes change of reality, and in order to do so, it cannot succumb to the facts. The primacy of Law is the primacy of political decision before the nature of the things. The Law does not always picture reality, as it intends to change it. Law is precisely that, a power of reality transformation. The pragmatism is contrary to this idea, it is the denial of the power of transformation by Law". PERLINGIERI, Pietro. Normas constitucionais..., p. 65.

[100] Expression employed in the sense of what is common and of interest to everyone.

[101] "The perspective criticism requires, as well, the appreciation of the phenomena which describe and analyze the legal and social changes, under the penalty of incurring into endless repetition". FACHIN Luiz Edson. Teoria crítica do Direito civil. 2. Ed. Rio de Janeiro: Renovar, 2003, p. 224.

political criteria: the German legislation – Nuremberg laws of 1935; the South – African legislation in force between 1950 and 1994; the North–American segregationist legislation, in force in the southern States between the end of the Secession war and the mid-sixties, and the Australian legislation of isolation of the aborigines. As for the Brazilian legislation, it must be remembered that the Institutional Act n.5 of December 13th, 1968 suspended the political rights and several individual guarantees of Brazilian citizens to assure the "authentic democratic order, based on freedom, on the respect to dignity of human beings, on the battle against subversion and the ideologies contrary to our people's traditions."

Apart from that, as it will be demonstrated, this preoccupation is conditioned by another methodological imperative; the understanding that even if the analysis is given on inter-private practices and relationship, inside them the rights and duties arising out of fundamental and human Rights are incident and enforceable. Thus, in other words, there is search for a way to understand the law which at the same time can change reality and also respect a political choice unavoidable of respect to the individual.

However, before going on to the analysis of the material elements of the theme, an approach of other premises is still necessary to the argumentative construction of this work.

2.2. TIMES OF LEGAL PLURALISM[102]

The first logical conclusion which can be drawn from the comparative method is the existence of pluralism of normative systems[103] that discipline the different social relations all over the world. This pluralism is especially

[102] The expression "pluralism" will not be adopted in its purely political meaning, that is, "a conflict on behalf of the conception of an entity separated in groups of power which are, at the same time, in a lower position related to the State, and in a higher one related to the individuals, and as so, they consist of the guarantee of the individual against the excessive Power of the State (State ownership) on the one hand, and on the other hand a guarantee of the State against individual fragmentation [atomism]. BOBBIO, Noberto: MATTEUCCI, Nicola; PASQUINO, Gianfranco. Dicionário de Política. 11 ed. Brasília: UnB, 1998. v. 1, p. 928, It is not either intended to adopt the expression pluralism in a philosophical way, that is, "the doctrine which admits the pluralism of substances in the world [...] in the contemporaneous terminology, this expression is usually assigned to the recognition of the possibility of different solutions to a same problem, or different interpretations for the same reality or concept, or a diversity of factors, situations or evolutions in the same field.". ABBAGNANO, Nicola. Dicionário de filosofia. 5. Ed. São Paulo: martins Fontes, 2007, p. 765.

[103] BERMAN, Paul Schiff. Global legal pluralism. In: Southern California Law Review, v. 80, 2007, p. 1157.

interesting when it is taken into account the fact that pluralism is also made of grounds[104], methods, values and objects[105]. Thus, for example, different legal "families"[106] with the distinct systems of normative sources[107] can be remembered. Moreover, as FRADERA points out, different choices of legal solutions[108] live together inside their own "families".

It becomes even more interesting to take into consideration the fact that pluralism also exists in relation to the understanding of the formation of law by itself. FRADERA still says that while the Civil law is conceived as a logical construction, and so, devoid of gaps, the Common law[109], by its own characteristic of its formation (case law)[110] would have no problems to live with them[111].

Even though the concept of legal pluralism is still the object of an intense debate[112], for the perspective to the present book it can be employed, at a first moment, as the recognition of existence of several normative systems spread all over the world. According to BOBBIO[113], this way of thinking would correspond to the first phase of the pluralism movement.

This kind of construction, nonetheless, reflects a recent challenge imposed to the classical dogmatism, especially when linked to a positive national standard, such as the Brazilian one. This model, according to MARQUES, would be tested by the challenges proposed by the so-called post-modernity, that is, (i)

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[104] GEERTZ leaves it clear when analyzing the normativity in different cultures: from the Islamic preoccupation with the normative testimony, the logic of the Indian social order and the Malaise decorum. GEERTZ, Clifford. Op. Cit., p. 280-324.

[105] FAUVARQUE-COSSON, Bénédicte. Towards a Renewed Universalism in Law. In: Diogenes, n. 219. SAGE, 2008, p. 56.

[106] Expression employed by DAVID to gather the different normative systems, making it easier its comparative analysis. DAVID, René. Os grandes sistemas..., p. 21-23.

[107] Ibidem, p. 15.

[108] FRADERA, Véra Maria Jacob de. Reflexão sobre a contribuição do Direito comparado para a elaboração do Direito comunitário. Belo Horizonte: Del Rey, 2010, p. 60.

[109] According to Soares, the expression Common Law may be understood in several ways: (i) the Common Law originated in the decisions by the Westminster (London), created by the monarchy, and that overlapped the consuetudinary Law and distinct from Equity devised to apply equity and soften the harshness of that court; (ii) the second meaning would be the distinction between the Law created by the judges (judge-made-law) and that one created by the legislator (Statute Law); (iii) in a third sense, it reflects the distinction between Anglo-Saxon Law and the European Continental Law (German-Roman). SOARES, Guido Fernando Silva Soares. Op. cit., p. 31-53.

[110] Legal construction based on precedents.

[111] FRADERA, Véra Maria Jacob de. Op. cit., p. 60-63.

[112] BENDA-BECKMANN, Franz Von. Who's afraid of legal pluralism? In: Journal of Legal Pluralism, n. 47. 2002, p.37-82; MELISSARIS, Emmanuel. The more the merrier? A new take on legal pluralism. In: Social & Legal Studies, v. 13, n. 1. 2004, p. 57-79; TAMANAHA, Brian Z. A non-essentialist version of legal pluralism. In: Journal of Law and Society. V. 27, n. 2. Jun. 2000, p.296-321.

[113] BOBBIO, Noberto. Teoria geral do Direito. São Paulo: Martins Fontes, 2007, p. 302-303.

the reevaluation of the traditional contract model and (ii) the demand of incidence of the citizens' fundamental rights. It must be remembered that a lot of these rights, inclusively, are of international orientation and inspiration. Besides that, according to the author, the apparent bourgeois safety would be left aside, and it would be recognized that antinomies would be inevitable and that the system would live with the pluralism of legal sources and with the globalization of the societies and economies[114]. The author finishes by stating that:

> in post-modern times a critical vision of the traditional law is necessary, just like a reaction to the Science of law, imposing a new value of the principles, the values of Justice and equity, and mainly in the Civil law, the principle of objective good faith, as a limiting paradigm of autonomy of will.[115]

Such conclusion, however, is not exclusive to the Brazilian society of the twenty-first century. GOMES, for instance, had already mentioned it in the mid-fifties, claiming that in "the wearing of the legal instrument", along with the "incapacity (by the jurists) to replace it by another source adequate to the new style of production", what mattered was that the coded legal technique would remain "practically motionless"[116]. The author commented:

> The cult to the legal text and the cult to the legislator necessarily lead to Statolatry. The law emanated by the State covers all the surface of the legal order. Such monism of the sources of law stultifies all efforts of research and investigation of the legal phenomenon, since it reduces it to the legislation enacted by the State, dictated by the legislators, sovereign will.[117]

Even though it is insisted on the capacity of the adaptation of law to the new demands and social customs[118], the written law has been proved insufficient: it is impossible for the statutory "law" to stop the "law"[119]. This

[114] MARQUES, Cláudia Lima. Contratos bancários em tempos pós-modernos – primeiras reflexões. In: Revista de Direito do Consumidor, n 25, jan. /mar. 1998, p. 19-38.
[115] Ibidem, p. 26.
[116] GOMES, Orlando. A evolução do Direito privado e o atraso da técnica jurídica. In: Revista de Direito GV, v. 1 São Paulo: FGV, maio 2005, p. 121-122.
[117] Ibidem, p. 124.
[118] RIPERT, Georges. Les forces créatrices du Droit. Paris: LGDJ, 1955, p 45-49; 65-67.
[119] GOMES, Orlando. A evolução do Direito..., p. 125.

conclusion seems to be extremely important, as, in the past, it had been the target of some confusion, especially with regards to its different translations[120].

It should be pointed out, this way, that the "Statutory law" represents only and solely the simplification necessary to the complexity of the social relations. This way it is characterized as one among other possible forms of regulation of life in society.

What may pose a problem[121] is the exaggeration of its role. That is why it seems to be wrong to identify social progress with the legal creations, just like the way it happened to the doctrine[122].

This kind of questioning would be unthinkable inside the modern logic, as the only possible rational construction would be associated to the "Statutory Law". To speak about its several hypotheses would be to go towards the ways of irrationality, inadmissible to the agents of the *"Lights"*. It is because of that VILLEY ascribes to HOBBES the origin of positivism[123].

The legolatry, however, accentuated the evidence of insufficiency of law as long as conflicts started to appear and which were not enclosed inside the narrow boundaries of the legal text. In other words, certain other "realities" would not belong to the "legal" normative standard, either because of an ideological question, an economic[124] choice, or because of a cultural option.

It was due to this gap that the second phase of the pluralism thought started to ambush, and which BOBBIO called institutionalist[125]. It is about the idea that several distinct normative systems would exist, as many as the number

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[120] As it is known, the terms "Statutory Law" and "Law" are not synonyms, admitting the latter one as much wider than the first one (even though this meaning, in certain historical moments, is refused by some philosophical chains); as for the Anglo-Saxon language, they are represented by the same word (Law): "1. The enforceable body of rules that govern any entity". "2. One of the rules making up the body of Law, such as an Act of Parliament" (MARTIN, Elizabeth A.; LAW, Jonathan. Oxford: a Dictionary of Law. 6. ed. Oxford: Oxford Press, 2006, p. 306). Thus, difficulties of translation are common, for example, the American / English texts translated into Portuguese, precisely because of this kind of semantic idiosyncrasy. To go more deeply into this topic, see: GROSSI, Paolo. Mitologias jurídicas da modernidade. Florianópolis: Fundação Boiteux, 2004, p. 114-115.

[121] GEERTZ, Clifford. Op. cit., p. 257-258.

[122] CARBONNIER, Jean, Op. cit., 10. Ed., p. 16.

[123] VILLEY, Michel. A formação do pensamento jurídico modern. São Paulo: Martins Fontes, 2005, p. 745.

[124] WOLKMER, Antonio Carlos, Pluralismo jurídico: fundamentos de uma nova cultura no Direito. 3. Ed. São Paulo: Alfa-Omega, 2001, p. 45-46.

[125] BOBBIO, Noberto. Teoria geral..., p. 303.

of different social institutions[126]. Anyway, this pluralism would still occur whereby State permit.

Thus, in a certain moment, for instance, the modern State itself would assure the respect to normative "diversity" *(classic pluralism)*[127], either by colonial, convenience or by protection of the peoples conquered[128]. It can be inferred, thus, that the legal pluralism "is not a temporary deviation, but a central element in the modern scenery"[129]. This way, given a certain historical moment, not very far away, the legal pluralism became part of the central scenery of the political, economic and social logic, imperial liberal of the central nations of the European capitalism.

Its most contemporary overcome is about the recognition as a State Law, plural of industrial entities, no longer colonial. According to FEITOSA, it would be included here the resistance to the State Law by means of non-state public organizations, professional self-regulation, independent regulating agencies, standardization of legal models and the figure of the *lex mercatoria*, among others[130].

Following towards autonomy, CORREAS states, yet, a third sense: the existence of several "basic rules"[131] in the same territory, not necessarily with the State agreement, even though not all these normative systems could be considered as legal[132].

TAMANAHA, on the other hand, proposes, for example, six different "normative systems" (among them the legal and the consuetudinary ones) and admits that there may occur crashes between them, once not all of them claim

[126] ROMANO, Santi. O ordenamento jurídico. Florianópolis, Fundação Boiteux, 2008, passim. The author, for instance, restrictively understands the concept of "rule", identifying it with its State origin (p. 72-73). That is why he states that the legal system is "an entity which on the one hand acts according to the rules, but, above all, on the other hand, the system itself acts as if the rules were pawns on a chessboard. Thus, they represent the object and the means of the activity of the ordination, more than an element of its structure". (p. 69). The understanding of the rule which comprises the present work is diverse and does not limit itself to that rule derived from a legislative authority.

[127] FEITOSA, Maria Luiza de Alencar Mayer. Paradigmas inconclusos: os contratos entre a autonomia privada, a regulação estadual e a globalização dos Mercados. Coimbra: Coimbra, 2007, p. 253.

[128] GRIFFITHS, John. Legal pluralism. In: SMELSER, Neil J.; BALTES, Paul B. (Eds.). international Encyclopedia of the Social & Behavioral Sciences. New York, 2001, p. 8651.

[129] GEERTZ, Clifford. Op. cit., p. 352.

[130] FEITOSA, Maria Luiza de Alencar Mayer. Op. cit., p. 255-256.

[131] By basic rules the author understands the legitimator speech of the origin of a legal system. CORREAS, Oscar. Introdução à sociologia jurídica. Porto Alegre: crítica Jurídica, 1996, p. 79-88.

[132] Ibidem, p. 92.

to be compulsory, legitimate, competent and supreme and also because there are several interests they support[133].

As a general mark of this understanding, it would seem to be clear that pluralism denies, this way, the normative exclusivity of the legal text. So, the legislator State does not entangle with every creative movement of social normativity.

However, apart from that, legal pluralism does not occur only inside the narrow boundaries of the national frontiers[134] any longer. If at a given moment it would be possible to admit the influence of international rules to various aims, it also cannot be denied that its normativity leaks into the State frontiers, regardless the sovereign consent.

TEUBNER notices that the pluralism theories need to reformulate its explanations, as the Law was not being formed from the traditional interactions (such as ethnic) any longer, but by the continuous reproduction of specialized global nets[135]. MICHAELS' opinion on global legal pluralism[136] is more or less similar.

From all these observations it seems to be viable to take out one of the premises of this book: "the denial that the State is the only center of political power and the exclusive source of all production of Law"[137] is feasible.

In a more general sense, so, the idea of legal pluralism reflects the existence, in a certain social field, of more than a set of obligatory rules[138]. This term may be understood in two different ways: (i) as the arrangement in which the legal system lives with the diversity (recognizing it and assigning distinct rules to it)[139] and (ii) in the sense of "normative heterogeneity", to which the individual would be exposed, and where the "Law" does not find its sources in a single system, but also in self-regulations of several social fields that can: help

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[133] TAMANAHA, Brian Z. Understanding legal Pluralism: Past to Present, Local to Global. In: Sydney Law Review, v. 30. 2008 p. 397-401.

[134] "From the legal-technical point of view society with no boundaries necessarily leads to the application of pluralism of the sources of Law; as its establishment gradually implies the necessary decentralization of the origin of the legal phenomenon, both in the State-infra scope, and in the supra-national one.". RAMOS, Carmem Lucia Silveira. Op. cit., p. 20.

[135] TEUBNER, Gunther. A Bukowina Global sobre a Emergência de um Pluralismo Jurídico Transnacional. Impulso In: Revista de Ciência Sociais e Humanas. V. 14, n. 33. 2003, p. 14.

[136] MICHAELS, Ralf. The re-statement of non-state law: the state, choice of Law, and the challenge from global legal pluralism. In: The Wayne Law Review, v. 51, 2005, p. 1223-1224.

[137] WOLKMER, Antonio Carlos. Op. cit., p. XV.

[138] GRIFFITHS, John. Op. cit., p. 8650.

[139] Idem.

each other, complement, ignore or frustrate each other[140]. All the future assertions in the present work will be done in this last sense.

Thus, next to the legislator State, there would exist other social fields of normative production, which were sometimes recognized by that one, or sometimes denied, according to a certain political, social or economic convenience. However it was always located historically, and it should not be questioned in the narrow boundaries of this book.

Therefore, it is about recognizing the existence of normative room beyond the Statuary Law or conferred by it. This way, for example, from school regulations, bureaucratic organizations, neighborhood relations, international business organizations[141], interactions in stock exchange, securitarian markets, to even clubs[142], relationships between gentlemen, sportspeople and gamblers[143] may produce some kind of normativity. Not all of them, however, will be "elected" by the State legislative politics to become "Statuary Law", in the formal and institutionalized sense of the term. However there is no reason why they will not be obligatory, and general, and will not produce the effects expected by a certain collectivity, leading their components to a certain behavior.

Its applicability still exists not only in systems of solutions of non-state disputes, but also in the interaction of the State with the rules produced by these same entities. Some examples can be cited, such as the ones of the class regulations that become obligatory (codes of medical ethics or any other profession), the anti-tobacco regulations which end up publicly wrapped[144] up and the recognition of foreign arbitral reports.

Why, then, talk about legal pluralism at this historical moment?

If on the one hand, in the countries of continental tradition, the effects of de-codification are still noticed, on the other one the need for the search of new ways of re-systematization becomes higher and higher[145].

According to PALACIO the discussion on legal pluralism appears again in Latin America at the end of the twentieth century, due to four factors: (i) the

[140] GRIFFITHS, John. What is legal pluralism? In: Journal Of Legal Pluralism, n. 24, 1986, p. 38-39.
[141] GRIFFITHS, John. Legal pluralism..., p. 8651.
[142] BERMAN, Paul Schiff. Op. cit., p. 1172.
[143] GROSSI, Paolo. Primeira lição sobre Direito. Rio de Janeiro: Forense, p. 31.
[144] GRIFFITHS, John. Legal pluralism..., p. 8652.
[145] LORENZETTI, Ricardo Luis. Fundamentos do Direito Privado. São Paulo: RT, 1998, p. 77-79.

crisis of the production model to accumulate capital based on the regulation of an industrial capitalist society before the new circumstances imposed by the economic globalization, especially the flexibility of the productive relations; (ii) the development of a re-structure movement of the American hegemony (neoamericanism) before the reorganization of the major global economies and their respective areas of influences; (iii) the process of administrative decentralization motivated by the neoliberal policies adopted by Latin-American countries and (iv) the appearance of new social movements. Still, according to the author, the current legal transformations happen at the cost of the State by the local and global interaction, being its main transnational strength, even though there is no replacement of the State legal monism by the international one. There would be, in fact, the fragmentation and disorganization of society, being the capitalist laws remained as orientating principles[146].

Following the same line of thought, WOLKMER[147] claims that there would exist two ways of looking at pluralism: the conservative one which would preach the anti-state, deflating the conciliatory role of the State between Capital and Social, and secondly that communitarian perspective (democratic-participative) of social organization. In short, while one of them would be represented by a way of non-state pluralism regulation, but private, strongly connected to the international corporations and to the economic agents, the other would be represented by the individual and collective participation in the definition of new rights. There would also be, therefore, according to WOLKMER, an ideological issue inserted in the defense of pluralism, even if it appears to be Manichaean.

BERMAN still points out that there are several modalities of legal discourses: they can be either the assertion of the authority of the national law (in a consequent policy of isolation and protectionism), or the search for the universal harmonization (eliminating the pluralism). According to the author, neither of them is completely successful, since, in his opinion, it would be possible to keep hybridism by means of co-operation between the different

[146] PALACIO, Germán. Pluralismo jurídico, neoamericanismo y postfordismo: notas para descifrar la natureza de los cambios jurídica, n. 17. 2000, p. 151-176.
[147] WOLKMER, Antonio Carlos. Op. cit., p. 355-358.

sources[148]. This also seems to be MICHAELS's conclusion, who would notice the new role of the State before globalization[149].

Recognizing the debate over the motivations and utilization of politics and pluralism discourse, the present book will concentrate on the identification of pluralism from the role performed by the contractual custom, proving it as one of these ways of non-state normative production, even if not all of them agree that it is about a non-formalized and official[150] regulation. In addition, the starting point will be the understanding that this is a global phenomenon and which is not limited to peripheral[151] countries

However, it appears that the advantages offered by the admission that there exists other normative sources together with the State are evident. It is not about denying its importance[152], but noticing that misunderstanding State with law, and law with Statuary law, is, in a final analysis, to let the State itself establish the boundaries where it will act. ROULAND's conclusion to this paradox is exemplary: "the legal pluralism allows to overcome the issue of the State of law to assure the State has no monopoly of the production of the official law[153].

Even though, according to ASSIER-ANDRIEU, it is in societies in which there exists the figure of the State that it can more easily be noticed the existence of the legal approximation. Such approximation, however, distances the legal construction of social life, rendering it impermeable, making it formal and institutional[154]. Moreover, the potentialized conceptual opening by the

[148] BERMAN, Paul Schiff. Op. cit., 1163-1164.

[149] "Instead of asking how globalization has changed the role of the state in the world, we must ask how the state must change itself in order to deal with globalization. Instead of asking how multiple communities can replace or supplement the state, we must ask how the state can accommodate multiple communities. Instead of asking how conflicts can be avoided through privatization and depoliticization of private law, we must ask how conflicts be resolved through a combination of public and private interests. In short, instead of moving the state to the periphery of our analyses and thereby denying its importance for our problems, we must move it into the analytical center of our analysis so as to be able to critique its role in globalization. To emancipate non-state law vis-à-vis the state, it is not enough to change the status of non- state law within the state. We must look as well at what is necessary on the side of the state to make such emancipation possible; and we must ask what kind of emancipation this will be". (MICHAELS, Ralf. Op. cit., p. 1258-1259).

[150] WOLKMER, Antonio Carlos. Op. cit., p. XIX.

[151] GRIFFITHS, John. Legal pluralism..., p. 359.

[152] It is an interesting fact that the approach used during the French Revolution was to protect the indissolubility of the Republic. Every way of difference, being it weight, measure or culture could be understood as a threat to the revolutionary conquers. (ROULAND, Norbert. Nos confins do Direito. São Paulo: Martins Fontes, 2003, p. 163).

[153] Ibidem, p. 174.

[154] There came up "precise rules, instances of trial, administrative classifications, of penitentiary institutions and other legal fulfilments" which separate the legal from the social. And this distinction would be completed with the written Law, as from that time on, there could be extracted different meanings and their effects

pluralism allows the legal performance at levels not currently reached by the official law, especially in Latin America, due to multi-cultural circumstances, and cultural, democratic and participative deficit[155]. In short, according to COELHO: "the place for reflection to conquer a fair law"[156].

It can be concluded, then, that the existence of a parallel system and autonomous of the normativity provenient from the State cannot be denied, with basis on the establishment of the contractual custom as a normative source.

The relationship between both, nonetheless, is going to be our source of interest from now on. This is why at some point it will make a difference in the political collision[157] or democratic assertion[158].

2.3 THE INTERNATIONALIZATION OF CONTRACTUAL LAW

The other preliminary concept that must be properly understood is the one here called "internationalization" of contractual law and which will be essential to the proposed conclusion.

As previously mentioned, it will be noticed that this idea is not a synonym of search for the concept of "international contract", that is, of a contract submitted to the typical regime of that business where two or more legal systems are presented as potentially competent to govern the obligational relationship encapsulated and that, at the same time, represents transnational economic operation.

It is firstly a process to overcome the physical and normative frontiers of the different States, especially in relation to the reception of normative phenomena and the full capacity of national conformation of the legal institutes.

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would perpetuate beyond their time, in detriment of any social movement." (ASSIER-ANDRIEU, Louis. O Direito nas sociedades humanas. São Paulo: Martins Fontes, 2000, p. 20-24).

[155] BORTOLOZZI JUNIOR, Flávio. Pluralismo jurídico e o paradigma do Direito moderno: breves apontamentos. In: Cadernos da Escola de Direito e Relações Internacionais da UniBrasil, Curitiba, n. 12, 2010, p.30.

[156] COELHO, Luiz Fernando. O Estado singular e o Direito plural, In: Revista da Faculdade de Direito da UFPR, n. 25, 1989, p. 163.

[157] As long as certain rules are recognized or the existence of others is denied in an attempt to assure political authority. GRIFFITHS, John. Legal pluralism..., p. 8654.

[158] In the sense that the new normativities are not subjected to the control or prevalence of the State Law. WOLKMER, Antonio Carlos. Op. cit., p. 351-352.

Traditionally, the approximation of legal systems can happen through the "transplant" or system import (typical in colonial societies); by means of more co-operative ways such as harmonization, or else, the mentioned negotiation of terms that approximate the fundamental concepts of the normative system at issue and the unification, instead of approximation, the negotiation involves the assumption of a sole system by both the negotiating countries. Other ways, nonetheless, are possible, being originated either from the hard law[159] or the soft or the soft law[160].

Nowadays, for example, it is talked about acculturation. Its content, however, is still vague and maybe it will be able to reflect several tendencies together. This way it can be represented by the typical "inspiration" of former metropolis and their colonies[161], by the influence of sovereign countries over others[162], or international normative texts on internal law[163]. It is about a complex process which cannot be reduced to a single model, it does not refer only to rules and legal concepts, and the State is not its only agent[164]. In private terms this acculturation may be exemplified by the import of typically international

[159] "Hard law consists of international conventions, national statutory law and regional or international customary law. Only a small proportion of hard law rules will be of mandatory nature and they will normally be national legal system specific. Their "hardness" is due to the fact that when parties make an effective choice of substantive law they will have to take the law as they find it; they cannot modify it, but they may amend it with their contractual stipulations". MISTELIS, Loukas. Is Harmonization a Necessary Evil? The Future of harmonization and New Sources of International trade Law. Available on: http://www.cisg.law.pace.edu/cisg/biblio/mistelis2.html.

[160] "Soft Law consists of provisions embodied in model laws (but not incorporated in the national law), principles to be found in legal guides, and in scholarly restatements of international commercial law. Contractual stipulations agreed upon by the parties which do not conflict with relevant mandatory rules or public policy principles also belong to soft law. All these rules and principles are not legally binding and enforceable unless the parties to a commercial transaction decide otherwise". (Idem).

[161] As in the instance of the French Law on the Lebanese contractual legislation (CABRILLAC, Séverine; ZEIN, Youmna. L'acculturation em Droit dês affaires libanais: Le cas du droit dês contrats. In: NAVARRO, Jean-Louis; LEFEBVRE, Guy. (Dir.). l'acculturation en droit des affaires. Montréal: Éditions Thémis, 2005, p. 6490 or the French Law on the legislation from Quebec. LEFEBVRE, Brigitte. L'évolution de La Justice Contractuelle en Droit Québécois: une influence marqueé du Droit Français quoique non exclusive. In: NAVARRO, Jean-Louis; LEFEBVRE, Guy. (Dir.). Op. cit., p. 196-219.

[162] As in the instance of the American Law on the French Law. GUIGNARD, Laurent Justice contractuelle: influence Du droit américan? In: NAVARRO, Jean-Louis; LEFBVRE, Guy. (Dir.). Op. cit., p. 183-195.

[163] As in the instance of the CISG on the Law of Quebec (DROSS, Willian. L'acculturation em matière de vente: l'influence de La CVIM sur La ventre interne. In: NAVARRO, Jean-Louis; LEFEBVRE, Guy. (Dir.). Op. cit., p. 143-182); of the Conventions on the international transportation on the French Law (BOM-GARCIN, Isabelle. L'acculturation em matière de contrat de trasport de marchandises par route: i'influence de la CMR sur Le contrat de transport national. In: NAVARRO, Jean-Louis: LEFEBVRE, Guy. (Dir.). Op. cit., p. 221-239) and the international documentary sale on the Canadian Law. LEFEBVRE, Guy. L'acculturation em droit dês affaires québécois: Le cas de La vente documentaire internationale. In: NAVARRO, Jean-Louis; LEFEBVRE, Guy. (Dir.). Op. cit., p. 241-291.

[164] TWINING, Willian. Diffusion of Law: a global perspective. In: Journal of legal pluralism, n. 49, 2004, p. 34-35.

institutes (the adaption of the INCOTERMS to the national need may be cited[165]) or by the creative role of arbitration, especially the international one[166]. This new logic, hence, is "instilled into the national legal orders and bothers the habitual canons of modern law"[167].

Thus, what is at stake is the traditional explanation of the concept of sovereignty which can no longer be understood as absolute by the invested authority of the internal legislative power[168]. The absolute and unique role of the State in the normative production goes into a crisis, and the possibility of the existence of other adversary normative sources (pluralism, as seen in the previous item) becomes to be admitted. When such sources are located outside the State territory, the crisis reaches the pith of the state sovereign.

The territory, as "room of law"[169] exclusive to the State, has always been observed as unsurmountable; however:

> There is no doubt that today the State is in crisis, and the old legalism is in crisis; equally, there is no doubt that an elected land is precisely the one of the sources of law, of the legal production. And because of the impotence and inefficiency of the States, we watch the formation and the development of rights parallel to the state official law, with the invention of new legal institutes which are more adequate to ordinate the new economy and the new techniques. Channels of private impulse which flow autonomous, that establish their rules, that face a private justice.[170]

The key issue that is opened, so, is the fact that there is no way to sustain the absolute vision of sovereignty before the international perspective as well. This warning is necessary because, traditionally, in the Public International

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[165] "The creation of uniform supplementary rules and its generalized use by the performers of the international trade, by legal aculturation, form the premises of an International common contractual Law in such a way that the reception of the Incoterms by the different national systems does not contradict the existence of this common law". (JOLIVET, Emmanuel. Les incoterms: etudes d'une norme du commerce international. Paris: Ltec, 2003, p. 426-427.).

[166] ORREGO VICUÑA, Francisco. Op. cit., p. 344.

[167] BENYEKHLEF, Karim. Une possible histoire de la norme: les normative émergentes de la mondialisation. Montreal: éditions Thémis, 2008, p. 86.

[168] MELLO, Celso Duviver de Albuquerque. Direito Internacional Econômico. Rio de Janeiro: Renovar, 1993, p. 45-52. However, the idea debated here is that sovereignty should not be understood as the capacity of unlimited exercise of power. Contemporaneously it is internally linked to the capacity of a certain authority (normally thinking in terms of a State) to enact legislation with independence, as long as the provided limitations in its own ordination are obeyed. On the other hand, internationally speaking, the duty to respect the international order is recognized, as well as to respect independence.

[169] GROSSI, Paolo. Primeira lição..., p. 62-63.

[170] Ibidem, p. 34.

Law, the idea of sovereignty is usually strictly attached to the understanding of exercise of self-determination and national independence[171].

From the twentieth century on, however, it was noticed that several phenomena occurred at a national level, regardless the State consent. At the beginning of the twenty-first century it is admitted the hypothesis that international organisms, deprived from sovereignty and armed power, imposed military and economic sanctions, and "legal" decisions on State and their representatives[172].

According to FAUVARQUE-COSSON, the internalization of law would be a phenomenon related to the globalization. It would be encouraged by the increment of the individuals' mobility, the creation of international organizations and their activities[173]. The key issue, this way, would be what the consequence of this phenomenon was to the different national legal systems. This was a challenge mainly issued by the multiplication of the normative sources[174], being them national, international, private and public.

According to DELMAS-MARTY, nowadays, it would not be possible to assert the State as the only normative producer. The global scenery would not only reveal that the legal production has been internationalized, but it has been decentralized and privatized[175]. So, it becomes possible to search for normative basis elsewhere and it also does not necessarily depend on the consensus of the States. This process ends up valuing not only the non-written sources of Law, but also equally those international and precedent sources[176]. The normative re-composition that becomes to be necessary, according to the author, must be centered in the Human Rights. The Human Rights themselves, at a certain extent, would be examples of how internationalization allows the incorporation of foreign rules or non-national[177] ones. SUPIOT points out that globalization does not create the normative homogenizations only at an international level, but

[171] Even if today it is recognized its difficulty before the economic harmonization undergone by several countries and the fundamental right to development.
[172] There can be mentioned as examples the economic embargoes and military coalitions before Iraq and the trial for war crimes before national leader from Sudan and the old Balkan Countries.
[173] FAUVARQUE-COSSON, Bénédicte. Op. cit., p. 56. In the same way: FORGIONI, Paula A. Teoria geral dos contratos empresariais. São Paulo: RT, 2009, p. 131-132.
[174] FAUVARQUE-COSSON, Bénédicte. Op. cit., p. 56.
[175] DELMAS-MARTY, Mireille. Por um direito..., p. 45-59.
[176] Ibidem, p. 88.
[177] BENYEKHLEF, Karim. Op. cit., p. 88-89.

that would equally create its territorization[178]. The fragmentation of the State power (what he calls *Guarantee* of the pacts) makes it proliferate the existence of independent agents of power. This fragmentation is only possible from the moment when the notion of sovereignty itself is questioned. According to the author, this happens with the substitution of discretionary power by the functional power and by the retreat of the central power in profit of the deregulation and increase of room of the technical rules[179].

In other words, this would be the same as stating that the regulating role of the State is passed over to the "Authorities" who then technically govern gaps left by the State vacuum by means of contracts. SUPIOT sees "a sort of feudality of freedoms", in it, that is, the contract starts to dispose on values which are no longer strictly patrimonial, and starts to instrumentalize the own sources of Law[180].

> Far from appointing the victory of the contract over the law, the "contractualization of society" is more the symptom of hybridization between the law and the contract, and the reactivation of the feudal ways to weave the social bind. (...) The identification of the State, the law and the currency was, in fact, a moment in history, and these figures (...) are, thus, susceptible to becoming autonomous.[181]

Thus, once the phenomenon of internationalization is admitted, and the pluralism normative perspective is accepted, the influence to the contractual Law would be equally relevant.

> As one of the richest sources of the obligations, pressed between the praxis and the more and more casuist and imperative laws, the contracts, as technical instruments left at the disposal of the parties for self-regulation of their interests, are being kept, mainly through the changes in the old types and the creation of new ones.[182]

According to LORENZETTI, the globalization itself would have harmonized certain contract legal conceptions, conciliating the national

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[178] SUPIOT, Alain. Homo juridicus: Ensaio sobre a função antropológica do Direito. São Paulo: Martins Fontes, 2007, p. 128-129.
[179] Ibdem, p. 186-188.
[180] Ibdem, p. 208-230.
[181] SUPIOT, Alain. Op. cit., p. 132-133.
[182] BULGARELLI, Waldírio. Atualidades dos contraltos empresariais. In: Revista de direito Mercantil, n. 84. RT, out./dez. 1991, p. 63.

differences. Even though the author understands that it is not about a new phenomenon and that it has limited content to the Trade international Law, he recognizes its importance and the need for its extension, but in a way so as to respect what he calls the national public policy. The author still ascribes the facilitation of this phenomenon to the appearance of an autonomous Law of international trades, the dissemination of comparative studies, the internationalization of business custom, and the consumption and raise of technical language of the economic analysis[183].

Perhaps a better example of this tendency is that one reported by WAINCYMER when analyzing the" internationalization" of the Australian Trade Law and concludes that this one is highly influenced and dependent on international initiatives[184]. The process was developed with easy access to research and material, the improvement of international education in legal professions, the legislative reforms (trade practices and competition) with the adoption of unification instruments and harmonization (CISG for the international purchase and sale of goods, rules of Hague-Visby and Hamburg for the contract of maritime transport, the Convention of Warsaw for air transport, Convention of New York in 1958 and UNCITRAL model law for arbitrage, etc.), and the adoption of the WTO mechanism. In addition, it would have conditioned the local Judiciary to the use of international argumentation[185]. The thesis ends up being confirmed by ORREGO VICUÑA, when he states that the nature of the international Market determines that day by day fewer transactions may be considered exclusively domestic or national[186]. Even though this is possibly more true for countries of Anglo-Saxon tradition and more internationalized economies, it seems plausible to state that, at a certain moment and in certain legal themes, the internationalization influence is bigger.

[183] LORENZETTI, Ricardo Luis. Tratado de los contraltos: parte general. Buenos Aires: Rubinzal-Culzoni, 2004, p. 29-30.
[184] "In spite of uncertainty about the exact nature and status of the new Lex mercatoria and gaps that remain in the field of public international trade law, the sheer body of international initiatives and the amount of time and energy devoted to such endeavors, readily supports the conclusion that Australian commercial law is heavily influenced by and dependent upon international developments". WAINCYMER, Jeff. The internationalization of Australia's Trade laws. In: Sydney Law Review, v. 17, 1995, p. 335.
[185] "foreign authorities as persuasive tools". Ibdem, p. 303-306.
[186] ORREGO VICUÑA, Francisco. Of contracts and treaties in the Global market. In: Max Planck University of New York in Belgrade, v. 8, 2004, p. 343.

If with regards to international contracts this tendency can be easily noticed by means, for example, of the number of private[187] and state measures[188] of legislative harmonization, with regards to domestic contracts, such phenomenon is not less relevant, even though, it is recognized to be less visible. This way, the internationalization is not misinterpreted with harmonization or with legislative uniformization, but it is about a process of inverted osmosis", that is, the means of great concentration per excellence (national) demands more and varied solutions which are transposed from the means of less normative concentration (international), essentially creative and flexible with regards to contracts.

Besides that, the communitarian legislation has contributed to the internationalization of the law of contracts, something which not long ago was eminently national[189], just like the *lex mercatoria*[190] movement contributes to the decrease of room in strictly local regulation[191] . The comparative method itself and the homogenization of the negotiating practices would allow this kind of incorporation to the internal legal System. This way, CANÇADO TRINDADE comments.

> In the scope of international law at the integrated regional level, the phenomenon is linked to the crescent role of the internal courts in the own creation (and not mere use) of the law. The performance of the national courts in this sense was

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[187] It can be cited: the consolidation of international customs by the International Chamber of Commerce of Paris (INCOTERMS and UCP 600); the development of Restatements, such as the Principles of the International Contractual Law of UNIDROIT (most recent edition of 2010); the Principles of European Contractual Law, European Code of Contracts and the Restatements on the Law of Contracts do American Law Institute.

[188] It can be cited as an example: the Vienna Convention of International Sales of products of 1980 (CISG) was adopted by 83 (eighty-three) countries, among them all the members of the MERCOSUL; for a complete list of the contracting countries and the status of the Convention see: UNCITRAL. Available on: www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html. Another examples is the New York Convention on the recognition of foreign arbitral reports was adopted by 153 (a hundred fifty three) countries, among them, Brazil (for full list of the contracting parties and the status of the Convention see: UNCITRAL: Available on http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. At last, it must be mentioned the Model Law of UNCITRAL on international trade arbitrations was adopted by several countries in its proposed version, besides being the inspiration for so many others (for full list of contracting countries and the status of the Convention see: UNCITRAL: Available on http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

[189] MARKESINIS, Basil S.; UNBERATH, Hannes; JOHNSTON, Angus. The German Law of Contract: a comparative treatise. 2. ed. Portland: Hart, 2006, p. 46.

[190] Provisionally understood as a normative system applicable to the international trade relations. It is characterized by the pluralism of the sources and by the pretension, partly supported by the doctrine, of autonomy in relation to the States.

[191] AGUIAR JUNIOR, Ruy Rosado de. Os contratos nos Códigos civis francês e brasileiro. In: Revista CEJ, n. 28. jan./mar. 2005, p. 19.

> the object of attention and debate in the ninth Congress of Comparative law of the International Academy of Comparative law (...) there it was pointed out the participation of the internal courts in the normative activity itself, and the establishment of general rules of behavior. There was even an attempt to catch a glimpse at the possibility of rebirth of the old ideal of a jus commune in the whole community European process of integration, which was "denationalized" through the comparative method.[192]

Thus, also with regards to the obligational issue, especially the contractual one, the sovereign boundaries of the state power were narrowed. This is the same as the statement that the contracting parties will search for the basis of their contractual freedom not only in the room which they are given by law, but also by all the legal System (private autonomy), or else, with all its pluralism of sources: internal customs and also international ones.

MORENO RODRIGUES points out that, at a certain extent, the State sovereignty in some themes would be approximate to the "roar of a mouse"[193], that is,

> [Los estados] operan tan solo en un minúsculo fragmento de un mercado de dimensión mundial, sobre el cual no pueden incidir eficazmente. La economía clásica estaba basada em un sistema de producción y consumo local; hoy día ella se asienta fuertemente en bases internacionales, al punto que, por ejemplo, el poder impositivo de los Estados se diluye con *holdings* o grupos empresariales que transfieren los tributos de una jurisdicción a otra, o las empresas optan por asentar sus sedes de servicios em países que cuentan con un mejor ambiente em cuestiones de orden sindical o salarial, por citar ejemplos[194].

Not all of the authors, however, agree with this thought[195]. LORENZETTI, for example, remembers that the national particularities are not eliminated, and even identifies a certain "Latin-American" conception of contract that privileges the constitutionalized content and the employment of the fundamental rights[196].

Nonetheless, it is important to highlight that these arguments by themselves are not contrary to internationalization. This is why

[192] TRINDADE, Antônio Cançado. Op. cit., p. 159.
[193] GALGANO, Francesco. Atlas de Derecho Privado Comparado. Madrid: Editorial Fundación Cultural Del Notariado, 2000, p. 13 apud MORENO RODRIGUEZ, José Antônio. Temas de contratación internacional, inversiones y arbitraje. Asunción: CEDEP, 2006, p. 59.
[194] Idem.
[195] According to CHEN, even though the CISG has made an attempt to codify the International Law for international Sales, the national systems keep an important role of its regulation. CHEN, Jim C. Code, Custom, and Contract: the Uniform Commercial Code as Law Merchant. In: Texas International Law Journal, v. 27, 1992, p. 105.
[196] LORENZETTI, Ricardo Luis. Tratado..., p. 33-34.

internationalization is not paid to the Market[197] Advertisement only, but equally to the normative sources which establish the Human Rights, even if they still have not been converted by the State recognition (fundamental rights). In this sense, thus, internationalization is not a synonym of the feared *Lex mercatoria*, but it can be used as an instrument of re-personalization of the contract (national or international). On the other hand, the instrumentality itself adopted by the *Lex mercatoria* helps to reveal the way in which the internationalization can be operated.

Even though TEUBNER prefers to adopt the term "global Law", he seems to support this conclusion when he explains that the world coordination is not only noticed in the corporative rules, but also in the human Rights and in the environmental Law[198].

Thus, when the possibility of internationalization of contract rules is defined so as to make them part of the set of obligation sources of an internal contract, at a certain extent the application of rules from different sources (not necessarily the national one) is defended by national judges, or not, by means of the so called "transnational Law"[199].

Even though JESSUP admitted that there would be a problem of certainty and that this logic would only be applied to the "transnational" instances, the internationalization of the contract allows to equally assume the resource to international normative sources. The certainty, on the other hand, is given by the new axis of re-systematization of the system, no longer national. This is the reason why it can be understood how the *Lex mercatoria* operates and if it constitutes a normative system it becomes to be relevant.

However, the way internationalization occurs, its relationships with the legal culture and the local customs are diverse, not only a bottom-top process. Examples of this kind of situation may be taken from several concrete events,

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[197] It is understood as an abstraction that ends up representing the interests which are strictly private, transnational, not bound to any specific sovereignty and so, with a tendency to exercise its profitable practice, to the detriment of welfare of the local populations, the adequate fruition of non-renewable resources or any other value that does not identify with their own values.

[198] TEUBNER, Gunther. Op. cit., p. 11.

[199] "The transnational Law comprises both the civil and the criminal aspects, including what we know as public and private International Law, and the National Law, both public and private. There is no reason why the legal court, national or international, should not be allowed to choose among all these legal bodies the rule considered most appropriate to the reason and justice for the solution of any particular controversy". JESSUP, Philip. C. Direito transnacional. Rio de Janeiro: Fundo de Cultura, 1965, p. 87.

such as the legal dispute for the construction of the exploitation complex of the hydraulic capacity of the Narmada Valley in India, when several normative levels demonstrate the complexity of acting under the perspective of legal pluralism at global and local levels[200]. Another example is the acquisition of local business activities by transnational societies, either from the competitive point of view (Nestlé and Garoto instances), or from the point of view of the trans-frontier insolvency (Parmalat instance).

If the contract is internationalized and also its plural normative sources, the analysis of one of them becomes necessary to understand how that re-systematization may occur. In order to do so, a serious study on the contractual custom is proposed.

III. THE BARGAIN FOR THE SOVEREIGNTY: THE ROLE OF THE CUSTOM IN THE MODERN CONTRACTUAL LAW.

> Willian, in a loud and clear voice, enunciates his wills. Actually he has very little freedom. Each one knows with relative precision what John Doe or Richard Roe deserve according to the custom, this non-written law, but so imposing in relation to the most strict Codes.[201]

3.1. THE CUSTOM AS A SOURCE OF LAW

When the source of Law is mentioned, there is an attempt to explain the origin of the normative grounds of the legal system chosen by a certain entity. At a certain extent, this way, it is about explaining the reasons which determine the source of eligibility to a whole mechanism of "jurisdiction"[202].

[200] It was an attempt of construction of a dam along the valley of the River Narmada. The project became international with the financing by the World Bank and international enterprisers that provided services and equipment. There was conflict with the Indian legal system involving the discussion on the incorporation of the International Law and its coherence with the national perspective. RAJAGOPAL, Balakrishnan. The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmanda Valley Struggle in India. In: Leiden Journal of International Law, n. 18. 2005, p. 345-387.

[201] DUBY, Georges. Guilherme Marechal ou o melhor cavaleiro do mundo. 2. ed. Rio de Janeiro: Graal, 1988, p. 13.

[202] Expression not employed in the technical meaning, but in the wider sense to say the Law.

Thus, such determination is not necessarily universal and it depends on the historical, temporal and sociological conditions which stipulate the political choices of an entity. This way, so, in a preliminary feature, it can be roughly stated that while the countries of the "Common Law" tend to privilege the court precedents, the countries of the "Civil Law" prefer to resort to legislation. This vision, however, is limited to the western and Christian world, and also to the modern formation[203].

This simplistic "origin and reason" vision was gradually replaced by a more elaborated and procedural understanding in the modern western societies. According to KELSEN, for instance, a source could be understood in two meanings. In a purely legal sense, the source of Law would be "Law" itself, since a rule takes its validity from another one which is, hierarchically superior. In a second and wider stage, the source of Law would be accepted as any influence exerted by the organs that created the Law. In this last sense, they would be lack ins of obligatoriness and would be highly ambiguous[204], as well. The conceptual trap mentioned by KELSEN takes away any non-systematic weighting.

The classification that became more frequent was the one which divides the sources of Law into material and formal ones. While those would make reference to justification, and historical and sociological explanations of Law[205], the last ones would refer to the way of production of a rule[206].

This distinction, which could take place in merely pedagogical terms, ended up strongly influencing the way in which the legal system would be understood. Being supported by the majority of jurists[207], it was admitted that the thesis where the production of a legal rule would depend on a procedure which would count on some kind of consent by the State[208]. Such procedure may be a legal process, the formal consent of the consuetudinary law or the reiterated manifestation of the courts.

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[203] GIDDENS, Anthony. As conseqüências da modernidade. São Paulo: UNESP, 1991, p. 173.
[204] KELSEN, Hans. Teoria geral do Direito e do Estado. 4. Ed. São Paulo: Martins Fontes, 2005, p. 192. With that the author also denies that chain which defends that the rule is produced by the authorized interpreter (e.g., the judge)
[205] MIALLE, Michel. Introdução crítica ao Direito. 2. ed. Lisboa: Estampa, 1994, p. 197.
[206] Ibidem, p. 197-198.
[207] For example: BERGEL, Jean-Louis. Op. cit., p. 53-54; BOBBIO, Noberto. Teoria geral..., p. 196; REALE, Miguel. Fontes e modelos do Direito: para um novo paradigma hermenêutico. São Paulo: Saraiva, 2002, p. 12-14.
[208] RÁO, Vicente. Op. cit., p. 274; DANTAS, San Tiago. Programa de Direito Civil: aulas proferidas na Faculdade Nacional de Direito [1942-1945]. Parte Geral. Rio de Janeiro: Rio, 1977, p. 82.

This procedural bias[209] of the normative source is highlighted because it points out the requirements for the valid production of legal rules[210], relating them, necessarily, to the existence of a power that may demand its behavior (Legislative, Judiciary, Social Power or the negotiating one)[211]. It is usually pointed out that the procedure entitles certainty and rationality to the normative production, leaving aside everything that either lays its roots in the medieval obscurity[212], or that has folk or merely wild (non-civilized) origins. Nonetheless, not all the normative sources have a good relationship with the proceduralization, since not all of them are formal, written or ritualistic. Some way, this rate tends to privilege only one of them: the law.

However, the problem seems to lie on the choice about what is part of this system. If such choice is so discretionary so as to deny as a condition of "rule" something which has no state origin, thus in a final analysis, a rule is only the one thing produced by the legislator, and so, only that rule which serves to certain State politics. This way, the regulator role becomes to be exercised by the politician agent, only.

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HOBBES[213], for example, used to justify the alliance between the "State" and the citizen insofar the absolute freedom of man would approximate him to things, that is, he would be subjected to others. This logic would be explained in the freedom itself where each one had to use their power to preserve their own nature. Each one's defense of right would cause a situation of general

[209] "the process or means because of which the legal rules are made positive with legitimate compulsory Power, that is, force and efficacy in the context of a normative structure". REALE, Miguel. Lições preliminares..., p. 140.
[210] REALE, Miguel. Fontes e modelos..., p. 12.
[211] REALE, Miguel. Lições preliminares..., p. 141.
[212] According to Jean Starobinski the artistical metaphor of the light that beats death is common around the year 1789. The French revolutionary movement takes control over the image, making it the "Solar Myth of the Revolution", which would give the world a new point of light. STAROBINSKI, Jean. 1789: os emblemas da razão. São Paulo: Cia das Letras, 1988, p. 38-43.
[213] HOOBES, Thomas. Op. cit., p. 39-283.

uncertainty. According to the author, this situation would give cause to the rational admission of three natural laws; (i) every man should search peace and follow it; (ii) it would be possible for the man to defend himself by all means; and (iii) every man should fulfill his commitments. HOBBES claims that the search to make this ideal come true would go through the abandonment of the right on everything and its transfer to a collective entity. The voluntary transfer would impose the duty (obligation) for the man to respect his own voluntary act (since disrespect would be contradictory), and, at the same time, given the volatile nature of the human will, it would be maintained by the fear of the consequences in the case of breach. The so-called transference would be given in exchange for some advantage, and this is the season why men would not be able to transfer the right to defend their life and physical integrity. The bargain would be completed with the promise of certainty.

The social pact would end by a certain "poetical freedom" represented by the Constitution. This is the cause why it is so common to refer to the fights for the control of the English monarchical power and the imposition of the Magna Carta to the King John (1212); the Declaration of Man and of the Citizen (especially articles number 1, 2, 4, 5 and 6)[214] and their gradual recognition, as fundamental rights of first generation in the constitutional instruments of the different States (like section 5, and II of the' Constitution of the Federative Republic of Brazil in 1988)[215]; in addition, there is the Universal Declaration of Human Rights of the UN (especially article number 1)[216].

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[214] "Art. 1º. Man are Born and they are free and have equal rights. social distinctions can only be based on common usefulness"; "Art.2. The end of every political association is the conservation of the natural and indispensable rights of man. These rights are freedom, property, safety and resistance to oppression"; "Art. 4. Freedom consists of being able to do anything which does not harm another: thus, the practice of the natural rights of each man has no limits, other than the ones which assure the same rights to other members of society. These limits can only be determined by Law"; "Art.5. The Law does not prohibit except for harmful actions to society. Everything that cannot be hindered, and no one can be led to do what is told to"; "Art.6. Law is the expression of general will. Every citizen has the right to compete, personally or through representatives, for their formation. It must be the same for all, either to protect or to punish. Every citizen is the same in their eyes, equally admissible to all dignities, public jobs and places, according to their capacity, and with no other distinction than their virtue and talents. Available on: http://www.direitoshumanos.usp.br/index.php/Documentos-anteriores-%C3%A0-cria%C3%A7%C3%A3o-da-Sociedade-das-Na%C3%A7%C3%B5es-at%C3%A9-1919/declaracao-de-direitos-do-homem-e-do-cidadao-1789.html.

[215] "Art. 5º Everyone is equal before the law, with no distinction of any nature, guaranteeing to the Brazilian people and foreigners living in the country the inviolability of the right to life, freedom, equity, safety and property, in the following terms: II – no one will be made to do or not to do something other than by virtue of the law."

[216] "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". UN. General Assembly. The

From the modern point of view, the explanation and justification would persist: this was the only truly rational choice. The individual should not attempt at their own human condition. Any other normative choice would be irrational and self-destructive, such a fact which would offend the condition of the human being in itself.

This logic also introduces a new understanding of the role of the "State"[217] in the production of Law. That was because so far the owner of the "centralized" power "would not always perform, exclusively and definitely, the cogent production of legal rules. In a few words, in modern times, this way, the full freedom would be given in exchange for the promise of certainty preservation. This pact would be realized with the political body (Leviathan) whose law would not be divine (natural), but civil, a sole source of Law[218]. According to this logic, any other assumed source (like the custom, for example) would have to be confirmed by the law[219], as it is the expression of the same bargain.

Thus, all the previous system of sources of production of Law would be substituted, giving its place to that one which can be "confused with the Prince's will, the only character above the passions and the partisanship, the only one capable of reading the nature book and translate it into rules, the only one (....) who has conditions (...) to get free by shaking the inextricable jungle of uses and customs[220], but also frequently irrational.

It becomes to be common to identify the statement in which the custom is a material source of Law, but at the same time, it is denied its formal character of normative production[221]. In other words, despite being a source, it would not be given a title of obligatoriness. Alternatively, when its obligatoriness is recognized, its role is of second order, being limited to complete, specify or fill in gaps of the legal system[222]. In fact there are those who recognize it as a formal

Universal Declaration of human rights. Available on: http://www.un.org/en/documents/udhr/index.shtml#a30.

[217] The expression is used in inverted commas due to the inexistence, at that time, of the image of modern State.

[218] VILLEY, Michel. Op. cit., p. 740.

[219] Ibidem. P. 749.

[220] GROSSI, Paolo. Mitologias jurídicas..., p. 45.

[221] CELANO, Bruno. Dos estúdios sobre La costumbre. México: Fontamara, 2002, p. 115.

[222] REALE, Miguel. Fontes e modelos..., p. 68.

source, but its uncertainty is so in convenient that it makes it move back when facing the law[223].

Such option, deliberate or not, would distance the concomitant understanding, according to MIAILLE,

> Factors that influence legislation, a study that somehow would give sociological relevance to a positivist description of the sources of law. On the contrary, it would be necessary which way and content are simultaneously included in the same explanation[224].

The explanation that the author finds is the way of economic production[225]. HESPANHA draws attention to the fact that traditionally it is work with the impression that the sources are systematized, "legal propositions of generical and abstract character, not recognizing that the law may be present, little by little, in concrete and case-by-case solutions[226].

Thus, depending on the dominant economic model or the organizational model conceived as a paradigm, the custom would r would not be a normative source.

BOBBIO still explains, for instance, that in modern legal systems the custom ends up receiving treatment of a delegated source, and this would represent not only a way to complement the legal system, but also the recognition of permission to the private partier to produce, through a uniform treatment, legal rules[227]. This statement would have power not only to explain the contractual, but also the international custom[228]. Somehow, however, this explanation takes away the normative power of the custom to delegate it to the autonomy recognized to the individual (private autonomy). In other words, it would be enough for the legal system the confirmation of private autonomy, supported by the custom for interpretative aims, only. At a certain extent, so, the customs could be confused with the contractual freedom.

However, GROSSI questions the general conclusion in which Law would have the state apparatus as a necessary reference. According to this

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[223] BERGEL, Jean-Louis. Op. cit., p. 197.
[224] MIAILLE, Michel. Op. cit., p. 197.
[225] Ibidem, p. 208.
[226] HESPANHA, Antonio Manuel. O caleidoscópio do Direito: o Direito e a Justiça nos dias e no mundo de hoje. Coimbra: Almedina, 2007, p. 439.
[227] BOBBIO, Noberto. Teoria geral..., p. 191.
[228] CELANO, Bruno. Op. cit., p. 56-69.

argumentative logic, the role of Law is ordering, that is, it organizes wills, imposing them limits[229]. It should be noticed that there is clear displacement of normative production from one pole to another. The author, nonetheless, identifies exactly the contrary: the "totalizing" monism which demands no more than an obligingly legal behavior, being it always *secundum legem*[230]. It is about a speech of power, exclusionary of the pluralism to which it would be exclusively oriented to Law. Thus, it is appropriate to ascertain the existence of this "pluralism".

3.1.1 The custom in the formation of Contemporary European Law

When it is talked about the legal role ascribed to the customs, it is not uncommon to present a historical digression informing about its importance in the ancient times[231]. Sometimes this presentation is followed by the explanation that this is due to the fact that the "primitive way of social grouping would not allow the presence of written laws"[232].

So, at a first moment the custom is presented in opposition to the law, that is because as it is written and the result of a previously defined procedure, the law is more "developed"[233]. This way, the speech that points out the custom as a historical source of western Law makes sense. Once again its role as "antiquity" is highlighted. The custom would be the fruit of tradition, a simple way to keep the social roles and the social control by imitation[234]. And the

[229] GROSSI, Paolo. Primeira lição..., p. 11-13.
[230] Ibidem, p. 30.
[231] HAGGENMACHER, Peter. Coutume. In: Archives de Philosophie Du Droit, t. 35, Vocabulaire Fondamental du Droit, 1990, p. 27-41.
[232] PEDRASSOLI, Antonio Fernando Campos. Algumas reflexões sobre os costumes In: Revista de Direito Civil, Imobiliário, Agrário e Empresarial, n. 76. São Paulo: RT, abr./jun. 1996, p. 45. In the same sense: LOSANO, Mario G. Os grandes sistemas jurídicos: introdução aos sistemas jurídicos europeus e extra-europeus. São Paulo: Martins Fontes, 2007, p. 347; NORONHA, Fernando. Direito e Sistemas Sociais: a jurisprudência e a criação de direito para além da lei. Florianópolis. UFSC, 1988, p. 94 e AUGUSTIN, Sérgio. Algumas considerações sobre o conceito historic do costume. In: Revista da Ajuris: doutrina e jurisprudência. Set. 1999, p. 383. SOARES even draws analogies between primitive entities and the International Law in which the absence of a legislator make the interested parties edit rules that will govern their relations. SOARES, Guido Fernando Silva Soares. Contratos internacionais de comércio: alguns aspectos normativos da compra e venda internacional. In: CAHALI, Yussef Said. (Coord.). Contratos nominados: doutrina e jurisprudência. São Paulo: Saraiva, 1995, p. 163.
[233] "The usages form a way of standardization of the less "modern" economic relation than the Law, tending to be replaced by it in the contemporaneous ordinations. That is why it is more important in the least advanced sectors of economy." . ROPPO, Enzo. Op. cit., p. 189.
[234] LOSANO, Mario G. Op. cit., p. 321.

discourse is completed: it is usual the reference to the classical Roman Law[235] as an example of acceptance of the image, especially in the formation of the *jus gentium*, or in the regulation of the provinces, where imperial determinations co-existed[236]. The political collapse of the Empire would have allowed the classical Roman Law[237] to live with the German Law[238] for a certain time, strongly marked by the custom[239], precisely because of the absence of any state apparatus which would impose one or the other. The picture is clear: the existence of the state bureaucracy is a synonym of modernity and rationality. Its absence would represent the normative chaos, the savagery.

First of all, it must be remembered that this construction is a way of propaganda[240]. It proposes to present any other social structure, non-organized under a state way, with really unfavorable colors. Apart from that, the proposed structure is the one thought in western terms, excluding, for instance, every way of eastern traditional political structure. To sum up, the only acceptable political model, adequate to "Reason", is the one structured around an idea originated from an European political-philosophical model which can see in the State the capacity to replace a system of classes and its openness to free initiative.

As any piece of propaganda, the colors of the competitors have to be exaggerated so as to be perfectly identified. As FITZPATRICK points out, "the custom was reduced to a peripheral category opposed to the law through its association with the savage and with those traces of lower importance in a recalcitrant past, still to be changed by modernity"[241].

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[235] According to EHRICH is not before an imperial period that the Romans will make reference to the consuetudinary Law, as the "people had already become Roman citizens, but had not even formally had accepted the Roman Law or the Roman customs. Before, just like afterwards, they lived according to their Law and their tradition." EHRLICH, Eugen. Fundamentos da Sociologia do Direito. Brasília: UNB, 1986, p. 337.

[236] CAETANO, Marcello. História do Direito português. 4. Ed. Lisboa: Verbo, 2000, p. 83; 85-86.

[237] Caetano explains that "initially it was in force the system of personality of Law: in order to know, in a court, which was the applicable Law in a Trial, it was necessary to first ask the parties which social and legal group they belonged to, that is, under what law they were governed." Ibidem, p.100.

[238] The Law of the different German ethnic groups was essentially consuetudinary; however, it is difficult to study its features, since they have not been written. Its basic sources are literary, customs written after the period of the "invasions" and the Scandinavian customs. The latest one were kept due its late drafting (in the eleventh century) of the customs dictated by some elderly from the villages. GILISSEN, John. Introdução histórica ao Direito. 4. Ed. Lisboa: Fundação Calouste Gulbenkian, 2003, p. 162-165.

[239] CAENENGEM, R. C. van. Uma introdução Histórica ao Direito privado. 2. ed. São Paulo: Martins Fontes, 2000, p. 24.

[240] Understood as the promotion of a set of ideas.

[241] FITZPATRICK, Peter. A mitologia na lei moderna. São Leopoldo: UNISINOS, 2005, p. 91.

Thus, the reports by travelers and the barbarous and fantastic uses found among the "savages"[242] are not pointless. In this sense, the customs of those that are "found" are usually objects of curiosity[243], as they are bucolic[244] and primeval, if not absurd[245].

On the other hand, such customs, as LLOYD says, can be compared to the modern positive system, once they are used to regulate social order, according to its conditions and economic needs, and also imposing sanctions where there is a breach of the commandments. In other words, they are distinct bodies of rules, distinct from the merely religious or ritualistic ones[246].

It is also forgotten that the western modern law is the fruit of a long constructive process, originated in the open Middle Ages, where, the regionalism (customs) and the cosmopolitanism (Roman and canonic Law) lived together at the same time. In other words, the modern Law also contains the "irrationality" that it vehemently denies.

As GROSSI points out, the consuetudinary Law is outlined from facts, experiences shared by the population of a certain territory. It is, so, plural in sources and alive in production. The intellectual legal production (from universities) will also assume this material and associate it to the Roman and canonic elaborations, allowing the coexistence of the *ius propria* (local, autonomous law), and the *ius commune*[247]. It is the "common Law" the one which will surpass frontiers, but it will also find its opposition in the need for the sovereign national monarchy to be asserted. It is only when the assertion of the sovereign power of a centralizing monarch becomes necessary that the *ius commune* is replaced by a national Law.[248]

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[242] The term is a reference to the famous report by Hans Staden on his captivity "among the savages in Brazil". As it is known, the author had been on board of a Portuguese merchant ship which submerged in the Brazilian coast; he was received in Bertioga and ended up being captured by the Tupinamba natives, who intended to devour him in one of their ritualistic ceremonies of warriors celebration. Eventually he comments: "I dedicate myself to this misery more than you do, because I am from a strange land and undone to the horrors of these people, but you, who were born and raised here, should not be frightened of the custom of the land." STADEN, Hans. Meu cativeiro entre os selvagens do Brasil. Curitiba: Fundação Cultural, 1995, p. 120.

[243] As an example: SOUSA, Gabriel Soares de. Tratado descritivo do Brasil em 1587. Recife: Fundação Joaquim Nabuco, 2000.

[244] Maybe by the influence of the myth of the good savage. For example: LÉRY, Jean de. Viagem à terra do Brasil. Belo Horizonte: Itatiaia, 1980, p. 229-243.

[245] For example: GANDAVO, Pedro de Magalhães. Tratado da Terra do Brasil. Brasília: Senado Federal: 2008, p. 133-138.

[246] LLOYD, Dennis. A idéia de lei. 2. ed. São Paulo: Martins Fontes, 1998, p. 292-295.

[247] GROSSI, Paolo. Primeira lição..., p. 44-45.

[248] GROSSI, Paolo. O Direito entre Poder e Ordenamento. Belo Horizonte: Del Rey, 2010, p. 66.

Moreover, the role granted to the customs varied according to the region and its respective tradition.[249]

It would be also important to emphasize the fact that the Civil Code, a legal monument of modernity, had, among its sources, the pre-revolutionary French customs[250], especially in private matters whose power of disposition[251] did not even belong to the king, even though they were later relegated to a marginal role[252]. Besides that, the Code represented a rather violent transformation and its acceptance was slow, mainly because of the political changes by the French society[253]. In short, the pre-nineteenth century legal system was plural[254].

Just as in franc territory[255], in the Iberian Peninsula, for instance, the visigothic management would gradually start the codification (or compilation of customs[256]) of the different normative texts, so as to organize the management of justice. In this period it was pointed out the *lex romana wisigothorum* (applicable to the Roman subjects), the *Codex Euricianus revises* (an attempt to unify the legal treatment addressed to the different subjects), and the Visigothic Code (which revoked the Roman Laws, recognized some customs, and prohibited and banned all the other ones)[257]. Anyway, the customary Law has fully prevailed[258] from the periods prior to the incorporation of the peninsula to the position of Roman province, to the moment when the Iberian monarchies are consolidated.

Even though it can be noticed the growing importance assigned to the law, this would still be little sensed in the relations between the private parties that insisted on keeping the customs, even if banned[259] or originated from the

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[249] CAENEGEM, R. C. van. Op. cit., p. 02-03; 25
[250] HALPÉRIN, Jean-Louis. Histoire des Droits en Europe: de 1750 à nos jours. Paris: Éditions Flammarion, 2006, p. 70.
[251] GROSSI, Paolo. De la codificación a la globalización del derecho. Pamplona: Aranzadi, 2010, p. 70.
[252] CAENEGEM, R. C. van. Op. cit., p. 8; 12.
[253] STURMEL, Philippe. Le code civil, fin de la coutume? A propos d´un anonyme toulousain. In: GAZEAU, Véronique; AUGUSTIN, Jean-Marie. Coutumes, doctrine et droit savant. Paris: LGDJ, 2007, p. 223-250.
[254] HESPANHA, Antonio Manuel. Justiça e Litigiosidade: história e perspectiva. Lisboa: Calouste Gulbekian, 1993, p.13.
[255] CAENEGEM, R. C. van. Op. cit., p. 30.
[256] LE GOFF, Jacques. As raízes medievais da Europa. 3. ed. Petrópolis: Vozes, 2010, p. 48.
[257] CAETANO, Marcello. Op. cit., p. 102-107.
[258] MIRANDA, Pontes de. Fontes e evolução do direito civil brasileiro. 2. ed. Rio de Janeiro: Forense, 1981, p. 29-30.
[259] CAETANO, Marcello. Op. cit., p. 106.

Islamic invasion, or yet, from foreign sources during the ''Reconquista"[260]. Before the formation of the modern State, therefore, the custom is the major source of the western private[261] Law. In the Portuguese situation, for example, it is the consolidation of the monarchic power which assures the adoption of a monist[262] system of sources. It should be remembered, nonetheless, that this process was not abrupt. The legislative centralization in the hands of the Portuguese central government faced local opposition and was built by means of law issues, and later, consolidations (Ordinations)[263]. Even at the beginning of the process, D. Alfonzo III was made to respect them, gradually admitting to the king the power to appreciate them, taking away the negative customs[264].

When explaining the mental structure of the medieval society, LE GOFF enhances the importance of authority, precedent and tradition, a reason why the custom is given relevance as a legal rule. However, he emphasizes the need for an immemorial and placid reiterated practice, not a contested[265] one. In this sense, DUBY enlightens the pre-modern importance of the custom, even though it refers to the law of succession: "In that time, the custom provides order in the world. It is something like sacred, indestructible."[266]

If so, what was the major change of the western thought that made it profane?

The explanation sums to reside in its origin. According to SEEN, for a classical Roman doctrine, the basis of obligatoriness of customs would lay in its natural origin, its general approval and in the fact that they are applied to the citizens in the city (*mores*), and, at the end of the Republic, to every man. He still believed that the custom would be only considered as one, if it were good and necessary (*recta and ratio*). This concept, however, would change throughout the years. The author[267] claimed that the conception that the custom is based on

[260] Ibidem, p. 232-233.
[261] Even though it is recognized that the ancient distinction between private and public Law no longer carries its original meaning, it may be used for pedagogical purposes and for limitation of complexity. In this sense, see: BOBBIO, Norberto. Estado, Governo, Sociedade: para uma teoria geral da política, 6. ed. São Paulo: Paz e Terra, 1997, p.13-31.
[262] MIRANDA, Pontes de. Op. cit., p. 37.
[263] ibidem, p. 37-41.
[264] LUDWIG, Marcos de Campos. Op. cit., p. 64-65.
[265] LE GOFF, Jacques. La civilisation de l´Occident médiéval. Paris: Éditions Flammarion, 2008, p. 301-302.
[266] DUBY, Georges. Op. cit., p. 17.
[267] SENN, F. La leçon de la Rome antique sur Le fondement de la force obligatoire de La coutume. In: LAMBERT, Edouard. Introduction a l´étude du Droit comparé. Paris: Sirey, 1938, p. 218- 226.

the people's consentment is gradually replaced by the individualization of the legal attribution, being it for imperial, canonic or monarchic organs[268].

At the end of the so-called medieval period, the tendency of appropriation of the normative body by the canonic institutions gave result to a high control of "power of the spontaneous normativity"[269], either by reconciliation with the origin of the religious doctrine, or by its resignation with the prince's Law.[270]

Even though it cannot still be talked about the formation of the national State, the consolidation of a "Law" for a people is already presented as a political requisite. It referred to the unifying role of the codification which is noticed by the visigothic kings and by the Iberian leaders from the thirteenth century on. Slowly, the supremacy of law is seeked, to the point of abolishing the "bad" customs, offensive to the "Law of God" and to the "natural Law", affirming only the "good" customs[271]. This tendency is sensed, for example, in the Ordinations by D. Alfonzo when praising the general laws from which not even the king would be excused[272] (in a certain way it is the tendency of the Portuguese Law)[273].

Romero explains that, as the feudal conception starts to decline, the authorities that start the process of consolidation of the power of the States realize that the political support of this new society will be the assumption of full sovereignty by means of the "dialogue" which will maintain with all the social layers. At the same time such understanding brings duties to the State – that justifies the growing budget needs, military ones, etc. – but it equally brings a growing centralization of power[274]. This process varied in time and space, but it seems that two tendencies have been followed: the bourgeois financing of an "armed branch" loyal to the centralizer monarch, and the resource to the Roman Law as a tool of authority affirmation.

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[268] PINTOR, Manfredi Siotto. Reflexions au sujet de la coutume en droit interne. In: LAMBERT, Edouard. Op. cit., p. 375-376.
[269] LUDWIG, Marcos de Campos. Op. cit., p. 49.
[270] Idem.
[271] CAETANO, Marcello. Op. cit., p. 352-353.
[272] Ibidem, p. 537.
[273] MIRANDA, Pontes de. Op. cit., p. 61.
[274] ROMERO, José Luis. Crise e ordem no Mundo Feudoburguês. São Paulo: Palíndromo, 2005, p. 233-243.

The studies of the Roman Imperial Law are retaken again from the Middle Ages on, and progressively start to be accepted as a source of the private Law in the different kingdoms. Surely, it is not the same Roman Law as before, but it is the one portrayed by the canonic lens[275].

> The legislators restored the principles and the Roman rule, where the tradition would allow and where they were advised by the circumstances, subtly introducing them in the chancellery documents or the collegiate organs. They were reiterated in written allegations, or simply advised to the king. From the twelfth century on its outbreak had been week and ostensive, its process became even lower and harder. The consuetudinary system that had worked out the feudal society and in principle enriched the cities which fought for their freedom, had another origin and pointed to other tendencies. When they noticed the implications of the Roman Law, the feudal class resisted to it, while the bourgeoisie pointed out what was most convenient to them, and also what most threatened them. Beyond doubt they rescued what was estate like, as they intended to re-establish the right to property founded in the Roman notion of state.[276]

Initially this reception is concentrated in the south of Europe, since during the sixteenth century there were several works of compilation of the customs carried out in central France (*pays de coutumes)*. Current Belgium, Switzerland, countries of the Scandinavian Peninsula, German and Spain. It is about a transformation process of the custom in law[277], together with the desacralization of the traditional and the rationalization of the intellectual methods[278]. So, in a certain way, there is a double move of political resignation: the Romanization and the compilation and ratification of the custom.

CAENEGEM says that the compilation and ratification of the customs happen with the transition between the feudal system and the legal model of the later period[279]. This was also the opportunity to lower the uncertainty of certain usual practices, changing its content and reducing its formula to a written form closest to the Roman Law[280].

In this process, writing must be pointed out. It was not only used as an instrument of consolidation and generalization of law, but it was also useful to

[275] WIEACKER, Franz. Op. cit., p. 139-140.
[276] ROMERO, José Luis. Op. cit., p. 244-245.
[277] HALPÉRIN, Jean-Louis. Op. cit., p. 20-21.
[278] LE GOFF, Jacques. La civilisation .., p. 316-317.
[279] CAENEGEM, R. C. van. Op. cit., p. 52.
[280] GILISSEN, John. Op. cit., p. 274-282.

divorce customs from reality[281]. The coding conception was not only presented as a local and momentaneous solution, but it was also universal and permanent, indifferent to reality and experience, artificial and stationary[282]. In addition to that, in this process of customs selection, some of them are left aside; some are approved, interpreted and needed[283], while some others are created[284]. All this happens with the perspective to seek the eligibility of a new power in an old tradition[285].

From this point of view the political interest in the centralization of legal production is evident, in a clear, complete and unique way[286]. In a certain way, this is a movement that foreshadows the "change of the medieval rationalism to the modern voluntarism"[287]. It is the creation of the state "abstraction", taking away the individuals from the exercise of sovereignty[288].

> The legal view of modernity is simple, as a matter of fact, incredibly simple. With the immediate recognition that simplicity is the result of a drastic reduction that the complexity proper to every legal order was made to twitch in scenery where the actors are exclusively the individual subjects: on the one side, the political macro-subject; on the other side, the private micro-subject.[289]

The modern order does not live with intermediate instances of power. To that end, it demands a simple construction (with basis on the separation of the State and the owner subject) and rational (unaware of the feudal chains and based on scientific argumentation[290]). It arises the justification that the traditional Law was no longer "adequate"[291] to that entity that is originated from the feudal haze. It was necessary an "erudite" Law, general and based on

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[281] According to ASSIER-ANDRIEU, the writing is the one thing that allows the decomposition of the text, the extracting of a diversity of meanings, assuring it survival, regardless the context in which the rule was inserted and the social movement. (ASSIER-ANDRIEU, Louis. Op. cit., p. 23-25). In addition, the written form allows, according GIDDENS, the detachment space-time, creating the perspective of past, present and future, contributing to the notion of tradition and antique. . GIDDENS, Anthony. Op. cit., p. 44-45.
[282] GROSSI, Paolo. História da propriedade e outros ensaios. Rio de Janeiro: Renovar, 2006, p. 88-89; 98-99.
[283] GRINBERG, Martine. La rédaction des coutumes et les droits seigneuriaux: nommer, classer, exclure. In: Annales. Histoire, Sciences Sociales, a. 52, n. 5, 1997, p.1032.
[284] ASSIER-ANDRIEU, Louis. Op. cit., 2000, p. 32-33.
[285] Idem.
[286] CAENEGEM, R. C. van. Op. cit., p. 18-19.
[287] GROSSI, Paolo. Para além do subjetivismo jurídico moderno. In: FONSECA, Ricardo Marcelo; SEELAENDER, Airton Cerqueira Leite (Orgs.). História do Direito em perspectiva: do antigo regime à modernidade. Curitiba: Juruá, 2008, p. 19.
[288] TORRES, João Carlos Brum. Figuras do Estado Moderno. São Paulo: Brasiliense, 1989, p. 32.
[289] GROSSI, Paolo. Para além..., p. 24.
[290] NUSDEO, Fábio. Fundamentos para uma codificação do Direito econômico. São Paulo: RT, 1995, p. 10-11.
[291] CAENEGEM, R. C. van. Op. cit., p. 47-50.

reason.[292] The paradigm at a state level does not value pluralism, associating it to the idea of ignorance, abuse, corruption. In short, it is given a "completely distorted image".[293]

Another important aspect is that the feudal pluralism brought great complexity of legal organization, taking into account the different jurisdictions and the different "types" of rights and privileges involved, mainly for the French territory. As an example of that, TARELLO mentions five distinct jurisdictions depending on the subject involved, and four of them depending on the object assets of demand.[294] Along with that, the social legal structure would make it difficult the turnover of lands, and as a result, the possibility of political participation and growth[295].

HESPANHA alleges that the process of power centralization takes away from the feudal system its ideological origin. One of the consequences is the appropriation of the competences (political, jurisdictional, etc.) of the peripheral organs[296] by the central authority. With regards to normative production, it means that the State (its formation would be on course in a last analysis) starts to demand the "fullness of its validity"[297]. In other words, the private and the supremacy of the common Law and the local custom give place to the primacy of Law (systematic and unique).

The construction would be finished with the formation of a particular system (special laws prevailing over general ones, traditionalist (built up on the notion of a Law rationally found, and so, non-historical) and with a doctrinaire character (created by jurists, and so, indifferent to the local conditions)[298].

This rationality would also be based on the liberal logic of Market, according to which the search for individual personal interest would lead to everyone's welfare. NUSDEO claims that this rationality, at least in economic

[292] WIEACKER, Franz. Op. cit., p. 386.
[293] HESPANHA, Antonio Manuel. As vésperas do Leviathan: Instituições e Poder político em Portugal no século XVII. Coimbra: Almedina, 1994, p. 441.
[294] TARELLO, Giovanni. Storia della Cultura Giuridica Moderna: assolutismo e codificazione del diritto. Bologna: Mulino, 1996, p. 75-80. In this same sense, on the adoption of the Roman Law in the German Law: WIEACKER, Franz. Op. cit., p. 115.
[295] TARELLO, Giovanni. Op. cit., p. 83-84.
[296] HESPANHA, Antonio Manuel. Para uma teoria da história institucional do Antigo Regime. In: ____. (Org.). Poder e Instituições na Europa do Antigo Regime: colectânea de textos. Lisboa: Fundação Calouste Gulbenkian, 1984, p. 57-62.
[297] HESPANHA, Antonio Manuel. Para uma teoria..., p. 64.
[298] Ibidem, p. 84-85.

terms, would be directed to the production of assets aiming satisfaction, without any kind of social judgment about this choice[299]. In order to carry out this scheme, freedom becomes indispensable (of choice and of initiative). However, it was about an artificial construction, mainly because simultaneously another battle was on course: the definition of the space of State power.

It is right now that the public and private spheres of social life are arranged. It is recognized, for example, the contract as a limit to the sovereign power[300], while it is also recognized its role of guarantee (to private property, for instance). The contract, however, acquires economic characteristics. This is how protection starts to be instrumentalized, before the State, from that social part that detains state.

Nonetheless, even in this period the custom is not completely left aside[301]. Even though the political instruments are directed to the attainment of the bourgeois economic interests, a series of feudal institutions are kept[302]. MIAILLE states that the even the Napoleonic Code itself would no longer be the result of a long Law centralization, uniformization and formalization process of the same nature as that of the custom[303]. Such a process that had begun with the compilations of customs under the "Ancien Régime"[304], as the respective French kings are made more powerful and the absolute State[305] is developed.

HOBSBAWM, however, claims that at that time the customs and traditions were, at most, tolerated, as they would have not presented a real challenge to the ideology and to the economic production, even though they were criticized for representing unnecessary expenses.[306]

Because of economic pressures (and the possibility of gain), it is opened, this way, the opportunity of shock: on the one side the invocation of immemorial

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[299] NUSDEO, Fábio. Op. cit., p. 08-09.
[300] MARAVALL, José Antônio. A função do direito privado e da propriedade como limite do poder de Estado. In: HESPANHA, Antonio Manuel. (Org.). Poder e Instituições na Europa do Antigo Regime: colectânea de textos. Lisboa: Fundação Calouste Gulbenkian, 1984, p. 233-234.
[301] GILISSEN, John. Op. cit., p. 240, 248.
[302] MARAVALL, José Antônio. Op. cit., p. 235.
[303] MIAILLE, Michel. Op. cit., p. 203.
[304] HAGGENMACHER, Peter. Op. cit., p. 37; GILISSEN, John. Op. cit., p. 17.
[305] JESTAZ, Philippe. Les sources du droit: le déplacement d'un pôle à un autre. In: Revue Trimestrielle du Droit Civil, v. 2, abr./jun. 1996, p. 303.
[306] HOBSBAWM, Eric. Introdução: a invenção das tradições. In: HOBSBAWM, Eric; RANGER, Terence. (Orgs.). A invenção das tradições. 3. ed. Rio de Janeiro: Paz e Terra, 2002, p. 17.

uses, and on the other side the rural delimitation[307]. This all happened in a moment when the idea of property was being consolidated, and the rights of use went through the reification and circulation (sale, leasing or legacy)[308].

In this aspect, THOMPSON, referring to the English institutions, understands that the notion of custom was particularly compelling until the eighteenth century, and explains its role from the idea of illegibility[309], the author points out that the custom, as a usual law, "would acquire the color of a privilege or right"[310]. This construction was closely associated to official letters and to rural privileges. Even though it did not contain any conservative features, it did not explain its use in a rational way[311], and neither was subjected to governmental control[312]. As he said, there existed a certain paradoxical defiance of a traditional society.

> The conservative culture of the populace almost always resists, on behalf of the custom, to the rationalizations and innovations of Economy (such as the enclosures, the working discipline, the non-regulated "free markets" of cereal) which the governors, traders and employers want to impose. The innovation is more evident in the higher layer of society. However, as it is not a neutral technological/social process with no rule ("modernization", "rationalization"), but an innovation of the capitalist process, it is usually experienced by the populace as a way of exploitation, the expropriation of rights of customs usage, or the violent destruction of valued patterns of work and leisure. That is the reason why the popular culture is rebellious. However, it is so in defense of the customs.[313]

This defense, nonetheless, takes place with the innovation of "paternalistic" rules of a more authoritarian society[314], chosen according to the current convenience. The custom, then, is presented as uncertainty and bad use.

SIMON, for example, explains that in this period of transition between the Middle Ages and the Modernity the condition of validity in itself would be placed in its effectiveness[315]. Maybe here there still was an approximation

[307] THOMPSON, E. P. Costumes em comum: estudos sobre a cultura popular tradicional. São Paulo: Cia das Letras, 2005, p. 105-118.
[308] Ibidem, p. 112.
[309] Ibidem, p. 14.
[310] Ibidem, p. 15.
[311] Thus, for example, the anathemas and curses put on the infractors of this common Law. Ibidem, p. 88.
[312] Ibidem, p. 19.
[313] Idem.
[314] Idem.
[315] SIMON, Thomas. Da validade "usual" para a validade formal: a mudança dos pressupostos de validade da lei até Século XIX. In: FONSECA, Ricardo Marcelo; SEELAENDER, Airton Cerqueira Leite. (Orgs.). Op. cit., p. 110.

between the custom and the legislation. On the other hand, the organization of the productive powers around the "corporate organizations" creates the pretension of self-government.[316]

The modern effort would consist, this way, in detaching the efficacy of the law and its effectiveness: (i) at first the courts would no longer demand the proof of its observance; (ii) then, they would no longer demand the proof of the knowledge of its content and (iii) finally, they would accept the presumption that the law is efficient as long as it has been regularly published[317].

Thus, for example, while the first attempts of the French monarchy for unification and civil codification (beginning of the eighteenth century) faced difficulties with the establishment of the customs and the local powers[318], the political centralization and the revolutionary "ideals" assured "the monopoly of the regulations as a source of law"[319].

The distancing of the custom from the secrecy of the modern society ruling initially happens from economic imperatives[320] (even as a way of commercial unification[321]), and, in some cases, the instrument adopted is the criminalization[322]. Thus, when the State starts to act as a "merchant" it also starts to determine the rules of the game, unifying the sources of civil law and Trade Law[323].

Initially, the contribution of formal education to this phenomenon can be emphasized. One example is that until the end of the eighth century there was

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[316] SCHIERA, Pierangelo. Sociedade "de estados", "de ordens" ou corporativa. In: HESPANHA, Antonio Manuel. (Org.). Op. cit., p. 146.
[317] SIMON, Thomas. Op. cit., p. 111-117.
[318] CAENEGEM, R. C. van. Op. cit., p. 131.
[319] Ibidem, p. 182.
[320] The concept of exclusive rural property, as a rule, to which other practices have to adapt, was then spreading all over the world, as currency that reduced all things to a common value".(THOMPSON, E. P. Op. cit., p. 134).
[321] MIAILLE, Michel. Op. cit., p. 212.
[322] The so-called Black Act, for example, was passed in England in 1723 in response to offensive behavior in the Real Forests (among them, fishing and hunting). The outstanding feature is that this legislation would clash with what part of the local people understood as being their customary Law. About the consequences, THOMPSON explains that. "The only generalization that can be certainly done is that the Law was available in the arsenal of the judicial process. When a crime seemed to be especially serious, when the State wanted to give a sample of horror, or when a certain claimant was especially revengeful, the charge was devised so as to make the crime incur within the Law". THOMPSON, E. P. Senhores & Caçadores. Rio de Janeiro: Paz e Terra, 1987, p. 333-334. The author sees in it the dominance of a class (pag.350). On the other hand, as centuries went by, the author realizes that its role is contradictory: dominance is assured and new values are imposed (property, equity, freedom, etc.); its performance is also refrained; restricting the exercise of the right of means of control (torture, arbitrary prison, etc.) and excesses (p.356).
[323] LOSANO, Mario G. Op. cit., p. 61-63.

no legal teaching in Portugal and the Court System was locally governed by elected judges, usually illiterate ones.[324]

Moreover, there is a significant distinction in the exercise of power. As HESPANHA points out, before modernity there was no opposition between public and private interest (or between the State and the civil society). In fact, the medieval political power was exercised so as to assure the private interests, especially because of its structure over a pluralism of lords who held economic and political powers.[325] Such logic is opposed by the exercise of the modern political power, which, before the State is capable to raise preference of the public interest and its opposition to the private interest.[326]

The process of centralization of power is slow, that is why the traditional Law and the official one do not always clash, but live together and tolerate each other. The increase of political prestige of the monarch power, the demographic growth and the weakness of social solidarity are the factors which would reinforce the replacement of paradigms.[327]

It is still important to keep in mind the convenience of law certainty. The modern jurists "distrust" the "uncertainty" of the custom. This logic would compare memory to the immutable certainty of documents.[328] However, even though referring to historical sources, PRINS claims that the official files could still be insufficiently reliable, depending on the political choices made, or even the aim to be achieved with the interpretation of the rituals conducted.[329] HESPANHA seems to share the same opinion[330]. When he comments on the text of the modern codes, mainly the Portuguese Civil Code of 1867, he emphasizes

[324] CAETANO, Marcello. Op. cit., p. 231. Although the judges were royal officers and the Ordinations made them apply the royal Law, there was no requirement that they should be instructed by the written Law, not even if they could read or write. It is only in 1642 that the access of the illiterate to the ordinary bench was prohibited. HESPANHA, Antonio Manuel. As vésperas..., p. 451-452.

[325] SCHIERA, Pierangelo. Op. cit., p. 148-149.

[326] HESPANHA, Antonio Manuel. Para uma teoria..., p. 29-30.

[327] "High population, mainly if followed by a high rate of urbanization, 'opening' to economy and the setting up of an official and literate administrative set, all of them seem to be decisive factors to the disarticulation of the non-official administrative-political world and the consequent promotion of official Law and administration. The resource to official justice develops, thus, in the populous zones and of urban characteristics, gifted with a more open and mercantilized economy, and served by a modern administrative set, namely by literate justices." HESPANHA, Antonio Manuel. As vésperas..., p. 468.

[328] PRINS, Gwyn. História oral. In: BURKE, Peter. (Org.). A escrita da história: novas perspectivas. São Paulo: UNESP, 1992, p. 188.

[329] BUC, Philippe. Ritual and interpretation: the early medieval case. In: Early Medieval Europe Journal, v. 9, a. 2, Oxford: Blackwell, jul. 2000, p. 186; 194-195.

[330] HESPANHA, Antônio Manuel. Um poder um pouco mais que simbólico: juristas e legisladores em luta pelo poder de dizer o Direito. In: FONSECA, Ricardo Marcelo; SEELAENDER, Airton Cerqueira Leite. (Orgs.). Op. cit., p. 195.

that in the dispute between jurists and legislators on the creation of Law, the Codes themselves left space for the final acting of those who controlled them, if necessary, through their own mechanisms (a mislead as to their rights, for example, that would allow to exclude the applications of law by lack of knowledge.[331])

The law would also be employed to extinguish the old inequities existing among people. The logic of formal equality would assure the same legal conditions to everyone. Thus, on the one hand, the privileges of the legislative body would be extinguished. On the other hand, however, the human condition of the subject would be abstracted, keeping some kind of punishment to those who were "socially weak, the poor, the ignorant, or else, the great majority"[332].

The first significant opposition to the process of the consolidation of law was the reaction led by the German Historical School[333]. Such doctrinaire chain defended the idea that the Law would originate from the custom and its judicial decisions. It was a strong opposition to the idea of codification, originated from a liberal and universal Revolution, in addition to the plain defense of the German aristocracy[334]. Among other Schools, the defenders of the "free law" that relate the custom to everything that may be provided with judicial relief deserve an outstanding position[335]. Also, there was opposition in the English, German and French Laws. MAINE incorporated the evolutionist perspective in the explanation of customs, such as the custom of the abduction in the development of the exogamy and the perception of a healthier offspring among the primitive societies[336]. EHRLICH[337], on the other hand, thinks about the construction of the concept of "Live Law", according to which there would exist a dominant Law life, different from the one "in force" in the courts and Codes. It should be learned through the "daily observation" of business, customs and usages, and also

[331] HESPANHA, Antonio Manuel. Prática social, ideologia e direito nos séculos XVII a XIX. In: Separata de Vértice, n. 340, 341-342. 1972, p. 40.
[332] GROSSI, Paolo. Para além..., p. 27.
[333] Philosophical chain which defended that the Law should be understood as a result of a process of historical construction, whose validity would depend on representing the consciousness of a people. The most outstanding author of this School was Savigny, who coined the phrase Volksgeist to explain that representation.
[334] LUDWIG, Marcos de Campos. Op. cit., p. 55-56.
[335] LOSANO, Mario G. Op. cit., p. 389.
[336] MAINE, H. Sumner. Op. cit., p. 200-202.
[337] EHRLICH, Eugen. Op. cit., p. 373 et seq.

associations, legally recognized, ignored ones, or even the illegal ones[338]. As for GENY[339], he criticized the centralization of the normative production in the law.

Despite these valuable doctrinaire contributions, generally speaking, the model centralized on the legislation was the one presented as a paradigm of the normative system of the countries of the Civil Law. It relegates the custom to a secondary position, punishment for the "original sin of being created by the legislator's will"[340]. The Brazilian traditional model is an example of this, as it will be demonstrated at a later stage.

3.1.2. The custom in the formation of the contemporary Brazilian Law.

The Brazilian Law before the codification was regulated by a plethora of sources in which it was specifically adopted the custom as a source of Law (The Philippine Laws[341] and the Law of August 18th, 1769 – Law of Good Reason). Such legislation remained in force even after the political Independence of the country and the Proclamation of Republic[342].

A certain tendency, nevertheless, has been observed since the works of Consolidation of the civil laws by Teixeira de Freitas, Nabuco de Araújo and Felício dos Santos. There is an attempt, from that time on, to organize the private Law in a codification way, that is, a systematized one[343]. Before a definite code, there is an attempt to centralize the producer power of rules. It happens, however, that the Brazilian Imperial State was not yet capable to impose itself and embrace all the regions of the country, and even, all the social classes[344].

Thereby, for instance, the Trade Code recognized the custom as a rule of interpretation of the trade contract in general (art. 130 and 131[345]), and especially

[338] Ibidem, 1986, p. 378.
[339] GENY, François. Méthode d'interpretation et sources em droit privé positif. 2. ed. Paris: R. Pichon & Durand-Auzias, 1954. 2t.
[340] LEIVA, Alberto David. Hacia un nuevo paradigma. El orden jurídico de la Ilustración frente al antiguo Derecho. In: PUNTE, Roberto Antonio. (Dir.). La Codificación: raíces y prospectiva - la codificación em América. Buenos Aires: El Derecho, 2004, p.270.
[341] MIRANDA, Pontes de. Op. cit., p. 46.
[342] GOMES, Orlando. Raízes históricas e sociológicas do Código Civil brasileiro. São Paulo: Martins Fontes, 2003, p. 08.
[343] Ibidem, p. 11-12.
[344] LOPES, José Reinaldo de Lima. Costume – redemocratização, pluralismo e novos direitos. In: Revista de Informação legislativa, n. 130. Brasília: Senado Federal, abr./jun. 1996, p. 71.
[345] "Art. 130. The words of mercantile conventions and contracts must be fully understood according to the custom and usage accepted by the trade, and on the same way and sensed by which merchants usually explain themselves, since if differently understood may mean something else" and Art.131. Being necessary to

incident on the commission contract (art. 169[346]), leasing contract (art.234[347]) and maritime insurance (art. 673[348]), this part is still in force. Apart from that, the Regulation n. 737 of 1850 would establish the real hierarchy between the custom and the legal source (art. 2°)[349]. The application of both codifications would be in charge of trade courts whose composition would be formed by "trade congressmen", with knowledge on trade uses[350].

The just born Republic is also thirsty for centralization, and gradually the custom leaves space for the legislation. The Civil Code of 1916, for instance, repealed the customs which opposed it (art. 1807)[351]. The liberal political option, the centralizing federalism and the later political dirigisme left even less space for its development.

Inside this Brazilian civilist tradition, so, the custom ended up being recognized as a formal source of Law[352], even though its role had been secondary in relation to the law (art. 4° of LINDB[353]; Law of Introduction to the Rules of the Brazilian Law). Such fact happens in such a way that the law should prevail even when opposed to the custom of long tradition[354]. Thus, if its importance is subsidiary (as Beviláqua says, the "immediate source (*sic*) of the Law is the statutory law[355]), its role would be to fulfill the legal insufficiency to encompass

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interpret the clauses of the contract, the interpretation, in addition to the before-mentioned rules, it will be governed on the following bases: (...) 4-the usage and practice usually observed in the trade of instances of the same nature, and especially the custom of the place where the contract is to be performed, will prevail over any intelligence contrary to what is intended to give to the words".

[346] "Art.169. The commission merchant who drives away from the given instructions or, on the performance of the mandate does not fulfil to what is the trade style and usage, will answer for award of damages to the consigner. However, this access to confession will be justifiable: (...) 2 not admitting delay of the transaction, or resulting in clear damage to its expedition, once the commission merchant has acted in accordance with the custom usually applied in the trade".

[347] "Art.234. Having finished the work in conformity with the adjustment, or not having, in the way of general custom, the one that ordered it will have to accept it; if, nonetheless, the work is not according to the terms of the contract, given plan, or general custom, he will be able to refuse it or demand a lower price".

[348] "Art. 673. In case of doubts on the intelligence of any of the conditions or clauses of the insurance policy its judgment will be determined by the following rules: (...) 3-the general custom, observed in identical instances in the venue where the contract was executed, will prevail on any diverse meaning which words may have in common use".

[349] "Art.2. The commerce code, and subsidiarity the commercial usages (art. 291 Code) and the civil laws (arts. 121, 291 and 428 Code) make up the commercial legislation. The commercial usages give preference to the civil laws only on social issues (art.291) and express instances in the Code".

[350] LUDWIG, Marcos de Campos. Op. cit., p. 72-73.

[351] "Ordinations, Permits Laws, Decrees, Resolutions, Usages and Customs concerning the subjects of Civil Law governed in this Code are abrogated."

[352] GOMES, Orlando. Introdução ao Direito Civil. 12. ed. Rio de Janeiro: Forense, 1996, p. 39.

[353] "When the law is silent, the judge will adjudicate in accordance with analogy, customs and the general principles of Law".

[354] GOMES, Orlando. Introdução ao Direito..., p. 39.

[355] BEVILAQUA, Clovis. Theoria geral do Direito civil. 4. ed. Rio de Janeiro: Paulo de Azevedo, 1949, p. 26. And as an expansion, the custom would end up a first subsidiary source.

all the social phenomena, and in a certain way, be used as an acting element of the system[356].

The long tradition of distrust in the role of the custom remained entrenched in the more contemporaneous doctrine. Thus, for instance, MELLO states that the "custom law is the law which is imposed to society by the dominant oligarchy, and so, it would be assumed as a static society[357]. It must also be recognized that such criticism can be opposed to the legislation as well, as it seemed to be the Brazilian Civil Code of 1916:

> Due to this contention, the Civil Code, with no embargo of having taken advantage of the legal experience of other peoples, does not get free from that preoccupation with the social circle of the family, making it distinct. It incorporates "the discipline of the basic institutions, such as property, family, heritage and production (labor contract), philosophy and the feelings of the class of the lords. Its conceptions regarding these institutions perfectly transfuse in the Code. Nonetheless, it was widely developed the propensity of the literate elite to work out a Civil Code to its image and likeness, that is, according to the representation that it made of society, in its idealism.[358]

Although it is not mentioned in the Constitution of Republic currently in force, the infra-constitutional positive Brazilian Law refers to the custom in several passages. Thus, for instance, the Code of Civil Process establishes as a procedural onus, the proof of the content of the alleged consuetudinary Law (art. 337)[359]; the Provisional Presidential Decree 2.186-16/2001, when regulating the Convention of Biological Diversity, defines as a local community the one which keeps customs practices (arts. 4 and 7, III)[360]; the art. n 8 of the Consolidation of the Working Laws[361]; and the Law of the corporations which

[356] DEL´OLMO, Florisbal de Souza; ARAÚJO, Luis Ivani de Amorim. Lei de Introdução ao Código Civil Brasileiro Comentada. 2. ed. Rio de Janeiro: Forense, 2004, p. 38.
[357] MELLO, Celso Duvivier de Albuquerque. Curso de Direito..., p. 281.
[358] GOMES, Orlando. Raízes históricas..., p. 22.
[359] "The party which alleges local, state, international or consuetudinary Law, and will prove the content and force, if so determined by the judge".
[360] "Art.4°. It is preserved the exchange and the diffusion of a component of genetic background and associated traditional knowledge practiced among each other by native communities and local communities to their own benefit and based on customary practice" and Art. 7. In addition to the concepts and constant definitions of the Convention on Biological Diversity, it is considered for the purpose of this Provisional Presidential Decree: (...) III – local community: human group, including remaining quilombola communities, distinct for their cultural conditions, who traditionally organize themselves by successive generations and own customs, and who keep their social and economic institutions."
[361] "The administrative authorities and the Labor Court System, lacking legal or contractual dispositions, will adjudicate, depending on the instance, by court precedents, analogy, equity and other principles and general

mentions the trade purpose as the one which is governed by the "uses" of trade (art. n. 2). The Civil Code of 2002 also refers to them in the already mentioned articles 113, 432, 569, II; 596 and 615. These references demonstrate, yet, submission of the custom to the legislation. Such conclusion is corroborated by the current text of art. n. 4 of the LINDB (Law of Introduction to the Rules of the Brazilian Law).

Although it does not provide specific treatment to the custom, the Brazilian positive Law recognizes it as a source of law. According to DINIZ, the role of this source, nonetheless, would be "inferior"[362] to the law, as it is subsidiary.

It must be questioned, however, if this thinking model is not already out-of-date. As an example, LUDWIG utterly states that "if the civil society granted to the State, in a historical moment of improbable definition, the monopoly of the creation of legal rules, the truth is that nowadays they ask for the return of a piece of nomogenetic power within society."[363] It ends up by the "exhaustion of the old state monopoly of normative production"[364].

3.1.3 The custom in the formation of contemporaneous international Law

In the international scenery, differently from the model traditionally associated to internal law, the pluralism of sources is recognized as a major aspect in the normative construction. However, when narrowing the analysis of international Law to the perspective of the solution of conflict of laws, maybe, the issue would not be so important.

Nonetheless, the premise of the present work is that the contract, as a legal institute that is internationalized, does not only refer to preoccupations of internal logic (and so, only the considerations of conflict of laws or national legislation), but equally to international regulation. That is why it becomes

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rules of Law, mainly the Labor Law, and yet, according to the usages and customs, compared Law, but always in a way so that no interest of class or private party prevails over public interest".

[362] DINIZ, Maria Helena. Lei de Introdução ao Código Civil Brasileiro interpretada. 15. ed. São Paulo: Saraiva, 2010, p. 142.

[363] LUDWIG, Marcos de Campos. Op. cit., p. 25.

[364] Ibidem, p. 29.

essential to understand how casual international customs may influence the existence of the contractual legal relation.

In addition, for any attempt to explain the internationalization of the Contractual Law and extract from it assertions that might be useful to the proposed conclusion, it would be necessary to go into the controversial field of the so-called "globalization". It is also correct to say that any mention to its content will always be brief and limit. This is due to the fact that it is about a heterogeneous phenomenon, with a wide range of application and of different natures, causes and characteristics. Thus, it can be talked about economic and legal globalization, or yet, criticize this term and adopt the Francophile model *(mondialisation)*. So in this uncertain scenery there is an attempt to search for a new ground of "certainty".

The custom takes a central role in the international Law, mainly because of the national decentralization of normative production, which is a typical characteristic of that phenomenon of globalization[365].

The methodological warning casted by LUPI, however, is completely adequate; who and how can customs be created from an international point of view?[366] This happens because there usually exists the idea that the one who creates the bases of the international custom is a state actor, because of its diplomatic performance.

Nevertheless, as it will be later noticed, the State is not always the one to make the international custom emerge, neither is necessarily its diplomatic performance. The importance of this conclusion is the perception that there is also, internationally speaking, a greater room of regulation than the one comprised by the state agent (whether it is wanted or not), which does not depend on its consent (whether the voluntarist wanted it or not), regardless its specific formalities.

The second logical conclusion taken from there is that the international law is not the same any longer. But before reaching such stage, it is necessary to go into the classical distinction between the Public International Law and the Private International Law.

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[365] CADENA AFANADOR, Walter René. La nueva Lex mercatoria: un caso pionero en La globalización del derecho. In: Papel Político, n. 13, out. 2001, p. 101-102.

[366] LUPI, André Lipp Pinto Basto. Os métodos no Direito Internacional. São Paulo: Lex,2007, p.93.

(i) In the so-called Public International Law[367], it has been long recognized the role of the custom as a normative source. Despite that, it is still common the doctrinaire debate over the real nature of the consuetudinary Law. Thereby, if KELSEN asserted that there was a consuetudinary[368] rule on the ground of validity of every treaty and AGO defended the spontaneous formation of the international Law[369], BARBERIS claims that the custom cannot be a source of Law, as there is no rule from which validity can be expired out, and he also analyses the possibility of codification of the custom Law by means of treaties[370].

However, with basis on the art. 38 of the Statute of the international court of justice[371], it is traditionally asserted the normative power of the customs, and also its equivalence regarding the other sources[372]. It would be about the need resulting from the non-unilateral creation of Law[373].

For the characterization of the international custom, the doctrine usually designates the need of two requirements: generalized international practice and the conviction of need[374], even though there has been a wide debate over their real needs.

From the public point of view, the concept of the subjective element (conviction of need) is not yet peaceful and has generated some kind of debate in the International Court of Justice. Thus, for instance, the Court even commented on the need of the acceptance of the custom by the parts involved, such as the famous instance of the *Lotus* of 1927 over the maritime collision involving a French and a Turkish vessel and the consequent accountability on the respective officials, when confirmed the importance of the subjective element (conviction) and, so, the importance of the proactive thesis of the international

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[367] It is understood as the field of International Law which is in charge of regulating the non-private international relations.
[368] KELSEN, Hans. Teoria geral..., p. 525.
[369] AGO, Robert. Positive Law and International Law. In: The American Journal of International Law, v. 51, N. 4. out. 1957, p. 729-733.
[370] BARBERIS, Julio. Réflexions sur la coutume internationale. In: Annuaire Français de Droit International, v. 36, 1990, p.9-46.
[371] "The Court who functions to adjudicate according to the international Law the controversies to which they are subjects, Will apply: (...) b) the international custom, as a proof of a general practice accepted as being Law: (...)" LITRENTO, Oliveiros. Direito Internacional público em textos. 2. ed. Rio de Janeiro: Forense, 1985, p. 53.
[372] KIVILCIM-FORSMAN, Zeynep. Principe d'egalité entre le traite et la coutume en droit international public. Available on: http://auhf.ankara.edu.tr/dergiler/auhfd-arsiv/AUHF-1996-45-01-04/AUHF-1996-45-01-04-Kivilcim.pdf.
[373] DEUMIER, Pascale. Le droit spontané. Paris: Economica, 2002, p. 354.
[374] SOUZA, Ielbo Marcus Lobo de. Direito Internacional costumeiro. Porto Alegre: Sergio Antonio Fabris, 2001, p. 13; BASSO, Maristela. Curso de Direito Internacional Privado. São Paulo: Atlas, 2009, p. 68; LUPI, André Lipp Pinto Basto. Op. cit., p. 81.

Law[375]. This same tendency was noticed in other situations: Nicaragua[376] (1985), Jurisdiction of fishing[377] (1974), the right of passage[378] (1960), and consular and diplomatic staff of the United States[379] (1980), among others.

The insistence on this thesis would potentially bring to the Public International Law the problem of the "new" countries originated from the period of decolonization and the ruins of the Soviet empire. All this because as they had not agreed with those recognized "customs" (on issues such as asylum, the Right for Peace and War, etc.) theoretically they would not have the right to invoke such obligations.

Partly, the insistence on this conclusion is due to the traditional explanation that as there is no parallel between the system adopted by the State in a national scope, the international system would be formed only by the rules accepted by the States themselves or by the traditional notions of "tacit treaty"[380] and savage custom[381]. Besides that, the virtual absence of any kind of international sanction would impose the resource of the self-tutelage to the affected state[382]. In this kind of issue there seems to be the proviso that the Law does not exist beyond the State[383].

SOUZA still points out that the subjective element would be in charge of several functions: (i) the identification of the existence of the legal rule (to the

[375] TRINDADE, Antônio Augusto Cançado. Reavaliação das fontes do Direito Internacional Público ao início da década de oitenta. In: O Direito Internacional..., p. 29.
[376] It is about an instance involving Nicaragua and the United States which was an argument on the existence of customary Law to the non-intervention by a State in other internal matters. According to CHARLESWORTH the event reflected the tension between the old and the new tendency for characterization of the international custom but the Court made it prevail the first one (CHARLESWORTH, H. C. M. Customary International Law and the Nicaragua Case. In: Australian Year Book of International Law, v. 11, 1991, p.01-31).
[377] It was about an instance involving the United Kingdom and Iceland when it was discussed the extension of preferential zone for coastal fishing and the need to preserve the natural resources and the historical rights of fishing. INTERNATIONAL COURT OF JUSTICE. Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I. C. J. Reports 1974.
[378] It is about an instance involving Portugal and India on the existence of customary Law of on the right to cross Indian territory because of two Portuguese enclaves. INTERNATIONAL COURT OF JUSTICE. Right of passage (Portugal v. India), ICJ, 1960.
[379] It is about an instance involving the United States of America and Iran on the existence of customary international Law for the State to provide security to the consular and diplomatic staff of others. INTERNATIONAL COURT OF JUSTICE. United States Diplomatic and Consular Staff in Tehran, Judgment , ICJ. Reports 1980.
[380] BARBERIS, Julio. Réflexions sur la coutume internationale. In: Annuaire Français de Droit International, v. 36, 1990, p.12.
[381] Notion of a pre-existing custom to the State itself that starts to exist from the decolonization. This custom would be binding even if its consent had not been obtained, as it was previous. DEUMIER, Pascale. Op. cit., p. 122-124.
[382] AKEHURST, Michael. Introdução ao Direito internacional. Coimbra: Almedina, 1985, p. 07.
[383] AGO, Robert. Op. cit., p. 697-700.

detriment of another one from a diverse nature); (ii) the justification to the behavior of the State itself and (iii) the normative tool, which once exercised, it somehow reveals the "opinion" of the State on the International Law, on the conformity of its own behavior before this same Law and before the overall view[384]. NASSER still emphasizes that it is about the search for any way of behavior which reveals the "opinion" of a certain State, being them documents, actions, omission, or participations in international organizations[385].

The relations between the states, however, are not as static as they initially seem to be. This is why it is necessary to consider its effects on the other participants of the international scenery, together with the own manifestation of the State, considered individually. This explains why CANÇADO TRINDADE emphasizes that the increase of the multilateral interactions would highlight the role of the international consensus in opposition to the individual consent of the States[386].

The Nicaragua instance can be cited to explain this view, when the International Court of Justice accepted it as a generalized *opinio juris* of the States[387], or, according to PEREIRA, as a manifestation of the *jus cogens*[388].

On the other hand, D'AMATO conclusively states that the judges did not know much about what they were doing in that situation. In his opinion, the *opinio juris* gives sense to the several acts practiced by the State, drawing out from them those acts that have legal sense. So, the Court would be wrong when deciding for the existence of the custom and not the practice of the States (which would oppose the alleged custom), but for the votes of the Resolutions of the United Nations. In other words, the practice had not been used for the definition of the custom in this situation. In order to justify his conclusions, the

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[384] SOUZA, Ielbo Marcus Lobo de. Op. cit., p. 36-37.
[385] NASSER, Salem Hikmat. Fontes e normas do Direito Internacional: um estudo sobre a soft Law. São Paulo: Atlas, 2005, p. 72.
[386] TRINDADE, Antônio Augusto Cançado. Reflections on international Law-making: customary international Law and the reconstruction of jus gentium. In: O Direito Internacional em um Mundo em transformação. Rio de Janeiro: Renovar, 2002, p. 78-81.
[387] SOUZA, Ielbo Marcus Lobo de. Op. cit., p. 43.
[388] PEREIRA, Luis Cezar Ramos. Costume internacional: gênese do Direito internacional. Rio de Janeiro: Renovar, 2002, p. 250 e 256.

author still mentions the examples of humanitarian interventions and the way measures determined by the United Nations were carried out.[389]

AKEHURST emphasizes that studying the system only by the sanction is as irrational as confusing the illness with the Law, since even the States are internationally committed; the breach of an international rule may turn into a precedent contrary to the interests of the State itself, and given the economic needs, the States are inter-dependents.[390] As far as the objective element is concerned, CANÇADO TRINDADE understands that the difference of levels of publicity in the promotion of the diplomatic practices would make different countries have higher influence on the definition of certain international customs.[391] Indeed, this is the outstanding issue in the discussions taken to analysis by the International Court of Justice: in the public international Law the custom is not necessarily generalized.[392] One example was the Asylum case (1950)[393] when the International Court of justice understood that there was no proved existence of a regional custom, and essential the uniformity and constancy of the conduct[394]. As NASSER alleged, the frequency and constancy of a certain customs practice was much more important than the number of States involved.[395] PEREIRA also highlights this aspect: the practice must be uniform and constant, even though the temporal gap has some level of flexibility.[396]

However, it is criticized the fact that some regional customs are not taken into account, especially when they do not coincide with western values[397], like the *Preah Vihear* instance (1962)[398].

[389] D´AMATO, Anthony. Trashing customary international law. Appraisals of Nicaragua v. United States. In: The American Journal of International Law, v. 81, 1987 p. 101-103.
[390] AKEHURST, Michael. Op. cit., p. 09-13.
[391] TRINDADE, Antônio Augusto Cançado. Reflections..., p. 78-81.
[392] Although this themes has been the object of some controversy as demonstrated by: COHEN-JONATHAN, Gérard. La coutume locale. In: Annuaire Français de Droit International, v. 7, 1961, p.119-140.
[393] It was about an instance involving Peru and Colombia on the existence of Right to asylum or duty of extradition of refugees. cs. INTERNATIONAL COURT OF JUSTICE. Colombian- Peruvian asylum case, Judgment of November 20th 1950: I. C. J. Reports 1950, fls. 266.
[394] SHAW, Malcolm N. International Law. 5. ed. Cambridge: Cambridge Press, 2003, p. 72.
[395] NASSER, Salem Hikmat. Op. cit., p. 73.
[396] PEREIRA, Luis Cezar Ramos. Op. cit., p. 210-213.
[397] BUSS, Andreas. The Preah Vihear Case and Regional Customary Law. In: Chinese Journal of International Law. 2010, p. 111–126.
[398] It is about the setting of borders between Thailand and Cambodia in which one of the issues raised is the customary right/duty of the Siamese king to defend Buddhist monks. This argument would have the power to influence the setting of border in the area of the Preah Vihear temple. The consequences of this conflict still persist nowadays, as demonstrated by the recent clashes between the two countries (May 2011).

Inside the perspective of the Public International Law, so, the custom binds the States (although the question of agreement is still being discussed), and its breach is sanctioned, unless omission is tolerated. Nowadays this seems to be the prevailing opinion, even though a theory that accepts a kind of withdraw of the consuetudinary custom has already been outlined.[399] Its content is highly polemic and greatly criticized[400], but it somehow reflects some tension between a more traditional line of thought and a more contemporaneous vision. Some authors understand that settlement would be possible, sine the practice of the State must be analyzed in a plural way[401], or have basis on a behavioral perspective[402].

This same tension can be sensed when Human Rights are involved. In these cases, the objective approach of the requirements may be more clarifying, as BEDERMAN explains when reporting the event of Filartiga *versus* Peña-Irala, when an American court decided that torture was a violation of the "nations' rights". Such decision was kept by the Superior Court based on the resolutions by the United Nations.[403]

Therefore, in this perspective it seems to be essential to demonstrate the precedents (legislative acts, legal decisions, executive order, diplomatic orders, diplomatic mailing, governmental instructions, technical opinions by legal

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[399] BRADLEY, Curtis A.; GULATI, Mitu. Customary international law and withdrawal rights in an age of treaties. In: Duke Journal of Comparative & International Law, v. 21, 2010, p. 01-30.

[400] ROBERTS, Anthea. Who killed article 38 (1) (b)? A reply to Bradley & Gulati. Duke In: Journal of Comparative & International Law, v. 21, 2010, p. 173-190; BREWSTER, Rachel. Withdrawing from custom: choosing between default rules. In: Duke Journal of Comparative & International Law, v. 21, 2010, p. 47-56; BEDERMAN, David J. Acquiescence, objection and the death of customary international law. In: Duke Journal of Comparative & International Law, v. 21, 2010, p.31- 45; HELFER, Laurence R. Exiting custom: analogies to treaty withdrawals. In: Duke Journal of Comparative & International Law, v. 21, 2010, p.65-80; STEPHAN, Paul B. Disaggregating customary international law. In: Duke Journal of Comparative & International Law, v. 21, 2010, p.191-205; OCHOA, Christiana. Disintegrating customary international law: reactions to withdrawing from international custom. In: Duke Journal of Comparative & International Law, v. 21, 2010, p.157-172; TRACHTMAN, Joel P. Persistent objectors, cooperation, and the utility of customary international law. In: Duke Journal of Comparative & International Law, v. 21, 2010, p.221-233; ESTREICHER, Samuel. A post-formation right of withdrawal from customary international law? Some cautionary notes. In: Duke Journal of Comparative & International Law, v. 21, 2010, p.57-64; SWAINE, Edward T. Bespoke custom. In: Duke Journal of Comparative & International Law, v. 21, 2010, p.207-220.

[401] ROBERTS, Anthea Elizabeth. Traditional and modern approaches to customary international law: a reconciliation. In: The American Journal of International Law, v. 97, 2001, p. 757- 791.

[402] LIM, C. L.; ELIAS, Olufemi. Withdrawing from custom and the paradox of consensualism in international law. In: Duke Journal of Comparative & International Law, v. 21, 2010, p.143-156.

[403] Even if some of the same States that vote for the Resolutions end up making use of acts of torture, according to the author. BEDERMAN, David J. Custom as a source of Law. Cambridge: Cambridge Press, 2010, p. 149.

consultants, international treaties, subsequent practice, acts by international organizations and international court precedents)[404].

The recent importance of custom in the solution of international conflicts may be measured again by its use in the situation of the wall in the Palestinian territory[405] (2004) over the existence of customary rules that would seal the annexation for the acquisition of territories. There is also the example of the Legality of Use of Nuclear Weapons (1993-1996), when it was intended to recognize the existence of a customary International Law to keep the duty of avoiding environmental damage[406].

Apart from the States, the Public International Law admits the possibility that international Organizations act so as to produce international rules, for example, execute international treaties[407] or even establish international customs as the one of the Red Cross[408] and of the humanitarian customary rights regarding armed conflicts, besides the Resolutions by the United Nations.[409]

The specialized doctrine has admitted that the traditional requirements of the international custom are no longer completely appropriate to explain the relations between the States[410]. Several uncertainties are still evident in all the attempts for a theoretical explanation[411]. On the one hand there is an excessive theorization concerning its requirements, whereas on the other one the

[404] LUPI, André Lipp Pinto Basto. Op. cit., p. 107-130.
[405] INTERNATIONAL COURT OF JUSTICE. Advisory opinion of 9 July 2004 on the legal consequences of the construction of a wall in the occupied Palestinian territory.
[406] INTERNATIONAL COURT OF JUSTICE. Legality of the use by a State of nuclear weapons in armed conflict Advisory Opinion of 8 July 1996.
[407] UNITED NATIONS. Vienna Convention of 1986.
[408] MAYBEE, Larry; CHAKKA, Benarji. Custom as a source of international humanitarian law: Proceedings of the Conference to Mark the Publication of the ICRC Study "Customary International Humanitarian Law" held in New Delhi, 8–9 December 2005. New Delhi: ICRC, 2005.
[409] HENCKAERTS, Jean-Marie. Étude sur le droit international humanitaire coutumier. Une contribution à la compréhension et au respect du droit des conflits armés. In: Revue Internationale de la Croix-Rouge, v. 87, 2005, p. 289-330.
[410] LUPI cites an example the "Namibia" instance in which the UN had abrogated the mandate of South Africa, determining the withdrawal of its troops from Namibia (1966). South Africa refuted the validity of the Resolution, since two of the permanent members of the Security Council had refrained from voting. The International Court of Justice considered enough practice in the Council to assert the validity of the act. (LUPI, André Lipp Pinto Basto. Op. cit., p. 123- 124). PEREIRA also mentions the role the Resolutions and Charters by the UN. PEREIRA, Luis Cezar Ramos. Op. cit., p. 192-194.
[411] KAMMERHOFER, Jörg. Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems. In: EJIL, v. 15 n. 3, 2004, p.523–553.

existence of more flexible points are pointed out as more contemporary ways to approach the theme.[412]

Moreover, the conveniences of international politics make their weight fall over international custom[413]. This is a reason why it is not enough to deny the existence of international custom as a source of regulations of inter-state relations, even because the treaties themselves greatly depend on the same kinds of mechanisms of coercivity available in customs.[414]

(ii) As far as the so-called Private International Law is concerned, the most traditional Brazilian doctrine reinforces the duality of sources, that is, the existence of internal and international sources. Paradoxically, however, the same doctrine rarely refers to the custom among them. It is not rare to see its focus in the conflict of laws.

The common reference to the brazilian authors[415] who mention the theme is MACHADO VILLELA[416]. He does not only list international customs as a source of the Private International Law, but also underpins this assertiveness in every theoretical construction of Public International Law.

In the national doctrine DOLINGER stands out. He mentions as internal sources of the Private International law: the statutory law, the doctrine and the court precedents; as international sources, he mentions the treaties and the court precedents, even though he admits some roles to the international organizations. The same path is followed by ARAUJO, who does not share the same idea in relation to the doctrine and court precedents as internal sources and adds the doctrine as an international source[417].

According to RECHSTEINER, unlikely the internal custom, the characterization of the international custom would take place once the requirements of general and extended usage were fulfilled, that is, "uniform and reiterated practice of acts with legal effects, culminating in the legal conviction

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[412] D´AMATO, Anthony. The concept of custom in international law. New York: Cornell Press, 1971, p.73-102, 269-274.
[413] VAGTS, Detlev F. International Relations Looks at Customary International Law: A Traditionalist's Defense. In: European Journal of International Law. v. 15, n. 5. 2004, p. 1039-1040.
[414] GUZMAN, Andrew T. Saving customary international Law. In: Michigan Journal of International Law, v. 27, 2005, p.175-176.
[415] As for example: BASSO, Maristela. Op. cit., p. 67-69.
[416] MACHADO VILLELA, Álvaro da Costa. Tratado elementar de Direito internacional Privado: princípios gerais. Coimbra: Coimbra, 1921, p. 17.
[417] DOLINGER, Jacob. Op. cit., p. 65-91; ARAUJO, Nádia de. Direito Internacional privado: teoria e prática brasileira. Rio de Janeiro: Renovar, 2003, p. 127-129.

of being a rule of right (*opinio necessitatis*). In other words, the certainty of the need of a rule"[418].

Its generalization, on the other hand, would depend on its clarity and objectiveness so as to guarantee its universal respect, leading to the conclusion that rules of Private International Law from customary origin would not exist.[419] As for CASTRO, he mentions the customs relating them to the requisites of the *opinio juris* and reiterated behavior. He points out, nonetheless, that they would be sources only to be used for judicial appreciation, just like the law and the court precedents. Also, the author does not recognize the treaties as sources of the Private International Law, due to its international nature[420]. STRENGER also accepts the customs as sources of the Private International Law, only in the internal order[421]. Other authors accept them just as international sources[422].

The Brazilian bibliographical sources of the Law of International Trade are silent and mention too little on the issue. Among the several authors, only DOLINGER mentions the role of Court precedents (which associates to the *Lex Mercatoria*) as a material source[423]. STRENGER recognizes a higher "sensitivity" to the changes, and also the major role of the customs and trade usage in the definition of the normative picture[424]. And BAPTISTA, who affirms the usages and customs as "state" sources, and the *lex mercatoria* and the professional usages as "private" sources of the international trade arbitration[425].

At a certain point it is recognized to the customs the capacity of formation of a transnational normative room to rule certain specific areas of international business, even if general rules become necessary (based on consensus)[426].

This normative power was not only historically recognized by the English and American[427] courts, but it also sustained "codifying" movements (private and

[418] RECHSTEINER, Beat Walter. Op. cit., p. 112.
[419] Ibidem, p. 113.
[420] CASTRO, Amilcar. Direito Internacional Privado. 6. ed. Rio de Janeiro: Forense, 2008, p. 84-101.
[421] STRENGER, Irineu. Direito internacional privado. 4. ed. São Paulo: LTr, 2000, p. 121-125.
[422] CRETELLA NETO, José. Contratos internacionais do Comércio. Campinas: Millennium,2010, p. 165.
[423] DOLINGER, Jacob. Op. cit., p. 91.
[424] STRENGER, Irineu. Op. cit., p. 749-750.
[425] BAPTISTA, Luiz Olavo. Arbitragem comercial e internacional. São Paulo: Lex Magister,2011, p. 68-69, 71-83.
[426] DEUMIER, Pascale. Op. cit., p. 357-358
[427] BEDERMAN, David J. Op. cit., p. 124-129.

state ones). These themes, however, will be dealt with in the following part of the present research.

(iii) Also, with regards to the so-called economic international Law there is strong reference to the Customary Lew as a normative source. This "field" of the international Law is still going through difficulties for doctrinaire recognition due to its "mixed" characteristics (sometimes public, sometimes private). Actually it reflects the preoccupation with the international economic effects and its legal responses[428]. This happens because the international economy has been undergoing several changes since de mid-forties, such a fact that historically coincides with the creation of the United Nations and the International Court of Justice. As MELLO sums up, it was "a peaceful period, guaranteed by the nuclear weapon"[429], although some "peripheral" wars had been waged. Two political-economic groups were formed, new countries joined the market relations (result of the decolonization) and the international trade exchanges heated up.

This "new international economic order"[430] ended up politically reflecting the clash between the developed and underdeveloped countries, mainly in the definition of new rules of the international trade. This conflict, taken to the General Meeting of the United Nations, ended with the Charter of Economic Rights and Duties of States (1974), in which several countries made the commitment to preserve others' sovereignty, peaceful co-existence, respect to the Human Rights and fundamental freedom, among others (chapter 1)[431].

In this period, nonetheless, there was also a crisis between the strong powers: the missiles in Cuba (1962), the petrol (1973); the decay of the Soviet bloc (1989). At the very end of the twentieth century, the world order, concerning military and political issues, was similar to an imperial construction. The key point was that the American economic power was being challenged.

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[428] TRACHTMAN, Joel P. Op. cit., p. 33-55.

[429] MELLO, Celso Duvivier de Albuquerque. Perspectivas do Direito Internacional Econômico. In: CASELLA, Paulo Borba; MERCADANTE, Araminta de Azevedo. (Coords.). Guerra comercial ou integração mundial pelo comércio? A OMC e o Brasil. São Paulo: LTr, 1998, p. 71.

[430] VINUESA, Raúl Emilio. El nuevo orden económico internacional. In: Revista de Direito Mercantil, Industrial, Econômico e Financeiro, n. 55. São Paulo: RT, jul./set. 1984, p. 114-121.

[431] UNITED NATIONS: General Assembly. Resolution n. 3281 of 12 December 1974, which establishes the Charter of Economic Rights and Duties of the State.

MELLO explains that the neoliberal politics, introduced at the end of the eighties, started to require the trade liberalization, promoting the globalization politics[432]. If on the one hand, this "new" economic policy aimed at the satisfaction of the American economic interests, on the other one, it promoted an European reaction (logic of the economic integration). This is the shock between the "globalization" and the "integration" that has characterized the economic development.

The strict nations of consent (State acceptance) and sovereignty do not manage to prosper during all the twentieth century. However in the middle of the last century it was recognized that the concept of sovereignty started to be conditioned to the international Law, restraining the State discretion, especially with regards to the protection of the Human Rights[433]. Because of that, the classical Public International Law left its first "niches" (Peace and war, Treaties, etc.) and started to worry about issues involving economic and social domains[434].

Theoretically speaking, these international movements are reflected in the development of the so-called "Law of Development"[435] and "Economic International Law"[436]. While the first theoretical line still discussed on the exclusive role of the States, the latter one assumed that the international trade relations concerned not only the private agents (focus of the international trade Law), but also the State as a whole. In other words, the classical liberal logic in which there should be a role to be developed by the State and another role by

[432] "At last, the neoliberalism is adopted by the powerful States and imposed to the others. The market is the new God. The capitalism needs room and consumers with no barriers that hinder the commerce. It created the State by destroying the feudalism and now it will destroy the State to promote globalization". MELLO, Celso Duvivier de Albuquerque. Perspectivas do Direito..., p. 73.

[433] TRINDADE, Antônio Augusto Cançado. Os rumos do Direito internacional contemporâneo: de um jus inter gentes a um novo jus gentium no século XXI. In: O Direito Internacional..., p. 1047-1051.

[434] TRINDADE, Antônio Augusto Cançado. Os rumos..., p. 1054.

[435] "The international Law of development, with its several components (right to economic self-determination, permanent sovereignty over natural resources, principles of non-reciprocal and preferential treatment to the developing countries and equal participation of the developing countries in the international economic relations and in the benefits of science and technology), emerged like an international normative system aiming at regulating the relations between legally equal States, but economically unequal". TRINDADE, Antônio Augusto Cançado. Os rumos..., p. 1065.

[436] Which, according to MELLO, must be understood as the "different aspects of international relations, such as foreign investment, economic integration, economic international organizations, currency, international organizations, currency, international legal regime, etc.?". (MELLO, Celso Duvivier de Albuquerque. Perspectivas do Direito..., p. 79). As for Carreau and Julliard it would be the set of rules which govern the organization of macro-economic international relations, from which contracts of strictly private interest would be excluded. cf: CARREAU, Dominique; JUILLARD, Patrick. Droit international économique. 3. ed. Paris: Dalloz, 2007, p. 02-03.

private agents[437], separated to explain the new logic of the Market. This would be one of the flaws of the internationalization of the Contractual Law[438]. Thus, what is present is a paradox to be solved: on one side, the defenders of the Market intend their self-regulation; on the other side they resort to the State when the Market itself does not have enough tools to overcome its challenges.

Besides that, nowadays it is recognized the existence of several possible actors capable of taking part in significant international relations, with some kind of possibility for normative production, from the traditional States and international organs, to the non-governmental Organizations and transnational enterprises[439].

However, MELLO was skeptical in relation to the interests and possibilities of this field of Law, to which he granted the strengthening of the inequalities among the States, even though he recognized its conditioning to the Human Rights[440]. Such skepticism would also refer to the role represented by the custom as a source of this Law: due to the novelty of its development, the importance of custom would not exist[441], or it would be restricted to non-structured areas by a multilateral system[442]. Partly, this opinion would reflect the impression that the economic international Law would branch from the Public International Law[443].

The distinction itself between Public International Law and Private International Law, in this aspect, ends up limiting the full understanding of the phenomenon and strongly bound to the liberal legal perspective, being, this way, in crisis[444]. Even if the pedagogical relevance of distinction persists, it is necessary to understand the contemporary international phenomenon from the perspective of an integrative logic. Only this last kind of thought allows the

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[437] NUSDEO, Fábio. Op. cit., p. 12.
[438] ORREGO VICUÑA, Francisco. Op. cit., p. 354.
[439] "The term transnational company covers a set of situations. Initially it is expanded beyond the national borders. Secondly, because of its structure and organization, it escapes international control, becoming legally denationalized. Thirdly, having unities of production in several countries, it has the upstream of its assets and decentralized results and abroad. Being managed by individuals of national origin, their decisions escape from the national perspective, whose transactions are not within the reach of national policies of any countries". OLIVEIRA, Odete Maira de. Relações Internacionais: estudos de introdução. Curitiba: Juruá, 2001, p. 261.
[440] MELLO, Celso Duvivier de Albuquerque. Perspectivas do Direito..., p. 93.
[441] MELLO, Celso Duvivier de Albuquerque. Direito internacional..., p. 80.
[442] CARREAU, Dominique; JUILLARD, Patrick. Op. cit., p. 15.
[443] MELLO, Celso Duvivier de Albuquerque. Direito internacional..., p. 71.
[444] GIORGIANNI, Michele. O Direito privado e as suas atuais fronteiras. In: Revista dos Tribunais, v. 747. São Paulo, jan. 1998, p. 37.

understanding of phenomena such as the international regulation of the financial and banking matters. In both examples, public and private interests come together in an attempt to create stronger and preventive mechanisms of crisis, like in the regulation suggested by the Basel Committee[445].

In another aspect the same cases can be cited as examples of absence of an international legal regime, such a fact that ends up encouraging the working out of a standard of rules of pragmatic content.

Thus, for instance, when state insolvency is discussed, there are no formal and fixed rules which determine a regime of international financial "contest of creditors". In fact, the debtor states enjoy great autonomy of choice about how and who they pay to, which is an exercise of their respective sovereignties. In the last crises, the practice has demonstrated the possibility of negotiation of great cuts in the respective credits, the absence of rules of priority for predictable payment, and also the aversion to the institutional discussion of this preference towards the creditors[446]. Actually, the most general principle applicable to such cases seems to be the equality of treatment which would be the basis of the national regimes and of the rules of the Paris Club[447], or even the attempt of institutionalization of the theme promoted by the International Monetary Fund (IMF)[448].

One of the great examples of the kind of preoccupation of the economic International Law is the way of organization and regulation provided by the World Trade Organization (WTO). Among the several multilateral aspects that form the system of the WTO, something that can be pointed out is the understanding of the Dispute Settlement, which in its art. 3.2, specifically mentions the use of customary rules of interpretation of the public international law[449].

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[445] DRAHOS, Peter; BRAITHWAITE, John. The globalization of regulation. In: The Journal of Political Philosophy, v. 9, n. 1, 2001, p. 115.

[446] BOHOSLAVSKY, Juan Pablo. Lending and Sovereign Insolvency: A Fair and Efficient Criterion to Distribute Losses among Creditors. In: Goettingen Journal of International Law, v. 2, 2010, p. 394.

[447] "The Paris Club is an informal group of official creditors whose role is to find coordinated and sustainable solutions to the payment difficulties experienced by debtor countries". PARIS CLUB. Available on: www.clubdeparis.org.

[448] BOHOSLAVSKY, Juan Pablo. Op. cit., p. 393.

[449] "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". Cf. WORLD

The Law of international investments is another field which can resort from the international customs[450], especially in the definition of the material rules applicable to the conflict, such as RAMINA proposes when interpreting art. 42 (1) of the Washington Convention of 1965[451], or when questioning the existence of patterns in the writing of treaties, the difficulties resulting from the asymmetry of power in the negotiations of treaties, and the requirements to talk about the conviction of obligatoriness[452]. DUMBERRY questions about the existence of a custom that allows the submission of demands before international courts[453] and GONGYAN supports him, when analyzing the treaties of protection to international investments[454].

Besides these issues, other transformations reach the international customary law. NASSER, for example, defends the possibility of the existence of "immediate" customs that he identifies as fruits of the instruments of the soft Law, that is, without obligatory character, influencing on the construction of the international practice, confirming the notion of obligatoriness, or even as an instrument of a general international Law[455].

According to BASSO, one of the reflections of the international relations of economic character is on the shift of normative sources to the treaties, the customary Law and the arbitral decisions, (new *Lex mercatoria*) and the development by the private initiative of a transnational Law disregarding the State, but which starts to influence it and has the international contract as a basic instrument[456].

In turn, other authors still believe that International Treaties that are not definitely ratified by the States may be applied as an international custom, once

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TRADE ORGANIZATION. Understanding on rules and procedures governing the settlement of disputes. Available on: http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

[450] ALVAREZ, José E. A BIT on custom. In: International Law and Politics, v. 42, 2009, p.17- 80.

[451] RAMINA, Larissa. Direito Internacional dos Investimentos: solução de controvérsias entre Estados e Empresas transnacionais. Curitiba: Juruá, 2009, p. 118.

[452] RAMINA, Larissa. Considerações sobre a Dialética Tratado-Costume e o Desenvolvimento Progressivo no Direito dos Investimentos Internacionais. In: Revista Brasileira de arbitragem, n. 24, out. /dez. 2009, p. 45-64.

[453] The author understands that this custom had not yet been established. DUMBERRY, Patrick. The legal standing of shareholders before arbitral tribunals: has any rule of customary law crystallized? In: Michigan State Journal of International Law, v. 18, n. 3, 2010, p. 353-374.

[454] CONGYAN, Cai. International investment treaties and the formation, application and transformation of customary international law rules. In: Chinese Journal of International Law, v. 7, n. 3, 2008, p. 659–679.

[455] NASSER, Salem Hikmat. Op. cit., p. 92-94; 154-157.

[456] BASSO, Maristela. Introdução às fontes e instrumentos do comércio internacional. In: Revista de Direito Civil, Imobiliário, Agrário e Empresarial, n. 77, jul. /set. 1996, p. 60-62.

they are attached to generalized international importance[457]. The basis for this acceptance may vary between the proof of the existence of international custom[458] and its relevance to the communities of the States.

The own Appellate Body of the World Trade Organization has already understood it that way with regards to the Vienna Convention of 1969 in several instances[459]. The interesting point is the Appellate Body employed the text of the Dispute Settlement Body to admit that the interpretation rules of the treaties, envisaged in the referred Convection, would have reached the status of international custom, even when not ratified by any of the parties.

The positioning of the Appellate Body in the Gasoline instance originated the discussion on the non "clinical isolation" of the solution system of settlement dispute in the World Trade Organization, and the possibility of application of other rules of the International Law by the arbitrators of the WTO other than those envisaged in the constitutive treaties, even for the appreciation of themes related to environment and trade[460].

Before that, the Dutch Supreme Court had already recognized, by the national lower courts, the Rome Convention over the law applicable to the contract obligations, when not yet ratified by the country[461].

By this time, therefore, it does seem to be no longer possible to deny the existence of the custom as an autonomous source of Law, being internal or international. However, as an argumentative reinforcement, it seems to be convenient to demonstrate that such recognition is viable not only in primitive societies, non-western ones, or via international organs.

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[457] D´AMATO, Anthony. The concept..., p. 105-166; D´AMATO, Anthony. Manifest intent and the generation by treaty of customary rules of international law. In: The American Journal of International Law, v. 64, 1970, p.892-902; D´AMATO, Anthony. Trashing customary..., p. 103-105.

[458] BASSO, Maristela. Curso..., p. 62.

[459] As, for example, the instance of Gasoline involving Venezuela and the United States of America on Standards of imports imposed by the American legislation. WORLD TRADE ORGANIZATION. Appeal Agency. Report WT/DS2. Another example was the instance of frozen chicken involving Brazil and the European Community on the classification of customs of cutting of frozen chicken and the respective limitations of import imposed by the EC. WORLD TRADE ORGANIZATION. Appeal Agency. Report WT/DS269/AB/R. of 12/09/2005.

[460] MARCEAU, Gabrielle. Um pedido pela coerência no Direito internacional. Elogios para a proibição ao "isolamento clínico" na solução de controvérsias na OMC. In: MERCADANTE, Araminta; MAGALHÃES, José Carlos. (Coords.). Solução e prevenção de litígios internacionais. Rio de Janeiro: Forense, 2003. v. 3, p. 344-356.

[461] DOLINGER, Jacob. Op. cit., p. 75.

3.1.4. Very Brief notes on the existence of the custom as a source of the Law in Comparative Law.

Thus, partly supporting what has been previously claimed, it should be pointed out that the role of the customs is not the same in the different legal systems. This way, for example, while the custom would have a limited role in some normative systems (Roman-German[462], Soviet[463] and Chinese[464]), at a great extent being limited to the filling and interpretation of the law, in others, the custom would perform a major role (Anglo-Saxon Law[465], Muslim Law[466], and in the African normative diversity[467]). Still, with regards to the latter system, VICENTE points out the recognition of the existence of legal pluralism as a need of social order[468] by the State, such as in Mozambique.

It is also important to remember that it would be a mistake to consider the common Law as a consuetudinary law, once, first of all, it is based on precedents, and so, a sole legal decision would be enough to create a conduct obligatoriness, and secondly, the precedent has legal origin[469].

Other examples can be cited:

(i) The Australian and Polynesian model. The French Law, prior to the Constitution of 1946, established distinction on legal treatment to its national ones and those which were native from colonial territories. With the extinction of this differentiated regime of citizenship, it started to accept the existence of "personal statutes", foreseeing the possibility that a local personal statute

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[462] DAVID, René. Os grandes sistemas..., p. 144-145. According to VICENTE there really existed a distinction in acceptance. While Portugal is not mentioned as a source and in France the custom would be a secondary source and in Germany, theoretically, it would be at the same hierarchic level as the law. VICENTE, Dário Moura. Op. cit., p. 168-171.

[463] DAVID, René. Os grandes sistemas..., p. 313-315.

[464] Even If this application had been assured in certain regions, like Hong Kong, in continental China it is not officially recognized. VICENTE, Dário Moura. Op. cit., p. 499.

[465] VICENTE points out the role of the custom in Common Law, especially in trade Law. VICENTE, Dário Moura. Op. cit., p. 283. DAVID, however, disagrees with this opinion. He understands that its role is limited because of the demanded requisites. (DAVID, René. Os grandes sistemas..., p. 437-438).

[466] According to VICENTE the role of the custom (urf) is essential in the Muslin Law: either as an inspiration of Xaria ("Word of God"), or as an inspiration of Suna ("rules deduced from the conduct of the Prophet") or lowering the standards established by Xaria. VICENTE, Dário Moura. Op. cit., p. 385-396. According to LOSANO the role of urf would be limited because it is a pre-Islamic source (LOSANO, Mario G. Op. cit., p. 409). As for GILISSEN urf admitted to the adaptation of the rite and also to supply a social need. GILISSEN, John. Op. cit., p. 121.

[467] DAVID, René. Os grandes sistemas..., p. 619 et seq.; VICENTE, Dário Moura. Op. cit., p. 427-435; LOSANO, Mario G. Op. cit., p. 353 et seq.

[468] VICENTE, Dário Moura. Op. cit., p. 435.

[469] SOARES, Guido Fernando Silva Soares. Common Law..., p. 51-52.

became French. Nowadays, this distinction exists in a few territories, given that in the New Caledonia[470] instance, the personal legal relations are ruled by the local customs[471]. It is also interesting to point out that this situation started to create constitutional difficulties from the moment the first civil relations started to be established between colonizers and natives (according to AGNIEL, the Constitution of 1946 is the one that suppressed the idea of the Indigenous Populations and favored the displacement outside the reserves)[472].

As the applicable regime to the natives would be customary, the French traditional jurisdiction had difficulties in applying it (as it is not written and absent in the compilations), sometimes making it prevail the French common Law, sometimes declaring itself incompetent for trial[473]. In the previous years, attempts were made in order to provide means of trial to the Judicial Body (from compilations of customs to the adoption of consultants on the customs). However, it was the *Ordennance* of October 15th 1982 which, for the first time, would recognize the existence of a local rule with the value of a legal rule (creating, yet, the element of consultants, instance of customary conciliation, but also accepting the waiver of the differentiated statute)[474]. Nowadays there exists a Customary Senate (created by the Noumea Agreement) with advisory competence over law projects of the territory; deliberative competence over symbols, customary civil statute and regime of lands, and also to put forward projects of interest of local identity[475].

Another interesting situation is the East Timor which, after the invasion by Indonesia forces (1975), is under UN control and is going through an attempt to restructure its civil infrastructure. As a matter of fact one of the major focus of preoccupations of the United Nations, was precisely the legal and judicial structure that was considered flawy. However, it was ignored the fact that since

[470] It is an archipelago located in Oceania and attached to the French Republic. Its administrative regime is differentiated (as it is not considered d'outre-mer territory), besides the fact that a plebiscite is to be subscribed on its independence (Noumea Accord of 1998). It is interesting to point out, yet, which recognizes that the French colonization occurred in a unilateral way, in disrespect to the local people and (Preamble). GOUVERNEMENT DE LA NOUVELLE-CALÉDONIE. Les Accords de Noumea Available on: http://www.gouv.nc/portal/pls/portal/docs/1/10065606.PDF

[471] AGNIEL, Guy. Statut coutumier Kanak et juridiction de droit commun em Nouvelle- Calédonie. In: Revue Aspects, n. 3, Montréal: L'Agence universitaire de la Francophonie, 2008, p. 83.

[472] Idem.

[473] Ibidem, p. 83-84.

[474] Ibidem, p. 86-87.

[475] GOUVERNEMENT DE LA NOUVELLE-CALÉDONIE. Le Sénat coutumier. Available on: http://www.gouv.nc/portal/page/portal/gouv/institutions/senat_coutumier.

the Portuguese colonization (in the middle of the sixteenth century), different legal systems have been applied together on the island, based on the Portuguese tradition and on the local customs. Actually, the latter have endured, and nowadays are constitutionally recognized[476].

Another example is the North-American territory of the Mariana Islands where the traditional customary law is still in force and must be applied by the local courts, even with certain amazement. The customs rule the properties as a familiar right, whose disposal or use depends on the family consent; succession and inheritance of the familiar house; regime of assets and adoption[477].

Concerning the Australian territory, there are incentive measures to the recognition of the traditional rights of the Aboriginal peoples, both at national and provincial levels. At a certain extent, it is about the effects of the damage caused after long years of policy of assimilation. One example is the policy conducted in the Queensland Province, from 1992 on, especially regarding the traditional rights related to marriage, adoption and successions. It is still relevant to remember that the customary rights are also limited by demandings of environmental protection and national parks[478].

New Zealand, or the other hand, has its fundamental agreement of the Waitangi Treaty executed between the *Maori* native leaders and the British Crown in 1840. Even though according to the terms of the Treaty the native customs were considered one of the sources of the New Zealander Law, the national Courts interpreted the treaty from the international point of view and the conflict of laws.

What happened was the gradual application of the sovereignty thesis expressed by the Parliament and the legal concentration among the normative sources. Although 15% (fifteen per cent) of the New Zealanders is Maori and

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[476] "The State shall recognize and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law". GRENFELL, Laura. Legal Pluralism and the Rule of Law in Timor Leste. In: Leiden Journal of International Law, v. 19, 2006, p. 305–337.

[477] RISTROPH, Elizabeth Barrett. The survival of customary law in the northern Mariana islands. In: Chicago-Kent Journal of International & Comparative Law, n. 8, 2007-2008, p.32-65.

[478] BARTHOLOMEW, Peter. Recognition given to aspects of indigenous customary law in Queensland. Brisbaine: Queensland parliamentary library, 1998.

several themes concerning its traditional interests are being recovered, all of them undergo the legislative edition[479].

(ii) The African model. The African Law is usually a transplant of the European model, like it is demonstrated in the Ethiopian work of codification carried out by DAVID[480]. Although in general the colonial powers treated the African local customs with despise, as they considered non-civilized and irrational acts, and exceptionally applied, the difficulty of lack of management and the lack of resources made them try not to get in conflict with the native populations[481].

Some notice, like in the Ghana instance and the former Congo, that the customs did not truly represent a tradition before the European colonization, but can be used as a model for the submission of several peoples with bases on the convenience of the local headmen[482] or urban elites[483]. The policy of consolidation and codification of the custom and respect to the local traditions would end up representing a way of assimilation[484] or domination[485].

The diversity of the tendency over the African Customary Law is strong: it is not only possible to identify instances in which the State sponsors its respect (South Africa), but equally instances of full eradication (Morocco and Ethiopia). Generally speaking, the custom still rules the less formal relations which are not reached by the legislation[486].

Concerning the Badagry (current Nigeria) situation, for example, the British authority established the continuity of the local customs which did not violate natural justice, equity and consciousness. Such policy was kept

[479] DAWSON, John. The resistance of the New Zealand legal system to recognition of maori customary law. In: Journal of South Pacific Law, n. 12, v. 1. 2008, p. 56-62.
[480] DAVID, René. Les sources du code civil éthiopien. In: Revue internationale de droit comparé. v. 14, n. 3. jul./set. 1962, p.497-506.
[481] BENNETT, T. W. Comparative Law and african customary Law. In: REIMANN, Mathias; ZIMMERMANN, Reinhard. (Ed.). The Oxford Handbook of Comparative Law. Oxford: Oxford Press, 2008, p. 644-645.
[482] KUNBUOR, Benjamin. "Customary Law of the Dagara" of Northern Ghana: Indigenous Rules or a Social Construction. In: Journal of Dagare Studies, v. 2. 2002, p. 04-07.
[483] PAUWELS, Johan. Le Droit Urbain de Kinshasa. In: Journal of legal pluralism, n. 42, 1998, p.09-20.
[484] SILVA, Cristina Nogueira da. Missão civilizacional e codificação de usos e costumes na doutrina colonial portuguesa (Séculos XIX e XX). In: Quaderni fiorentini, n. 33-34, 2004-2005, p. 899-919.
[485] SNYDER, Francis G. Colonialism and legal form: the creation of customary law in Senegal. In: Journal of Legal Pluralism, n. 19, 1981, p. 49-90.
[486] MILES, John. Customary and Islamic law and its development in Africa. In: Law for Development Review, v. 1, n. 1, 2006, p. 99-154.

throughout the colonial period[487]. This would have been a colonial tendency in Africa, also followed by the Portuguese administration[488].

The federalist model, adopted after the independence of Nigeria, kept the existence of regional Courts, with competence to apply the Customary Law[489]. Partly, such choice also explains why the full africanization of the legal system was considered non-convenient for the modernization and maintenance of the national unity of the just born countries[490]. Nowadays the importance of the custom from the point view of democratic practice is recognized, but the development of its studies if far from being satisfactory[491].

In Morocco, before the political independence, the French authority is compelled to respect the local customs and consents the creation and working of Customary Courts under its authority. The difficulty of the French management was that the different tribes had different normative systems (Customary or Islamic), and even mixed ones. Because of that, during the French Protectorate, two decrees -*dahir*- of 1914 and 1930 were edited in an attempt to "classify" the tribes according to the system they would be subjected to[492]. This system is ceased to exist when King Mohammed starts to rule Morocco in 1956 and abrogates the law which allowed the existence of Customary Courts, claiming national union. Anyway, ABOULKACEM points out that the old system still works in a clandestine way[493]. Such traces of customs, resulting from years of work of the Customary Courts in the rural regions of Morocco are both recognized as customs (*urf*), and also perform an important role in the Moroccan life (for instance, nowadays the right, positively recognized, of material compensation to divorced women for their work at home when they were married)[494].

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[487] YAKUBU, John Ademola. Colonialism, Customary Law and the Post-Colonial State in Africa: The Case of Nigeria. In: Africa Development, v. 30, n. 4. Dakar: CODESRIA, 2005, p. 203-206.
[488] VICENTE, Dário Moura. Op. cit., p. 429.
[489] YAKUBU, John Ademola. Colonialism, Customary Law and the Post-Colonial State in Africa: The Case of Nigeria. In: Africa Development, v. 30, n. 4. Dakar: CODESRIA, 2005, p. 207-208.
[490] BENNETT, T. W. Op. cit., p. 662.
[491] MUKORO, A. The interface between customary law and local government legislation in Nigeria: A retrospect and prospect. In: International NGO Journal, v. 4, n. 4, abr. 2009, p. 167-172.
[492] HOFFMAN, Katherine E. Berber Law by French Means: Customary Courts in the Moroccan Hinterlands, 1930–1956. In: Comparative Studies in Society and History, n. 52, v. 4, 2010, p. 858-861.
[493] ABOULKACEM, El Khatir. Droit coutumier amazigh face aux processus d'institution et d'imposition de la législation nationale au Maroc. Available on: www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100800.pdf.
[494] HOFFMAN, Katherine E. Op. cit., p. 880.

In South Africa, the custom is constitutionally recognized as one of the bases of the current legal system, especially when it recognizes the possibility for each citizen to choose the culture they prefer, linguistically and religious, individual or collective, being the application of this right determined by the Courts[495].

Ghana also follows the tendency of the British colonization and introduces a double legal system, based on Customary Courts for the application of the consuetudinary Law. This system lasted even after the political independence in 1957, being the custom nowadays constitutionally recognized as a normative source[496]. The civil responsibility can be cited as an example of application of the Customary Law, mainly in contexts that are not reached by the Common Law as personal violations[497].

Cameroon and Botswana have value in the consuetudinary Law constitutionally recognized, as well. Whereas in the first one the custom is conditioned to the law, democratic principles and men's rights[498], the other cannot oppose the written law, morality, humanity and natural justice, being mainly applied in issues related to family Law and successions.[499]

(iii) The Asian Model. The Japanese private modern Law, after its westernization, does not manage to completely refute the most traditional characteristic of its society. That is the reason why it is recognized the normative power of the custom that does not oppose public policy, conditioned to the legislative omission (Law 10/1898).

Yemen, on the other hand, was one of the few stable societies in pre-Islamic period. According to AL-ALIMI, this would inclusive correspond to the existence of a legislation that affirmed orders, prohibitions, contracts and properties. Even after the attachment by the Ottoman, the tribal customs were kept in force, initially compiled in 1715. In 1980, although the legislator of Yemen

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[495] SIBANDA, Sanele. When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation. In: Human Rights Brief, n. 17, v. 3, 2010, p.31-32. Available on: http://www.wcl.american.edu/hrbrief/17/3sibanda.pdf.

[496] KURUK, Paul. African customary Law and the protection of folklore. In: Copyright Bulletin, v. 36, n. 2, 2002, p. 12-13.

[497] DAVIES, Julie A.; DAGBANJA, Dominic N. The role and future of customary tort law in Ghana: a cross-cultural perspective. In: Arizona Journal of International & Comparative Law, v. 26, n. 2. 2009, p. 303-333.

[498] DJUITCHOKO, Célestin Sietchoua. Du nouveau pour la coutume en droit positif camerounais: la onstitutionnalisation de la coutume et ses conséquences. In: Revue Juridique Thémis, n. 34. 2000, p.131 157.

[499] KUMAR, Rekha. Customary Law and Human Rights in Botswana. Available on: http://www.du.edu/korbel/hrhw/workingpapers/2009/52-kumar-2009.pdf.

had prohibited some customs, he ended up recognizing his own *status*, and as consequence, the duality of the regime and its social importance.[500]

The peculiarities of the ethnic composition of Afghanistan led to a legal constitution from very diversified sources, giving privilege to the customs. Currently, when discussing the reconstruction of the legal system in Afghanistan (post-invasion), it is pointed out the role they still have to perform in the social pacification[501].

(iv) American and European Models. Until the middle of the last century, the *Kanun* (compilation of consuetudinary Law) still ruled every aspect of the life of the inhabitants in the north of Albania[502].

In turn, the *Saami* nomad people live around Sweden, Norway, Finland and Russia. They devote themselves to finishing and pasturing (reindeers). Their social structure is based on customs and their recognition was wide, so as to, during the nineteenth century, have the *Saami* custom applied for the solution of conflicts by the national Courts and authorities, especially in Norway, Sweden and Finland. During the second half of the nineteenth century and beginning of the twentieth century, theories of cultural hierarchy and application in the social evolution imposed strong discredit to the *Saami* culture, whose status had a sharp decrease. Even though those theories have been abandoned, the current policy keeps, at a great extent, its imperfections[503].

Estonia adopts the normative system in which the international custom has normative power in the same conditions as an international treaty, that is, as long as: it exists, it is valid, it prevails in an instance of hierarchy conflict, it is clear and concrete, and it is compulsory and valid in the country which invokes it . Its origin would be the § 3rd of the Constitution of 1992, which determines that the rules and principles of the international Law are part of the normative system in Estonia[504]. Even though Spain has historically recognized a secondary role to the

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[500] AL-ALIMI, Rashad. Le droit coutumier dans la société yéménite. In: Monde Arabe, n. 6. Égypte, 2004, p. 18-33.
[501] SENIER, Amy. Rebuilding the judicial sector in Afghanistan: the role of customary law. In: The Fletcher School Online Journal for issues related to Southwest Asia and Islamic Civilization. Spring 2006, p. 01-10.
[502] TARIFA, Fatos. Of Time, Honor, and Memory: Oral Law in Albania. In: Oral Tradition, v. 23, n. 1, 2008, p.3-14
[503] AHRÉN, Mattias. Indigenous peoples' culture, customs, and traditions and customary law – the saami people's perspective. In: Arizona Journal of International & Comparative Law, v. 21, n. 1, 2004, p. 63-112.
[504] VALLIKIVI, Hannes. Domestic Applicability of Customary International Law in Estonia. In: Juridica International, n. 7, 2002, p.28-38.

customs[505], given the social and historical conditions of the Balearic Islands, not only the customs still exercise some role, but it is admitted that they are compiled (as they were in the past) and rule certain areas of Civil Law.[506]

Nowadays in North American it can still be identified the presence of the contractual customs in trials by indigenous courts, mainly in the Navajo ethnic[507]. The examples are from pledged loans to purchasing and selling, and credit systems. The most interesting is that, according to COOTER and FIKENSTSCHER, for several tribes, the basis of obligatoriness of the business was the mutual agreement[508]. Besides that, the initial "attempts" of "compilation" of customs such as the one by LAWSON[509] previously to the Uniform Commercial Code (UCC) should not be forgotten.

(v) Commercial Models the American Commercial Law has as its main legislative tool the Uniform Commercial Code (UCC), which, despite its name, it is not a code in the sense given by the Civil Law (systematic, imperative and complete). Such ruling, besides recognizing typically consuetudinary aspects (clauses, FOB, CIF, etc.), proposes to allow the continuous expansion of commercial practices and customs[510]. Because it worked as a basis for international initiatives of legislative harmonization[511], it would have made it easier the acceptance by the American Courts in the role performed by international customs[512].

The efforts for a worldwide uniformization of rules applicable to international contracts of purchase and sales goods were redundant in the ratification by several countries in the Vienna Convention of 1980 (CISG). This Treaty specifically recognizes the primacy of uses and customs (art. 9, 1 and 2).

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[505] GORDILLO CAÑAS, Antonio. La costumbre: fuente autónoma del Derecho? Una reflexión desde la experiencia del sistema de fuentes del Derecho en el Código Civil Español. In: Quaderni fiorentini, n. 21. 1991, p. 387-523; CUESTA SAENZ, José Maria de la. Reflejo Del pensamiento de F. Gény sobre la costumbre en la doctrina civilista española. In: Quaderni fiorentini, n. 20. 1991, p. 319-350.

[506] MARTÍNEZ CAÑELLAS, Anselmo. Sobre el derecho consuetudinario balear como fuente y tradición jurídica. In: Boletín de la Real Academia de Jurisprudencia y Legislación de las Islas Baleares, 2010.

[507] ROSSER, Ezra. Customary law: the way things were, codified. In: Tribal Law Journal, v. 8, 2008, p.18-33.

[508] COOTER, Robert D.; FIKENTSCHER, Wolfgang. Indian Common Law: the role of customs in American Indian Tribal Courts (Part II of II). In: The American Journal of Comparative Law, v. 46, 1998, p.547-551.

[509] LAWSON, John D. The law of usage and customs with illustrative cases. Saint Louis: F. H. Thomas & Company, 1881.

[510] § 1-103: "(a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions".

[511] CHEN, Jim C. Op. cit., p. 93-94.

[512] Ibidem, p. 101.

Another example is the UNIDROIT Principles, private initiative of legislative uniformization which repeats the treatment recognized by the CISG and assures primacy to the contractual customs and usages (art.1.9).

This way, having demonstrated the existence of the custom as a normative source, it is now time to demonstrate its role as a source of Contractual Law.

3.2 THE CUSTOM AS A SOURCE OF CONTRACTUAL LAW

Even though the doctrinaire treatment of the sources of Contractual Law is not uncommon, the approach of the custom as a specific source is still scarce. There are some people who still believe that, in case of occasional conflict between such "models", the Negotiating one would prevail[513].

Thus, having as a starting point the general approach enunciated in the previous item, and mainly, applying to it the general doctrinaire requirements, it seems to be necessary to show how a consuetudinary rule would be formed. It is important to remember, however, that this would be a point of view characterized by the typical prejudice of the modern understanding of that source. This is why it becomes necessary to make use of critical bibliography as well.

3.2.1. From the traditional requirements to the formation of the contractual custom.

As a general tendency, it was noticed that the legislations and modern codifications had little space left for the customs. When this space was assured it was recognized the need to make sure that the custom, as a normative source, would not be completely free from the traditional binds. Some of these limitations are very evident when, for instance, it is demanded that the custom is confirmed by the legislation, or in other words, by the State jurisdiction. Others, however, are not so evident. They make use of the several and diversified legal requirements.

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[513] LUDWIG, Marcos de Campos. Op. cit., p. 170.

The Portuguese legislation of the Pombal Era known as the "Law of Good Reason", for example, required that the custom was not only according to the "good reason", was not opposite to any law, but also older than a hundred years old[514]. This "way of thinking" invigorated in Brazil, even after the Proclamation of the Republic. That was due to the force of the Portuguese legislation so far, and also because as the later legislation did not establish a concept over the custom as a normative source, the doctrine had to get support from those traditional requirements.

The resource to such requirements is not exclusive to the Portuguese colonization, but it is a tendency experienced in the countries which followed the Civil Law of French guidance. This is why this kind of treatment will be common in almost every Spanish former colony in America and in a great part of the western European countries. It is true, nonetheless, that the common law also demands a series of requirements for the characterization of the custom as a binding rule.

It is interesting, however, that the concept drawn out of the "Law of Good Reason" provides us some of the main requirements that can be found in these legislations and codifications, in a general way: (i) the constancy in behavior, (ii) adjustment to morality and (iii) adjustment to the legislation. Another requirement pointed out by the doctrine in general[515] is, apart from the constant observance, (iv) the conviction of obligation. Thus, for instance, when BEVILAQUA conceptualized the custom as a "constant observance of a legal rule non-based in *scripta* law"[516], did not only point out, but also covered the custom being formed by the legal system and doctrine. What was left to spontaneity was just a residual role.

[514] MIRANDA, Pontes de. Op. cit., p. 46.

[515] BETTI, Emilio. Interpretação da lei e dos atos jurídicos. São Paulo: Martins Fontes, 2007, p. 291; CAETANO, Marcello. Op. cit., p. 14; DINIZ, Maria Helena. Op. cit., p. 143; RÁO, Vicente. Op. cit., p. 281; ASCENSÃO, José Oliveira. O direito: introdução e teoria geral. 2. ed. Rio de Janeiro: Renovar, 2001, p. 260. In addition to these ones, DINIZ mentions morality. DINIZ, Maria Helena. Compêndio de Introdução à Ciência do Direito. 17. ed. São Paulo: Saraiva, 2005, p. 309); REALE, Miguel. Lições preliminares..., p. 158; JUSTO, A. Santos. Introdução ao estudo do Direito. Coimbra: Coimbra, 2001, p. 205; GOMES, Orlando. Introdução ao Direito..., p. 43.

[516] BEVILAQUA, Clovis. Op. cit., p. 27.

In short, the custom must be long, constant and greatly used, formed and kept with no contradictions by those legitimated to do it. In addition, it must be practiced with the conviction of representing a rule of Law[517].

Let us have, then, a brief analysis of each one of these requirements.

(i)Because of the constancy of behavior, the "Law of Good Reason" refers to the custom which is older than a hundred, that is, which ascends to the ancestry or the traditional requirement of the "immemorial constancy" mentioned in the Ordinations by D. Alfonzo[518].

The requirement of constant behavior is reproduced by the national and international doctrine[519], as being the "*material*" element of the custom, once it can be noticed without the subject analysis of individual behavior. While the basis of initial eligibility of the legislation is its certainty, as it comes from appointing authority and obeys the formal procedure previously established, with a certain term of validity, the custom would be based on consolidated use. The uncertain and unpredictable origin would be, this way, characteristics inherent to the custom, as well as the fact that its force would depend on the constancy of that determined behavior[520]. This distinction is really emphasized, as according to REALE, the custom comes anonymously and everywhere, making it different from the legal certainty[521].

Such distrust motivated the French monarchy, for a long period, to undertake the compilation of customs. The king Louis IX (Saint Louis) organized its legal system so as to undertake the verification and systematic research of every custom alleged in court. Through this procedure, the highest French Court (*Parlement*) began to have the power for clarification with regards to the source of Law, and also over the content of the custom[522].

The idea of emphasized certainty by Modernity, so, did not fit in the understanding of "stability" conveyed by the custom. This happens because it seems to be reasonable to assume that if some behavior were often practiced, in

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[517] GENY, François. Op. cit., p. 358-360.
[518] CAETANO, Marcello. Op. cit., p. 546.
[519] ALTERINI, Atilio Aníbal. Contratos: civiles, comerciales, de consumo. Teoria general. Buenos Aires: Abeledo-Perrot, 2005, p. 57.
[520] REALE, Miguel. Lições preliminares..., p. 155-158.
[521] Ibidem, p. 156.
[522] HILAIRE, Jean. Coutume et droit ecrit au Parlement de Paris d´apres des registres d´Olim (1254-1318). In: GAZEAU, Véronique; AUGUSTIN, Jean-Marie. (Dir.). Op. cit., p. 65-88.

a general way, constant and public, for a reasonable period of time, it can guarantee stability and certainty to the relations in such a way as to create the conviction of the existence of a normative precept[523].

VICENTE and LOSANO inform the existence of this same requirement for the characterization of the custom in the Anglo-Saxon Law[524]: it was uninterruptedly in force for a long time[525]. The certainty and the non-answer (peacefulness) of the custom were, formally, considered requirements by the traditional English precedents[526]. The Norwegian precedents talk about constancy and regularity, tolerance and passivity[527]. This is also the formulae adopted by the UCC (§1-303, C) and by the CISG (art.9.2), when demanding the custom to be regularly observed, in general terms, without establishing for which period this would be desirable.

But how should this regularity be understood? It is interesting to notice that the constancy of the custom has not always been one of its requirements.

> In the eighteenth century, the custom constituted the rhetoric of eligibility of almost every use, practice or right claimed. For this reason, the non-codified custom – and even the codified one – was in continuous flow. Far from exhibiting the permanence suggested by the word "tradition", the custom was a field for change and dispute, an arena where opposing interests presented conflicting claims[528].

LLOYD mentions that the quickness of changes in the English medieval entities would have given flexibility to the deadline for the practice to be considered a custom: 10 or 20 years would be enough[529]. According to GILISSEN, it was about an issue of fact, depending on enough time so as not to doubt its

[523] RÁO, Vicente. Op. cit., p. 281-282.
[524] It is appropriate to point out that the custom in the Anglo-Saxon Law is from a different nature and origin. As a consequence of the Norman conquer (1066), a new legal structure was organized which would meet and protect the interest of a new royal elite. This Royal Court gradually expanded its jurisdiction to other instances, under the argumentation that such cases also interested the Crown. The progressive emptying to the traditional courts and the traditional consuetudinary Law gave room to the Common Law. On the other hand, the Common Law itself reflected the adjudicative custom much more than the real popular custom, LOSANO, Op. cit., p. 325.
[525] VICENTE, Dário Moura. Op. cit., p. 283; LOSANO, Mario G. Op. cit., p. 333; CALLIES, David. Op. cit., p. 171-173.
[526] CALLIES, David. How custom becomes law in England. In: ØREBECH, Peter; et al. The role of customary law in sustainable development. Cambridge: Cambridge Press, 2005, p. 173-174;190-204.
[527] ØREBECH, Peter. How custom becomes law in Norway. In: _____; et al. Op. cit., p. 235-239.
[528] THOMPSON, E. P. Costumes..., p. 16-17.
[529] LLOYD, Dennis. Op. cit., p. 307.

existence. It is only when the medieval Law admits the Roman Law that more precise deadlines are established[530].

CALLIES explains that in the older English Law the concept of unmemorable practice was taken literally[531]. However, from the second half of the nineteenth century on, the presumption that worked in probative terms[532] was established. In turn, the Norwegian courts, for example, made use of varied criteria, being the antique ones, or the ones of a prolonged period of time[533].

On the other hand, the constancy of behavior could also import mobility, that is why part of the doctrine criticizes the custom for being static[534]. Actually, this seems to be false criticism, once, in several Ordinations, it is recognized that it is precisely its ability of adaptation that makes it dynamic[535].

That was a typical confusion between the custom and the "tradition". This one, according to HOBSBAWN, is useful to the "invariability", and that one would be used as "engine and steering wheel", since it would not impede changes adequate to the precedent ("flexibility" and "formal commitment with the past")[536]. The construction of tradition, in this aspect, would be applied to a more ideological and less pragmatic criterion.

ASCENSÃO, for instance, emphasizes that custom is specific and practical, contrary to the law, generical and a priori, with a tendency to strictness and arbitrariness (being detached from the social environment)[537].

BENNETT makes an important point on the African spoken tradition: the way of expression allows the continuous recreation of the custom through generations, as it allows the interpretation by the one who reports the custom, depending on the hearing, the context and their personal experience[538].

After wide research carried out among American business associations, BERSNTEIN concluded that the customary empirical basis is doubtful due to its

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[530] GILISSEN, John. Op. cit., p. 252-253.
[531] In the eighteenth century, the custom constituted the rhetoric of eligibility of almost every use, practice or right claimed. For this reason, the non-codified custom – and even the codified one – was in continuous flow. Far from exhibiting the permanence suggested by the word "tradition", the custom was a field for change and dispute, an arena where opposing interests presented conflicting claims. CALLIES, David. Op. cit., p. 166-167.
[532] Ibidem, p. 168.
[533] ØREBECH, Peter. How custom becomes law in Norway. In: _____; et al. Op. cit., p. 234.
[534] MELLO, Celso Duvivier de Albuquerque. Curso de Direito..., p. 281.
[535] YAKUBU, John Ademola. Op. cit., p. 209; JESTAZ, Philippe. Les sorces du Droit. Paris: Dalloz, 2005, p. 105.
[536] HOBSBAWM, Eric. Op. cit., p. 10.
[537] ASCENSÃO, José Oliveira. Op. cit., p. 262. In the same sense: JUSTO, A. Santos. Introdução ao estudo do Direito. Coimbra: Coimbra, 2001, p. 209.
[538] BENNETT, T. W. Op. cit., p. 647.

codification in the UCC. According to his studies the non-written customs varied a lot among the places and were not uniform. Besides that, its process of codification would have reflected the selection of the most "desirable" customs, or the ones which would make them ideas of uniformity and spontaneity fictions[539].

Thus, in a certain way, it would be a real paradox to demand constant observance or decrease to the formality and the written formula[540] of what is destined to be flexible and adaptable.

(ii) Before being constant, behavior must be valued so as to be noticed that it does not violate morality or rationality. The Anglo-Saxon Law added that (behavior, besides being peaceful and constant, should be reasonable[541]. This last requirement is also supported by LORENZETTI when analyzing the Argentinean Law[542].

However, not everyone agrees with such demand. ASCENSÃO, for example, understands that the demand for rationality would in fact care for some illuminist prejudice before tradition[543].

The criticism that the custom does not offer certainty is usually contested by the argumentation that the social practice becomes comprehensible and predictable, being really useful as a way of saving time and energy[544], since any need for convincing or valuation is expendable[545]. There are also some people who believe that the role of the custom would be bound to the search for a fair solution in the Roman German family[546].

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[539] BERNSTEIN, Lisa. The questionable empirical basis of article 2´s incorporation strategy: a preliminary study. Available on: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=162976.

[540] As, for example, the Brazilian commercial Law which demands the Registries of Commerce to establish the register of the commercial customs (art. 8º, VI da Lei n. 8.934/94). On this issue, BENNETT comments that the deleterious effects of the compilation process of the African customs: abandonment of specialization (some customs started to have more a general application that when they were exercised); systematization (some customs started to have a more expanded territorial application than when they were exercised); amendment of the custom and depreciation of the custom due to colonial prejudice or the attempt of adaptation to the legal terminology (BENNETT, T. W. Op. cit., p. 646-651). Another example is mentioned by GEERTZ, when he talks about the Malaysian instance adat which, by mistake, was classified, but not without an argument of its acceptance or prohibition by the colonial powers, as a "set of traditional rules, applied in a traditional way for the solution of traditional problems as well", when actually it would represent a vision of the world, related to the understanding of the idea of "decorum". In the instance cited by GEERTZ, the wrong identification of the custom resulted in artificial legal consequences GEERTZ, Clifford. Op. cit., p. 313-317.

[541] CALLIES, David. Op. cit., p. 174-185.

[542] LORENZETTI, Ricardo Luis. Tratado..., p. 205-206.

[543] ASCENSÃO, José Oliveira. Op. cit., p. 260.

[544] CUETO RUA, Julio. Op. cit., p. 84-85.

[545] LORENZETTI, Ricardo Luis. Teoria da decisão judicial: fundamentos de Direito. São Paulo: RT, 2009, p. 95.

[546] DAVID, René. Os grandes sistemas..., p. 143.

In ALTERINI'S opinion[547] the comments on the UNIDROIT Principles (1-8 [2] are very clear when they do not allow the application of unreasonable customs. The same way GENY emphasized the need for the custom to assure the feeling of stability and certainty, not being used in an irrational or antisocial way (for example, contrary to good morals, public policy, political and social organization, etc.)[548].

It can be mentioned as an example of that, the *Dixon, Irmãos & Cia, Versus Chase National Bank* instance, when the American Court understood as binding certain banking practice, even if there was reason not to apply it[549]. The same Court decided, on the other hand, that it would give no force to the custom based on unreasonable practices (the Hooper instance)[550].

(iii) Beyond the constant behavior, another discussion has started: the possibility or not of its affront to the literal legal disposition.

It is almost unanimously recognized the possibility of rating the custom in *secundum legem, prater legem* and *contra-legem*. While the first modality is that custom that assures its efficacy from the legislative recognition, the second one refers to the customs that present a role of complement of the existing gap in the legal system. The third modality would be the one of the customs that confront the law.

GENY states as a requirement of identification of the legal custom, the need for "public sanction" in such a way as to reveal its obligatoriness[551], together with the constancy of the practice and the conviction of need.

As expected, the modern codifications tend to accept the *secundum legem* custom with no restrictions (for example, the Argentinean Civil Code)[552], restraining the *praeter* and *contra leagem* custom (for example, the Brazilian Civil Code[553]). Nonetheless, the real controversy resides in those customs which are opposed to the normative text. According to DINIZ, this "is a [problem] of

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[547] ALTERINI, Atilio Aníbal. Contratos: civiles, comerciales, de consumo. Teoria general. Buenos Aires: Abeledo-Perrot, 2005, p. 57.
[548] GENY, François. Op. cit., p. 372-373.
[549] CHEN, Jim C. Op. cit., p. 98.
[550] Ibidem, p. 97.
[551] GENY, François. Op. cit., p. 320.
[552] LORENZETTI, Ricardo Luis. Tratado..., p. 205-206; ETCHEVERRY, Raúl Aníbal. Argentina. In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guillermo. (Dir.). Derecho de los contratos internacionales en Latinoamérica, Portugal y España. Madrid: Edisofer, 2008, p. 43.
[553] LUDWIG, Marcos de Campos. Op. cit., p. 75.

political nature, not legal one, as it is about an issue of collision between powers[554].

The traditional doctrine, as a rule, denies the possibility of a custom violating literal disposition of law, admitting only its subsidiary character[555], or else, to fill in legal omissions. For example, even though LUDWIG tends to deny the possibility of prevalence of the custom over the law, he admits that in some occasions the legal system accepts it in practice[556].

Some authors, nevertheless, accept the possibility of such violation[557]. ASCENSÃO, for example, questions the fact that in several instances the non-application of the law would happen precisely because of the conviction of its incidence[558]. In turn, HESPANHA believes that denying the possibility of affront to a legal device would be the same as "devaluing the custom before the doctrine, as it admits the abrogation interpretation, even though it is surrounded by the cautions and considerations due to the democratic law"[559]. DINIZ, on the other hand, even though he agrees with the subsidiary character of the consuetudinary rule, admits that the custom can be exceptionally applied against legal disposition[560].

This is not an unreasonable theme. Its relevance can be recognized, in the Brazilian law, in practice, reiterated, as the so-called postdated check, that is, payment order on demand, under which the term falls on. DINIZ[561] accepts it as *praeter legem* custom, or else, that one that suppresses a legal gap. On the other hand, if we take into consideration the fact that the law is clear when determining the immediate payment of the check[562], it could be considered an hypothesis of *contra legem* custom.

[554] DINIZ, Maria Helena. Lei de introdução..., p. 146.
[555] GENY, François. Op. cit., p. 414-415; BEVILAQUA, Clovis. Op. cit., p. 36,39; PEDRASSOLI, Antonio Fernando Campos. Op. cit., p. 51-52; DANTAS, San Tiago. Op. cit., p. 92-93.
[556] LUDWIG, Marcos de Campos. Op. cit., p. 170-176.
[557] JESTAZ, Philippe. Les sorces du Droit..., p. 98; PAULA, Jônatas Luiz Moreira de. O costume no Direito. Campinas: Bookseller, 1997, p. 173-174, 226.
[558] ASCENSÃO, José Oliveira. Op. cit., p. 270.
[559] HESPANHA, Antonio Manuel. O caleidoscópio..., p. 468.
[560] DINIZ, Maria Helena. Compêndio..., p. 306, 316.
[561] DINIZ, Maria Helena. Lei de introdução..., p. 144.
[562] Art. 32 Law 7.357/1985: The check is cashed. It is considered non written any mention on the contrary.

Another example could be mentioned: the "secret contracts"[563], which are so typical in the regime of the Brazilian mortgage system. Through such contracts, the borrower, a promisor buyer, assigns his/her debt to a third party that assumes obligations to pay for it. Regarding the legal disposition (art. 299 of the Civil Code[564]), which requires the creditor's consent; this assumption of debt is an informal transaction.

The comparative Law, however, presents examples of less tolerance. The Argentinean civil codification, for instance, flatly averts the possibility of conflict.[565]

Thus, the classification seems to be joined to a function exercised by the custom in the Brazilian Law.

(iv) The last of the main requirements is less controversial. The notion that to be considered a custom, certain behavior must be executed under the condition of existing a strong conviction of its obligatoriness, or, in other words, the existence of a legal duty that imposes the practice to be carried out.

The requirement of conviction of obligatoriness (*or opinion juris necessitates*), on the other hand, is reproduced by the national and international

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[563] They are transactions established with the aim of assumption of debt and contract for deed of the real estate whose acquisition is by a bank financing with mortgage pegged to the property itself which I used as an indirect object. The loan conditions are, either by specific law or by market conditions, defined with basis on economic conditions of the borrower, the reason for which it does not always interest the contracting parties the formal assumption of the contractual position.

[564] "Art. 299: The third party is granted the obligation of the debtor, with the express consent of the creditor, being the primitive debtor discharged, unless that one, at the time of the assumption, had been insolvent and the creditor was not aware of it."

[565] According to art. 17 of the former Argentinian Civil Code: "Los usos y costumbre no pueden crear derechos sino cuando las leyes se refieran a ellos o em situaciones no regladas legalmente". Maybe it is even clearer the vitality of the Argentinean legislation against the custom is the fact that it is not even mentioned in art. 16, when the secondary sources of law are listed. According to MOSSET ITURRASPE and PIEDECASAS, such interpretation is not simple or peaceful. MOSSET ITURRASPE, Jorge; PIEDECASAS, Miguel A. Contratos: aspectos generales. Buenos Aires: Rubinzal-Culzoni, 2005, p. 77. The new code (into force in 2016), on the other hand, expressly mentions: "Los casos que este Código rige deben ser resueltos según las leyes que resulten aplicables, conforme con la Constitución Nacional y los tratados de derechos humanos en los que la República sea parte. A tal efecto, se tendrá en cuenta la finalidad de la norma. Los usos, prácticas y costumbres son vinculantes cuando las leyes o los interesados se refieren a ellos o en situaciones no regladas legalmente, siempre que no sean contrarios a derecho. (art. 1º); "La declaración unilateral de voluntad causa una obligación jurídicamente exigible en los casos previstos por la ley o por los usos y costumbres. Se le aplican subsidiariamente las normas relativas a los contratos." (art. 1800) and "Los contratos se rigen por el derecho elegido por las partes en cuanto a su validez intrínseca, naturaleza, efectos, derechos y obligaciones. La elección debe ser expresa o resultar de manera cierta y evidente de los términos del contrato o de las circunstancias del caso. Dicha elección puede referirse a la totalidad o a partes del contrato. El ejercicio de este derecho está sujeto a las siguientes reglas: (...) d) los usos y prácticas comerciales generalmente aceptados, las costumbres y los principios del derecho comercial internacional, resultan aplicables cuando las partes los han incorporado al contrato;" (art. 2651).

doctrines[566], as being the *subjective* element of the custom, since it cannot be noticed without the psychic analysis of individual behavior.

NORONHA even doubts the existence of consuetudinary rules in force, precisely because of the absence of this psychological element. His disbelief indeed reaches the trading uses. In the author's opinion, the role of the custom in the creation of Law would be minimal contemporaneously, especially if compared to the court precedents[567].

CUETO RUA questions its validity as a requirement. He alleges that if the obligatoriness is not spontaneous to the individual, he does not understand the expected behavior, having no interaction with the group. For the author, the issue is not only the threat of "sanction"[568]. As for JESTAZ, he understands that the discussion on consensus can be driven away and that the adjustment to the group's needs and social pressure are the factors that make the custom compulsory[569].

In the private and international Law, according to D'AMATO's[570] definition, the conviction of obligatoriness involves not only the acting of the different States, but also equally the repercussions that would occur in the system itself (for example, with regards to other protected rights and of interest to a State). Thus, even if a certain State violated a customary practice for not believing in direct retaliation by another State, the violation could bring repercussions to other practices they intended to defend. On the other hand, the author counterclaims that there would exist two other requirements to be fulfilled: the general use and the generalist of its acceptance.[571] Such understanding is reinforced by the assertion that, in principle, it would be possible to claim that the conventional disposition would be a source of custom[572].

This positioning is criticized, but even if it refers to international treaties, some of these considerations can be brought for the analysis of the relationships

[566] ALTERINI, Atilio Anibal. Contratos: civiles, comerciales, de consume. Teoria general. Buenos Aires: Abeledo-Perrot, 2005, p.57.
[567] NORONHA, Fernando. Direito e sistemas..., p. 94-97
[568] CUETO RUA, Julio. Op. cit., p. 112-113
[569] JESTAZ, Philippe. Les sorces du Droit..., p.99.
[570] D'AMATO. Anthony. Customary International Law: a reformulation. In: International Legal Theory, v.4, Washington: ASIL,1998, p. 02.
[571] Ibidem, p.5.
[572] Idem.

between private parties, such as the prohibition of contradictory behavior (*venire* against *factum proprium*). In turn, the idea that the custom is also consensual, should be more deeply approached.

In the comparative perspective, it is important to remember that the English precedents claim the necessity of compulsion, or else, the custom must be compulsory[573]. The Norwegian refer to the obligatoriness supported in good faith and qualified according to the social group involved[574]. In this context, the CISG does not mention the conviction of obligatoriness of customs. In fact, in accordance with art. 9.2, the contracting parties would implicitly accept the application of international customs, which they know or ought to have known and that are widely known and applied. Very similar terms were adopted by the UCC (§ 1-303-c)[575].

VICENTE reminds us that the common Law demands the acceptance of the custom as compulsory by the addressee, its compatibility with other customs and its reasonableness[576] so as to produce legal effects. However, CALLIES points out that the American courts have understood the traditional requirements in a different way from the one established by the English precedents.[577]

At this point of the present research, so, it becomes necessary to question which would be the roles ascribed to the contractual custom, since the requirements for the characterization of the custom have been fulfilled.

3.2.2. From the role traditionally given out to the custom as a source of Contractual Law.

Besides the requirements mentioned in the previous item, which, by themselves, would be enough to reduce the application of the custom as a source of contractual Law, the modern codifications and legislation also had a tendency to point out its secondary role before the other normative sources.

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[573] CALLIES, David. Op. cit., p. 205.
[574] ØREBECH, Peter. How custom becomes law in Norway. In: _____; et al. Op. cit., p. 238.
[575] BEDERMAN explains that the American courts do not usually demand the proof of knowledge of the custom, but the notoriety of its existence, so that it is possible to establish the presumption of knowledge, and so, of obligatoriness. BEDERMAN, David. Custom as a source of Law. Cambridge Press, 2010, p. 83.
[576] VICENTE, Dário Moura. Op. cit., p. 283.
[577] CALLIES, David. Op. cit., p. 213.

The most suitable instance of this kind of treatment were the Ordinations by D. Alfonzo, which listed the custom as a subsidiary source of Law, explicitly indicating its application after the Law and the Court precedents of the Kingdom Supreme Court[578].

The current brazilian legislation does not establish a concept for what the custom is, neither does it define which would be its requirements, even if it is given some kind of purpose. In the Brazilian civil codification, the reserved role to the contractual custom remained interpretative: from the rules of interpretation of the legal transaction (arts 111 and 1130, going through setoff (art. 372), sales (art.429,445, §2º, 529), lease (art.569, 11), rendering of service (art.597 and 599), work by the job (art.615) commission merchant sections 695 and sole paragraph, 699 and 700), transportation (art. 753, §1º) and management of affairs (art. 872). LUDWIG strongly highlights this role, in an instance of a normative gap, being either before remission of the legal text itself, or general remission (art.4º of LINDB – Law of Introduction to the Civil Code)[579].

Nevertheless, there is also room for price-fixing of fees due in an instance of voluntary deposit for hire, agency for hire, commission, brokerage and transportation (art.596, art.628, sole paragraph; art.658, sole paragraph; art.701; art.724; art.754, §4º; respectively). In such instances the role of the custom is narrowed to fill in the gaps left by the contracting parties themselves. On the other hand, a simple interpretation is withdrawn, since there is integration of content. Regarding the contracts of deposit and agency, this issue is relevant, as the contract is gratuitous, unless otherwise agreed (section 628; section 658; respectively). In turn, it is relevant to point out that in both instances the legislator was careful enough to provide for a rule in case of omission of the custom. As to the other contracts (commission, brokerage and transport) such preoccupation did not exist, either because contracts are presumably costly, or simply because apparently the old trading contracts tend to be more sensitive to the customs and less dependent on legislators or at the discretion of the court.

[578] CAETANO, Marcello. Op. cit., p. 548.
[579] LUDWIG, Marcos de Campos. Op. cit., p. 153-165.

It is also important to pay close attention to the terminology, since the legal text does not make a distinction among the expressions "usages", "local usages", "general usage" and "customs". That is because, as it has been previously seen, most of the times those who refer to "usages", employ it in general terms which are applied to define the "customs". On the other hand, in the few times the "customs" is referred to (except for the good morals) and, in one of them, the expression is employed in the individual meaning used for the definition of "contractual practices"[580] as laid down in item 3.30).

The italian civil codification[581] establishes the usage as a source of Law (art. 1°, 4), even though there is clear subsidiary evidence (arts. 8 and 9) and character of interpretation of the contract (art.1374). The custom of the Italian Contractual Law, according to MESSINGO, operates in gaps left by the legal text, but its role ends up being the one of interpretation and integration of the transaction[582].

As for the Argentinean Law, what is highlighted is not only the role of normative source of the custom, but also its usefulness as an interpretative tool.[583] The national former codifications[584] reinforce this role in relation to civil and trading contracts, in case of omission of the Conventional text: (i) in the sales contract on credit or international ones, the local customs are used to define the payment program (art. 1424); (ii) in the leasing contracts, the customs are used to define what the thing is addressed to (art 1504) or the leasing payment program (art 1556); (iii) in the contracts of rendering of services, they are used to define the fees (art. 1627) and the way the job will be done (art 1632); and (iv) in the contracts of loan for use, to define what the thing is going to be used for (art. 2268). In the instance of loan for use, a rule is provided in case of a consuetudinary gap (art 2285).

However, from the conceptual point of view, the sub-lessee may oppose to the original lesser, to the payments made, if in conformity with the local

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[580] To that effect, see art. 432 of the Civil Code which governs the formation of the contract which discharges the express acceptance of the will in the transaction when it is a practice established between the parties.
[581] ITALIA. Codice civile e leggi complementar, 23. Ed. Napoli: Simone, 2003.
[582] MESSINEO, Francesco. Doctrina general del contrato. Buenos Aires: Libreria El foro, 1986, p. 10.
[583] MOSSET ITURRASPE, Jorge; PIEDECASA, Miguel A. Op. cit., p. 76-77; ETCHEVERRY, Raúl Aníbal. Argentina. In: ESPLUGUES MOTA, Carlos; HAEGAIN, Daniel; PALAO MORENO, Guillermo. (Dir.). Op. cit., p. 43.
[584] In accordance with arts. 217, 218, 219 and 220 of the former Commercial Code and civil codification. For the new Commercial and Civil Code, see previous note 565.

usages (art. 1595), as it is about an exception to the general rule set forth in the first part of the device. Even though it can be classified as custom according to the law, the custom will always be able to create rights deriving from the contractual relationship, instead of only interpreting it.

In the Spanish civil codification, the customs perform the role of a source of Law as well (art. 1°), although they are more useful in the interpretation of the transaction (art. 1287): (i) in the sales contracts, in the interpretation of the obligation imposed to the buyer that repossesses the asset sold (art.1520); in the lease contracts, they are used to define payment program, the interpretation of the partnership and the occasional redress (arts.1574, 1579 and 1580 respectively) and (iii) how long the contracts of loan for use last (art. 1750).

The French civil codification, in turn, emphasizes the obligatoriness of the contract in relation to what has been depicted, and also what can be applied in terms of equity, law and custom (art. 1135). In addition, the interpretative role is reinforce, too (art.1159), allowing the presumption of usual clauses (art. 1160). So, there is little use in kind. Its role is highlighted in the lease to define appropriate compensation due by the lessee (art.1754), how long the contract lasts (art.1759) and the term of repossession of the real estate. (art. 1762). According to GHESTIN, when referring to the custom, they are given, exceptionally, mandatory value[585].

The chilean civil codification is very clear about how the custom is subjected to the law and dependable on its reference (art. 2°). As far as contracts are concerned, its role is interpretative as well (arts 1546 and 1563): (i) in the leasing contracts to define how the thing must be used (art. 1938), the lesser' s duty to compensate for occasional deterioration (art. 1940), its duration (arts. 1981 and 1954) and payment program (arts. 1944 and 1986); (ii) to define the fees for the execution of work (art. 1997); and (iii) to define the fees in the contracts of onerous agencies (art. 2117). On the other hand, the Chilean arbitral legislation provides the usage of mercantile uses by an arbitrator in the interpretation and solution of international conflict[586].

[585] GHESTIN, Jacques. Traité de Droit Civil: Le contrat. Paris: LGDJ, 1980, p. 72.
[586] LOYOLA NOVOA, Héctor. Chile. In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guilherme. (Dir.). Op. cit., p. 177.

According to ACAR and YILDIRIM the turkish codified Law restricts the customs to a residual role (filling up gaps, art. 1 of the Civil Code and interpretation, provided that the custom is demonstrated, art. 2 of the Commercial Code)[587]. As for the Israeli legislation, the custom stopped being a part of the sources of Law in 1980, even though the courts are not prohibited to get support from the customs under certain circumstances[588].

The codification work of the English Contractual Law, promoted by the Law Commission, also emphasizes the interpretative role of the custom (arts. 41 and 111)[589].

As for the civil codification in Quebec, for example, it considers the custom not only as an interpretative tool (art. 1426), but also equally normative such as when they create implicit contractual obligations (art. 1434) and when the customs qualify the silence as acceptance (art. 1394).

According to LLUELLES it would be more adequate to talk about normative content and not implicit obligational content. That is because, besides obligation, normally an external one, the stipulation of rights may happen, on addition to the accuracy of contractual content (terms, going through formalities, choosing a technical procedure or way of calculation)[590]. It can be concluded, this way, that the custom must not prevail over private autonomy, being even possible the exclusion of its application, as long as it is explicitly stipulated[591].

The importance assigned to the interpretative role of the custom seems to be old and generalized[592], mainly if we take into account the known Roman

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[587] ACAR, Hakan; YILDIRIM, Ahmet Cemil. The new draft for the Turkish code of obligations: the comparative study with the Unidroit Principles of International Commercial Contracts. In: Journal of Qafqaz University, n. 24, 2008, p. 15-16.

[588] RABELLO, Alfredo Mordechai; LERNER, Pablo. The Unidroit Principles of International Commercial Contracts and Israeli Contract Law. In: Uniform Law Review, n. 8, 2003-3, p. 617-618.

[589] MCGREGOR, Harvey. Contract code: proyecto redactado por encargo de la Law Comission inglesa. Barcelona: Bosch, 1997.

[590] Le contenu implicite ne vise pás seulement La stipulation d'une obligation à proprement parler, c'est-à-dire, la creation d'uneprestation – généralment accessoire – (qu'elle consite à faire ou à ne pás faire). Il concerne aussi La stipulation d'um droit et,plus généralement, toute precision contractuelle, terls une modalité- comme un terme -, l'accomplissement de formalités, le choixd'un procédé technique ou d'un mode de calcu, voire une stipulationpour autrui À vrai dire, mieux vaudrait parler de "conten unormatif implicite" que de "contenu obligationnel implicite". LLUELLES, Didier. Du bom usage de l'usage comme source de stipulations implicites. In: Revue Juridique Thémis, n. 36, 2002, p. 88-89.

[591] Ididem, p. 115-116.

[592] It can also be mentioned Bolivia (RODRIGUEZ MENDOZA, Fernando. Bolivia. In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guillermo. (Dir.). Op. cit., p. 106-107); Ecuador (PÉREZ LOOSE, Hernán; RODRIGUEZ FREIRE, Boanerges; AROSEMENA SOLÓRZANO, Gustavo.Ecuador. In: ESPLUGUES MOTA,

quotation *Optima est legume interpres consuetude*.[593] In turn, other roles appear to have been more and more of a scarce.

Historically, nevertheless, several instances of how the contractual custom took its active role in the construction of obligational relations can be noticed.

An interesting aspect in relation to its role as a contractual source is that, in a certain way, its normative power is deliberately led, many times very pragmatically, to meet an immediate need of the social group. HOBSBAWM, for example, thinks that this kind of "maneuvering" can be called "invented traditions"[594]. That is because its main characteristic is, precisely, to meet the usual legal needs, that, for any reason, are made difficult. Besides that, nowadays it is not uncommon to claim how the local customs, by African instances, were only recognized (or even created) by the colonists or by the social elite, when fulfilling certain interests.[595]

One example is the "sale of wives" in England between the seventeenth and nineteenth centuries. A way for divorce was found (legally impossible at that time, and later, very expensive to most part of the population) by means of a public auction, or private selling, of the wife. The custom demanded a certain ritual (publicity, service, money exchange, wife's consent, etc.). Even though it was transmuted to sale, when certain typical formality of cattle was adopted, its function ended up being to break the matrimonial bind, and, occasionally, create a new one. The results not only reached the directly interested parties (releasing them from the fidelity votes), but also gave some "explanation" to the community. Although it was an illegal practice, socially, the eligibility of the act[596] was recognized.

Carlos: HARGAIN, Daniel: PALAO MORENO, Guillermo. (Dir.). Op. cit., p. 343); Honduras (LOBO LARA, Francisco Darío; LOBO FLORES, Francisco Darío. Honduras. In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guillermo. (Dir.). Op. cit., p. 467); Nicaragua (ORÚE CRUZ, José René. Nicaragua. In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guillermo. (Dir.). Op. cit., p. 567); Peru (TOVAR GIL, Javier; TOVAR GIL, María del Carmen. Peru. In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guillermo. (Dir.). Op. cit., p. 664) e Venezuela (HERNÁNDEZ-BRETÓN, Eugenio. Venezuela. In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guillermo. (Dir.). Op. cit., p. 806-807).

[593] "Law best interpreter is the custom". TOSI, Renzo. Op. cit., p. 525.

[594] "An invented tradition is understood as a set of practices, usually governed by tacit rules or openly accepted ones; such practices, of ritual or symbolic nature, aim at inculcating certain values or rules of behavior through repetition, which automatically implies continuity in relation to the past". HOBSBAWM, Eric. Op. cit., p. 09.

[595] TAMANAHA, Brian Z. Understanding Legal..., p. 384; ASSIER-ANDRIEU, Louis. Op. cit., p. 77.

[596] THOMPSON, E. P. Costumes..., p. 305-348.

One more example is the Norman custom that excluded the women from the succession of their ascendants when they had brothers. Among the varied customary established ways to escape from this prohibition, it can be noticed the admission of donations between fathers and sons, and in case of the father's death, the "appropriation" by the oldest son with the help of a familiar council[597].

Another interesting situation is the way of alienation of feuds that would not cause dismemberment of the territory or disrespect to the *hommage*, since that one could only be sold or dismembered with the lord's consent[598].

Other events can be cited: the french custom of donation between spouses and the customary development of the nation of conjugal communion[599] (identified from the eleventh century on in the west region of France); the Breton custom of proprietary responsibility, not a personal one, of the debtor[600]; the medieval french custom in the Alsace region where the owner of the real estate allowed the use of the land under the condition that the colonists would share profits made from their work (a kind of agricultural partnership)[601]; the limits to the donations between spouses[602] or the right to renounce assets to pay up debts; this right was owned by the noble woman, provided in the *Coutumes* of Paris[603]; the custom of collective property in the Malagasy Law[604].

More recently GERALDES found, among the inhabitants of the Minho Province, Portugal, the practice of disposing the way the legitimate distribution will take place between ascendants and their heirs and how to enter it in public deed, once the testamentary disposition on the same purpose is impeded. Even

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[597] JARRY, Thomas. Notes de Droit et D´histoire sur l´achat du fief Semion par l´Abbaye Saint-Étienne de Caen en 1388. In: GAZEAU, Véronique; AUGUSTIN, Jean-Marie. (Dir.). Op. cit., p. 111-112.

[598] Even if there were pecuniary interest, the custom would impose conditions to the "sale". The original vassal should keep some original rights of the lord, he should keep at least a third of the feud and remained responsible for the duties of a vassal for the whole feud. Actually the transaction would be more similar to a "lease" (BRUNET, Michel; VEILLON, Didier. A propos de l´incomplete alienabilite de la tenure noble: les deux conceptions doctrinales Du jeu de fief en droit parisien et droit commun coutumier (XVIème – XVIIIème siecles). In: GAZEAU, Véronique; AUGUSTIN, Jean-Marie. (Dir.). Op. cit., p. 146-151).

[599] THIREAU, Jean-Louis. Aux origines d´une tradition coutumiere: les liberalites entre epoux dans les coutumes de L´Ouest au moyen age. In: GAZEAU, Véronique; AUGUSTIN, Jean-Marie. (Dir.). Op. cit., p. 42-64.

[600] URBANO SALERNO, Marcelo. La influencia del Droit coutumier. In: PUNTE, Roberto Antonio. (Dir.). Op. cit., p. 152-153.

[601] BEAUNE, Henri. Introduction à l'étude historique du droit coutumier français jusqu'à La rédaction officielle des coutumes. Paris: Larose, 1880, p. 533.

[602] BORDIER, Henri. Commentaires sur un document relatif à quelques points de la coutume de Paris et à la jurisprudence du parlement au quatorzième siècle. In: Bibliothèque de l'école dês chartes, 1845, t. 6, p. 396-435.

[603] GUILHIERMOZ, Paul. Le droit de renonciation de la femme noble lors de la dissolution de La communauté, dans l'ancienne coutume de Paris. In: Bibliothèque de l'école des chartes, 1883, t. 44, p.489-500.

[604] BLANC-JOUVAN, Xavier. Les droits fonciers collectifs dans les coutumes malgaches. In: Revue internationale de droit comparé, v. 16, n. 2, abr./jun. 1964, p. 333-368.

if it is possible to rightfully doubt the legality of such arrangement, it is imperious due to the absence of labor which can exploit different economic unities[605].

Pierrick LE GOFF, in turn, identified contracts of construction of manufacture establishments, general conditions (VOB) that were characterized by the consuetudinary formation[606].

In short, it can be noticed that the contractual custom performed a wide role as a normative source of Law in contracts for a long period of time. Gradually, however, given the demands of the modern centralizing model itself, it was deprived of its greatest obligational creativity and ended up in a secondary role, purely interpretative, when the law or the transaction itself was not explicit.

3.3. A TERMINOLOGICAL ISSUE: CUSTOM, USAGE AND NEGOTIATING PRACTICES

Before the detailed description of what has been recognized by the Brazilian Ordination as deserving to be given treatment addressed to the contractual custom, it is convenient to point out that there exists certain terminological nuance which is adopted by the doctrine and by the different normative tools.

Besides that, it is recognized that not every social practice is a custom. As previously stated, the same sense of appropriate clipping for the definition of custom *legal fact* will be employed for the definition of custom with legal content[607]. By doing this, it is intended to avoid certain conceptual misunderstandings such as those faced by the brazilian Court precedents[608]. Because of this caveat, it is necessary to bring in terminological and conceptual

[605] GERALDES, Alice. Pratiques d'héritage dans une freguesia du Minho: un compromis entre loi et coutume. In: Recherches en anthropologie au Portugal, n. 3, 1991, p.34-35.
[606] LE GOFF, Pierrick. Théorie et pratiue du contrat de réalisation d´ensembles industriels en RFA: vers une lex mercatoria germanica? In: Revue de Droit des Affaires Internationales, n. 1, 2004, p. 22-32.
[607] Thus, AL-ALIMI's warming seems valid, even if the author refers to the notion of custom in the Yemeni society, that is, limited to those practices which had been devised to the solution of an internal or tribal group conflict, such as victim compensation (hushm). AL-ALIMI, Rashad. Op. cit., p. 17.
[608] In this sense, see: BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 24.150/RJ. Carlos Pereira Porto versus Cia. Docas da Bahia. Segunda Turma. Relator Min. Lafayette de Andrada. Adjudicated on 13 October 1953 and BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 12.878/SP. Mançor Daud versus Cia Agrícola e Comissária de São Paulo. Segunda Turma. Relator Min. Afrânio Costa. Adjudicated on 29 December 1959.

distinction among the several nomenclatures associated to the notion of customs.

(i) First of all it is still important to distinguish the custom of the so-called "habit", even if in a simplified way. According to the current definition, habit is the "everlasting disposition, acquired by the frequent repetition of an act, usage, custom"[609]. It does not necessarily represent any sense of obligation of regularity or invariability. Although the conduct is commonly respected (sometimes even by compulsion), its disrespect is not understood as a violation to any rule, since "they are not considered socially compulsive"[610]. Moreover, the conduct is not generalized, but individual.

Despite of not having the normative power of a custom, surely interesting complications may be added from the interpretative-behavioral point of view, especially the ones related to the principle of objective good faith and the prohibition of the contradicting behavior or the characterization of an activity (business or labor). Its obligational origin, when existing, would be on account of negotiating freedom and relief upon the expectation generated. The French explanation, however, associates it to the idea that past behavior is an indicator presume the current will[611].

The classic literature is also source of confusion between habit and custom, especially in the versions by Cicero directly to the technical legal text (*deinde consuetudine quase alteram quondam naturam effici* and *consuetudinis magna vis est*)[612]. References to the popular culture are common as well: "the habit does not make the monk" (the term habit has the effective double meaning of also referring to the monk's clothes) and "custom rules the law", or yet the fact that the inhabitants of Konigsberg adjust their watches according to the precision of Kant's habits.[613]

From the contractual point of view, however, the *habit* lacks the generality and the compulsory power that would characterize the custom.

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[609] FERREIRA, Aurélio Buarque de Holanda. Novo Dicionário da Língua Portuguesa. Rio de Janeiro: Nova Fronteira, 1985, p. 712.
[610] LLOYD, Dennis. Op. cit., p. 287.
[611] DEUMIER, Pascale. Op. cit., p. 67.
[612] "With habits, almost another nature is created" and " Great is the power of habit", respectively. Cs.: TOSI, Renzo. Op. cit., p. 72-73.
[613] LLOYD, Dennis. Op. cit., p. 287.

(ii) It is also common to relate custom to tradition. Tradition is usually defined as "knowledge or practice resulting from oral transmission or inveterate habits[614]. Still from the conceptual point of view it is important to point out the possibility that certain traditions may be invented: garments of the English judges, symbology of the Scout movement, Nazi liturgy, nationalism[615], Labor's Day[616], and the Scottish kilt as a national symbol[617].

Some of these "invented" traditions were made with the aim of achieving certain goals. This was the situation of all the British Imperial paraphernalia transplanted to the African territory. The "traditional" apparatus of the monarchic society made it possible to hierarchically manage the native society from the perspectives: officer-soldier, teacher-student, employer-employee and lord-servant[618].

It is possible, thus, to distinguish tradition from custom. According to HOBSBAWM, tradition keeps a higher relationship with ritualization and formalization, with an ostensible attempt of connection with a certain past, whereas the custom has the characteristic of precedent which does not impede change. Thus, tradition would tend to immobilization, while the custom would be flexible[619]. The custom itself, however, could become an invented tradition in Africa, since the understanding that the British imported from the old continent did not correspond to the more flexible local logic. It was a process that when appropriately handled allowed not only individual gains, but also achievement or affirmation of power and authority[620].

GENY presents another definition. The author classifies "tradition" and "authority" among the sources of Law. However, he is not worried about classifying them in formal or material sources, but to understand them as methods of legal interpretation[621]. In the author's opinion, the *authority*

[614] FERREIRA, Aurélio Buarque de Holanda. Op. cit., p. 1394.
[615] HOBSBAWM, Eric. Op. cit., p. 09-11.
[616] HOBSBAWM, Eric. A produção em massa de tradições: Europa, 1870 a 1914. In: HOBSBAWM, Eric; RANGER, Terence. (Orgs.). Op. cit., p. 291.
[617] TREVOR-ROPER, Hugh. A Invenção das Tradições: a tradição das Terras Altas (Highlands) da Escócia. In: HOBSBAWM, Eric; RANGER, Terence. (Orgs.). Op. cit., p. 25.
[618] RANGER, Terence. A invenção da tradição na África colonial. In: HOBSBAWM, Eric; RANGER, Terence. (Orgs.). Op. cit., p. 219-236.
[619] HOBSBAWM, Eric. Introdução..., p. 11-23.
[620] RANGER, Terence. Op. cit., p. 256-269.
[621] "Without precisely denying that there are two different fields of application (as formal and material sources) for the legal authorities, I believe that in practice, such chains almost necessarily are confused. Anyway and

represents doctrine and court precedents, being different from *tradition* by antiquity, more precisely because this one would be prior to the codifications[622]. He also claimed that despite the codifying efforts and that it had been denied the *status* of a formal source, the *tradition* would keep the condition of "moral ascendant", "practical value of history" and "teaching", which would allow the judge to assess the social merit and the value of the institutions[623]. In this situation, maybe the real connection is between *tradition* and *myth.* According to CARBONNIER, this connection would explain the creation of the primitive custom and also reinforce its obligatoriness[624].

Also in this way it would be possible to distinguish tradition from custom, not because of its origin, but mainly because of its effects.

(iii) The customs are still related to the so-called social conventions or social usages which would be socially recommended observances, but which could not be considered. The examples mentioned would be the rules of etiquette[625], decorum, courtesy, etc.[626].

Maybe in this aspect the so-called natural obligations and the discussion over the origin of its obligatoriness (or not) are somehow getting closer. It is important to remember, however, that the focus of all the explanation of obligational source in the instance of natural obligations is individual, not collective, like in the custom. Apparently, the best way to answer this issue without going too deeply into the theme, is to resort to the premise of the "filter" of the *legal fact*. In other words, some of the so-called social conventions may become legally relevant, and as long as they fulfill the other necessary requirements, they may be characterized as negotiating customs. It is enough, for example, to imagine that the principle as a typical social convention among merchants (as if it were ethics restricted to a class, originating other assertions: "an off-the-record agreement" and "a gentleman's agreement"), being considered a typical international custom (for example, established by the CISG)

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from our point of view, the acts of doctrinal and court precedents authorities do not deserve to be analyzed in an separate record, but what they really create that is new or change the results provided by the other sources, so as to impose characteristics of special legal solutions". GENY, François. Op. cit., p. 11.

[622] GENY, François. Op. cit., p. 2-3,12.

[623] Ibidem, p. 23.

[624] CARBONNIER, Jean. Op. cit., 10. ed., p. 120-125.

[625] LLOYD, Dennis. Op. cit., p. 288.

[626] PINTO, Fernando. A presença do costume e sua força normativa. Rio de Janeiro: Liber Juris, 1982, p. 68.

and nowadays made positive as a legal rule by the several codifications influenced by the German Civil Code. This is when it is not recognized as a general principle of the contemporaneous Western private Law.

Apparently, however, the mere findings of the existence of social conventions and custom demonstrate the need to understand the Law from a pluralist normative perspective[627].

(iv) Another possible relationship is that one established between *custom* and *practice*. Among the several definitions of *practice*, there can be found as synonyms "routine, habit"[628]. Even if in a more vulgar sense it can be seen as a synonym of *habit*, this one still keeps higher connection with some personal characteristic of the subject, while those others, with externalized behavior in the contractual relation.

Therefore, from now on, contractual practices will be understood as individual initiatives by the contracting parties so as to adequate the execution of their respective contractual performance, fulfilling the interest in the satisfaction of its credits and record to its reciprocal debits.

So, this would be the meaning employed by the UCC in Section 1-303 (a), when it establishes:

> (a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

They are, therefore, isolated manifestations whose effects would not go beyond the boundaries established by the own manifestation of the contracting parties. Despite unnecessary, once it is backed by the private autonomy itself, not only the ULIS (art. 9,1), but also the CISG (p.1) made it positive the obligatoriness of these practices with very similar words: "(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves."[629]

[627] CARBONNIER, Jean. Op. cit., 10. ed., p. 21.
[628] FERREIRA, Aurélio Buarque de Holanda. Op. cit., p. 1125.
[629] CISG (9.1)

The effects are those habitually recognized in behavioral analysis (principle of objective good faith): confidence relief and prohibition of contradictory behavior[630]. It is recognized, thus, the capacity of the parties to amend, the intent initially rejected by their own behavior, even though such behavior would have no greater meaning to institute the generality indispensable to the custom. This way, so, the identification with the "custom" would be incorrect[631], since it is more bound to individual contractual practices than to social ones[632]. (v) The distinction between the terms "usages" and "customs" is also extremely relevant. It can be noticed, however, that there is not such preoccupation in the Brazilian legislation, which avoids to employ the expression "usage" (in the singular form in Portuguese) to describe a hypothesis close to the idea of *custom*. Instead, when there is intention to associate the ideas of reiterated behavior it is given preference to employ the plural form[633]. Apparently there is nothing casual about this detail, since the term "usage" (in the singular form) in the Brazilian Law is strongly connected to the real right[634], and so, its use could originate lack of method in the legal text. The Brazilian doctrine is sparse (singular and plural forms). In addition, when doing it, a territorial distinction is apparently intended[635] or based on tradition and binding of customs.[636] JESTAZ, on the other hand, considers the distinction intangible.[637]

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[630] NORONHA, Fernando. O Direito dos contratos..., p. 183-191.

[631] Despite of this, this kind of mistake is common. See, for example: "The conduct of the contracting party that usufructs the relationship of trust and loyalty for its convenience violates the principle of objective good faith and its attached duties, and later, is insurgent against the "custom" established between the parties, alleging lack of proof on the transactions entered into negotiation" PARANA, Tribunal de Justiça. Apelação Cível n. 637305-9. Oswaldo Leal e Paulo Sérgio de Marco Leal versus Banco Itaú S/A. Décima Quinta Câmara Cível. Relator Des. Luiz Carlos Gabardo. Adjudicated on 27 January 2010.In the sense of habit, see, PARANA, Tribunal de Justiça. Apelação Cível n. 601820-8. Serrarias Campos de Palmas S/A. versus Liquigás Distribuidora S/A. Décima Quinta Câmara Cível. Relator Des. Jurandyr Souza Junior. Adjudicated on 30 September 2009; PARANA, Tribunal de Justiça. Apelação Cível n. 553439-8. Zago Imobiliária e Fomento Mercantil Ltda e Escoelectric Ltda versus A. J. Fernandes Equipamentos Ltda e outro Décima terceira Câmara Cível. Des. Gamaliel Seme Scaff. Adjucated on 19 August 2009.

[632] DEUMIER, Pascale. Op. cit., p. 101.

[633] There are, however, some expectations, such as art. 372 of the Brazilian Civil Code which deals of the expansion of offset time in which the phrase employed is "general use".

[634] The use as a real right must be understood as the "faculty (conferred) to temporarily enjoy the usefulness of the thing that it encumbers". (GOMES, Orlando. Direitos reais. 10. ed. Rio de Janeiro: Forense, 1991, p. 292). Special reference should be made to the technical meaning of the institute prescribed in arts. 1225, V; 1412 and 1413 of the Brazilian Civil Code.

[635] CAMILLO, Carlos Eduardo Nicoletti; TALAVERA, Glauber Moreno; FUJITA, Jorge Shiguemitsu; SCAVONE JÚNIOR (Coord.). Comentários ao Código Civil: artigo por artigo. São Paulo: RT, 2006, p. 224-225.

[636] LYRA FILHO, Roberto. O que é Direito. São Paulo: Brasiliense, 2006, p. 56.

[637] JESTAZ, Philippe. Les sorces du Droit..., p. 98.

The equivalent form of "usage" (in the singular form in Portuguese) is defined as "custom, practice, habit, use".[638] By this definition it will be noticed that almost all the definitions given so far make little sense outside strictly legal technical circles. Nonetheless, there are also significant distinctions in relation to the word "usages" (in the plural form in Portuguese) which do not allow them to be considered a technical synonym of contractual *custom*.

The expression "usages" (in the plural form) is understood as generalized conducts or a list of technical rules and regulations of a certain economic sector to which the parts cling to or refer to, without being part of it.[639] It is different from the *customs* by the complete absence of binding content and the (social) generality expected from it. KASSIS mentions the contractual nature of usages, even if generalized.[640] As for GENY, the author considers that the usages do not admit the conviction of obligatoriness typical to the customs. They are an issue of fact (not of right as the customs) and would not be lodged in the determination of application of material Law[641], from the point of view of DIPRI (Private International Law). DEUMIER, however, thinks that the distinction between the categories is not found in the bound, but in the social generality of the custom and sectorial specification of usages[642]. In his explanation it is clear the worry about justifying the positive Law (French), saying why a single legal fact could be binding either as a custom or as usage, depending on the agent involved. This thought is linked to the old tradition of qualifying the Law according to the agent, not the activity.

With regards to international affirmation, the obligatoriness of such uses is also recognized by the CISG, in accordance with the second part of art. 9.1, just like art. 9,1 of ULIS. It has to be noticed that in the convention text the reference to private autonomy is not senseless, once this is precisely the basis of obligatoriness of behavior.

[638] FERREIRA, Aurélio Buarque de Holanda. Op. cit., p, p.1434.
[639] LORENZETTI, Ricardo Luis. Tratado..., p. 206.
[640] "Conceived this way, the usage is a generalized commercial practice which is employed as a proof of will in the contractual relationships". (KASSIS, Antoine. Théorie générale des usages du commerce: droit compare, contrats et arbitrage internationaux, lex mercatoria. Paris: LGDJ, 1984, p. 107).
[641] GENY, François. Op. cit., p. 425-428.
[642] DEUMIER, Pascale. Op. cit., p. 183-189.

It is still important to point out that the *usages*, as mentioned by both Conventions, are deeply discordant from the "course of dealing"[643], provided in the VCC, and sometimes also translated into *usage*. That is why this must be considered a more clear way of contractual practice, as it is only relevant to individual contracting parties.

(vi) As for *custom*, it is usually defined as "usage, habit or practice generally observed (...) Court precedents based on usage, not on the written law".[644]

The *contractual custom*, by definition, does not prescind from the notion of generality. It is about general and uniform contractual behavior, to which it is recognized generic obligation. Thus, while *practices* bind the contracting parties and *usage* those who submit themselves to it, the *custom* would be bound to all of them.

ANTUNES mentions the application of the concept specifically to the Trade Law when referring to the "commercial usages of Law" as synonyms of trade custom in the scope of commercial relations, followed by the conviction of obligatoriness of its corresponding rule". So, for mere use, its distinction would be precisely the absence of understanding of its obligatoriness. The author, however, believes that the traditional resource to the *opinion juris* should be replaced by the notion of force.[645]

LYRA FILHO still identifies two special kinds of custom: the folkways, that conceptualize as "peculiar customs which define the way a people is"[646], and the mores, which would be more "vigorous" and so, sanctioned in a more organized way. Nonetheless, it is not clear how both are different from each other, from the folklore, usage and tradition.

As for the origin of obligatoriness of the custom, KELSEN, for example, claimed that it would be a mistake to treat it as a tacit contract, precisely because of the generality of its effects[647]. Here follows the first confrontation

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[643] "A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct". (UCC, 1-303(b)).
[644] FERREIRA, Aurélio Buarque de Holanda. Op. cit., p, p.394.
[645] ANTUNES, José Engrácia. A "Consuetudo Mercatorum" como fonte do Direito comercial. In: Revista de Direito Mercantil, Industrial, Econômico e Financeiro, n. 146, abr./jun. 2007, p. 07-22.
[646] LYRA FILHO, Roberto. Op. cit., p. 56.
[647] KELSEN, Hans. Teoria geral..., p. 187.

with the Gordian Knot previously presented and highlighted by BOBBIO. How to justify the contractual custom in individual autonomy if its binding is general?

DE LY answers this question in a direct way when he states that the distinction between usage and custom has practical relevance, as it does not depend on the consent by the contracting parties, while that one depends even on the knowledge of the practices[648].

ASCENSÃO is also careful when he points out the distinction between the custom and mere usage, since he considers the latter one as the reiterated social practice, with no conviction of obligation[649]. A similar distinction is made by MESSINEO between the usage of fact and the legal usage, as for the first ones would be compulsory to a certain circle of transaction, while the second ones would not depend on the will by the contracting parties[650]. Maybe these ones deserve to be called custom.

In a uniform international scope, just as in art. 9, 2 of ULIS[651], the CISG (art. 9, 2) also recognizes the binding effect to the contractual customs when the parties have made it applicable[652].

> The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

The UCC, for example, conceptualizes the "trade practices" as something which is regularly observed so as to raise the expectation that they will be observed in a certain contract[653]:

> A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a

[648] DE LY, Filip. International business law and lex mercatoria. Amsterdam: North-Holland, 1992, p. 152.
[649] ASCENSÃO, José Oliveira. Op. cit., p. 258-259.
[650] MESSINEO, Francesco. Op. cit., p. 10-11.
[651] "2. They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties".
[652] CISG (art.9,2)
[653] UCC, Section 1-303 (c) (UNITES SATATES OF AMERICA. Uniform Commercial...)

> usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

Such distinction, however, is not peaceful. According to DE LY, in the American Law, the distinction between usage and custom was dropped in such a way that the UCC points that the issue is not about a discussion on sources or interpretation, but contractual construction[654]. The American doctrine, for example, seems to understand the differences of the concepts much more in terms of a binding meaning. According to CHEN, the custom would be that practice which is individually understood as compulsory, while the usage would be the one assumed as an exercise of freedom[655], and so it would depend on the demonstration of obligatoriness.[656] This distinction would allow CHEN to state that the UCC would be more pragmatic[657] when giving privilege to contractual practice, unless otherwise agreed[658]. On the other hand, some people criticize the UCC, as its inspiration (apparently cheyenne[659]) ended up ignoring the consumer's role[660]. The British Law associates the idea of usage to the contractual basis, and the customs to the voluntary practices, correct, consistent and reasonable at the long-term[661]. Apart from that, other sources of criticism came up the way the usages and customs were recognized in the CISG. It is questioned, for instance, the fact that specific and general "practices" have been established; and even traditional and contemporaneous ones[662]. At a certain point the varied requirements ("widely known" or "usually applicable" – in some global sense) reflected the Soviet demand that only the international customs were binding[663]. The Convention itself does not approach the problem of its nature[664].

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[654] DE LY, Filip. Op. cit., p. 137-138.
[655] CHEN, Jim C. Op. cit., p. 103.
[656] BEDERMAN, David. Custom..., p. 83.
[657] CHEN, Jim C. Op. cit., p. 103.
[658] KOSTRITSKY, Juliet P. Judicial Incorporation of Trade Usages: A Functional Solution to the Opportunism Problem. In: Connecticut Law Review, v. 39, n. 2, dez. 2006, p. 455.
[659] Native people of North-America who lived in the big central plains of that continent, known by the process of displacement of their traditional lands (great migrations) and by the battles with the North-American (Rio Washita and Little Bighorn). Nowadays, their remainders, that still keep the more traditional life style, reside in a in Indian Reservation around the Black Hills.
[660] BEDERMAN, David. Custom..., p. 85.
[661] DE LY, Filip. Op. cit., p. 135.
[662] CHEN, Jim C. Op. cit., p. 103-104.
[663] Ibidem, p. 104.
[664] DE LY, Filip. Op. cit., p. 161.

Finally, DINIZ understands that the custom could be formed from the individual practices, the legal practice and the doctrine[665]. However, it appears that this positioning causes a certain confusion between the roles, and different relevance, ascribed to the different "sources". The reiterated and general practice, originated from the individual conviction of obligatoriness in full exercise of freedom, cannot be confused with the doctrine (which acts much more in the way of interpretation and criticism, than in the sense of construction) and court precedents. On that account, this will not be the meaning in which the term custom will be employed.

3.4. PARTIAL CONCLUSIVE NOTES

From the brief analysis of the theoretical origin and the Brazilian legislative choice it can be assumed that the role of the custom remains secondary to the law. Its incidence is usually in adjoining instances where the legislative omission is evident.

The first conclusion that can be drawn is that, sharing GROSSI'S opinion, there is no reason to assume that the statutory law is the only source of production of Law[666].

When widely accepting the legal pluralism, it also does not make sense to limit its creative role of the consuetudinary source in comparison with the legislation, mainly when the theoretical assumptions: order, safety, completeness and systemization are no longer reachable or aimed by the civil codification itself.

On the other hand, when recognized, the custom tends to be used as a way of eligibility of a certain decision (legal or not). These are the instances of institutes previously unknown, either from the point of view of time, or from the geographical point of view.

So, there would be room for a possible obligational creation by the contractual custom. JESTAZ, for example, understands that the so-called revival of the custom (pointed out in the usages of trade and international arbitration,

[665] DINIZ, Maria Helena. Lei de introdução..., p. 143.
[666] GROSSI, Paolo. Mitologias jurídicas..., p. 98.

for example) could not be identified as the old custom, since they differ for not having slow maturation, not being oral or anonymous. On the other hand, the other clearly sees two interactive and fluctuating poles as sources of Law: the statutory law and the judge[667]. Perhaps this role that the writer assigns to the judge may, in fact, be redirected to the parties, assuming that the legal system is, in principle, inert and not every legal fact knocks on its door.

This order of things could give rise to another discussion: which are the criteria used in the compilation or identification of the contractual custom.

As a matter of fact, once again this theme is not exclusive to the modern western societies, where some kind of "censorship' of internal customs can be considered due to political reasons[668].This way, for example, it would be possible to, in the traditional Islamic society, assert the collective property of area, recognize the value of the individual estate (irrigated areas) and affirm its adequacy to the Islamic laws[669]. It would still be made possible the election of areas where the customs are more strictly respected (female segregation), or more flexible respected (foods and domestic and agricultural innovations), such a fact that leads ALBERGONI to the understanding that the defense of the tribal customs is tactical[670].

In general, the discourse over the maintenance of the traditional rights hides the existence of non-compatible rules with the fundamental rights established by the western modernity. This seems to be an especially interesting point of clash between local identify and the western way of thinking[671]. This is also usually one of the issues raised to speak for the law before the custom: the fight against the old and inequitable traditions. There could be mentioned several instances, such as the secondary role assigned to the *Kanak* woman in New Caledonia[672].

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[667] JESTAZ, Philippe. Les sorces du Droit..., p. 308-311.
[668] ALBERGONI, Gianni. Droit coutumier, ethos tribal et économie moderne: un 'urf bédouin de 1970. In: Annales Islamologiques, n. 27, Cairo: Institut français d'archéologie orientale, 1993, p. 116-122.
[669] Idem.
[670] Ibidem, p. 132-134.
[671] In South Africa, for example, even though the consuetudinary Law is widely established, it is "absent in the real estate relations and in the economic sectors managed according to the Western methods. ROULAND, Norbert. Op. cit., p. 257.
[672] AGNIEL points out that the woman's role is reified (being in a marriage, she becomes her husband's property). This characteristic would have as a consequence the eligibility of domestic violence. There are several instances of waiver to the personal statute, seeking divorce provided for in the common statute

On the other hand, in this same entity the customs served as affirmation of self-determination before the authorities and colonial precepts[673].

According to LIMA LOPES, contemporaneously, two phenomena challenge the role traditionally assigned to the customs: the globalization and the establishment of particularisms. The author understands that the custom will be given relevance again, even though it could be appropriate in a positive way (as an instrument of inclusion) or negative one (oppression)[674].

Such control partly indeed exists in Ordinations that establish the consuetudinary Law. Thus, for instance, the repugnancy doctrine[675] of the Nigerian Law and other African countries, also adopted by Papua New Guinea[676], instituted during the colonial period that was presented as a wide expression that would not allow the content of limitation to be previously known. As for YAKUBU, this kind of control, kept even after the independence of the country, would relegate the consuetudinary to a minor role[677]. A recent decision by the Nigerian Supreme Court considered that the Islamic law cannot be considered a custom, and as a result of that, would not be subjected to this kind of control[678].

Botswana also adopts a system of control of customs, similar to the Nigerian system, when establishing that they are not contrary to the written law, morality, Humanity and natural justice. Besides that, the decision of a customary court, the occasional interested party can appeal to a superior Court such as, in restricted instances, the Supreme Court of the country. In practice, nonetheless, it has not been observed the fulfillment of the polices regarding the human Rights (especially in relation to the equality of genre), assumed by international commitments, through these ways[679]. VICENTE still informs us that in the Indian

(French). Another example is the treatment granted to the "collective violation" to young girls, treated less as victims than as causative agents of their bad luck. AGNIEL, Guy. Op. cit., p.88-94

[673] ASSIER-ANDRIEU, Louis. Op. cit., 83-85.

[674] LOPES, José Reinaldo de Lima. Op. cit., p. 73-75.

[675] "The determination of whether a particular customary Law is repugnant or not should not be based on the comparison of the English or Western system with the indigenous system or social value. A customary law can only be justifiably disallowed from being applied where its effect or its content will be an affront to reason, patently immoral or basically unjustifiable". (YAKUBU, John Ademola. Op. cit., p. 211).

[676] ASSIER-ANDRIEU, Louis. Op. cit., p. 86.

[677] YAKUBU, John Ademola. Op. cit., p. 218-219.

[678] It was about the sale of a property in which the neighbor alleged the right of preference (shufa). The Supreme Court drove away the claim based on the fact that the neighbor was not a co-owner, and so, did not have preference according to the Islamic Law (Maliki), applicable in the North-east region of Nigeria. ADAM, Sani. Case review: Islamic Law distinct from customary Law and the applicable muslim law in Nigeria. In: Journal of Public and Private Law, v. 4, n. 4, 2000, p. 216-219.

[679] KUMAR, Rekha. Op. cit.

Law the customs go through control of compatibility with the fundamental rights established in the Constitution[680].

By analyzing the experience of traditional solution of disputes in East Timor, GRENFELL found advantages and disadvantages in the consuetudinary system. On the one hand it allows the expansion of access and higher speed in the solution of disputes, assuring better adequacy of the language and decisions to the local context, contributing not only to higher index of internalization (not questioning) of the local decisions, and also the promotion of reconciliation by the parties. In turn, there is clear inconsistency of results and difficulties to carry out the decision, possibility of local abuse, and, what is more serious, decisions which contain violation to human rights (mainly the ones referring to women)[681].

BOSSELMAN, on the other hand, analyses the issue from the point of view of social solidarity and points out, for instance, that it could be chosen the setting up of a consuetudinary normative system in hypotheses where it is intended to reinforce the sense of group and social responsibility, or yet, for the co-operation of certain groups, search for innovative techniques and empirical data[682]. The author understands that some cautiousness should be preserved, since the model aimed may reflect mere nostalgia, cause the decisive decentralization for its privatization, lead to domination and exclusion of groups and minorities[683].

For sure, just as the freedom that authorizes the formation of the custom is limited, the exercise of the custom would be conditioned to the same limitations imposed to a wider contractual freedom, that is, "compensated for by its subordination to the sieve of the constitutional values"[684] and to the protection of the human rights. In other words, it is about a hypothesis of incidence of the fundamental rights to the private relations fully admitted and exploited by the Brazilian ordination. Several examples may be cited to support this thesis: the Nicaragua instance, when the International Court of Justice lent consuetudinary grounds to the basic principles of the International Human Rights; the *Tadic* instance, when the Criminal Court for Yugoslavia considered

[680] VICENTE, Dário Moura. Op. cit., p. 472.
[681] GRENFELL, Laura. Op. cit., p. 318-321.
[682] BOSSELMAN, Fred. The choice of customary law. In: ØREBECH, Peter; et al. Op. cit., p. 435-437
[683] Ibidem, p. 438-441.
[684] HESPANHA, Antonio Manuel. O caleidoscópio..., p. 470.

compulsory the respect to the most basic human rights, from the international custom (even if that one would not be about an international conflict) and yet, the so-called "Martens Clause", which preconizes the existence of a universal consciousness[685].

Even if such instances do not have a contractual nature, given the rare legal examples, perhaps they may serve as a paradigm or basis for analogical interpretation.

From the contractual point of view, the emphasized role of the custom, both for the doctrine and also for the court precedents, is interpretative. However, it does not seem to be reasonable that in a world where State sovereignty has been challenged, it is intended to structure normative explanations for classical solutions of classic liberal retouching. The contemporaneity is much more complex than the "statutory Law", "the State" and the "Nation" may understand.

In addition, it does not seem to be reasonable to demand that the custom is backed by the consent (expressed or tacit) of the contracting parties. If the contractual custom withdrawn its authority of negotiating freedom of the parties, it would be stillborn as a legal institution (it would be enough to explain it through the legal transaction). KESSEDJIAN[686] appears to agree with this idea. After all, the creature does not tame the mahout. In this scenery, roles are changed. It is important, nonetheless, not to be misled by the charming effect of the tradition or nostalgia. The exacerbated value of custom can also be pernicious, especially because it may reflect the customs of a dominant elite[687]. If neither the law nor the custom always reflect society in an isolated way[688], special attention must be drawn so that the negotiating autonomy does not extrapolate the limits of the Human.

Yet, before going more deeply into the ways like such "trainings" and "limits" may occur, it becomes necessary to demonstrate how the creature is born and how it may need to be tamed.

[685] PEREIRA, Luis Cezar Ramos. Op. cit., p. 302-304.
[686] KESSEDJIAN, Catherine. Op. cit., p. 665.
[687] LYRA FILHO, Roberto. Op. cit., p. 31-32.
[688] CRUET, Jean. A vida do Direito e a inutilidade das leis. 2. ed. Leme: Edijur, 2003. passim.

PART II – THE INTERNATIONALIZATION OF CONTRACTUAL LAW AND THE CUSTOM AS A SOURCE OF CONTRACTUAL OBLIGATIONS

IV. *PROPER LAW OF CONTRACT*[689]*, NEW LEX MERCATORIA*

> L'homme d' affaires, lui, sort du cadre feudal et rural dans lequel s'inscrit l'objet du droit coutumier. Étranger à un système de relations socials fondé sur l'exploitation du dol et organisé en une pyramide de droits reels et personnels où l'emportent les liens verticaux, il est à l'èkart des securities que méhagent aussi bien les coutumes des fiefs que celles des terres tenues à redevance. II èchappe aussi bien aux règles de la societé chevaleresque qu'à celles Du monde paysan. L'échange de La protection contre Le service personnel, La solidarité mutuelle mais inégale de celui qui concède et celui qui doit, l'hérédité de fait – plus de droit – dês situations et dês liens, tout cela n'a guère de sens pour l'homme d'affaires qui joue à la « grosse aventure » maritime, non plus que pour l'artisan riche seulement de sés Brás et de as compétence. I'un et l'autre mettront longtemps à passer pour gens normaux. Leurs affaires échapperont pour l'essentiel au droit dês juristes, à ce droit que l'on enseigne dans les facultes ou se forment civillistes et canonistes.[690]

4.1. GLOBALIZATION AND THE CHALLENGES ISSUED TO THE TRADITIONAL LAW

The conceptualization of what the process of globalization appears to be is not peaceful. Normally, the legal doctrine identifies its existence and recognizes its "symptoms", but does not yet face substantial difficulty in delimiting its direct interferences in the national normative boards.

It seems to be coherent to state the inexistence of an only concept of globalization, but of several possible meanings established from different

[689] Expression employed in the sense of applicable Law and appropriate to the contract, regardless its origin.

[690] "The trader escapes from the rural and feudal scope, object of consuetudinary Law. He is a stranger in a system of social relationships based on the use of land and organized in a pyramid of real rights and persons that establish vertical connections, he is driven away from the certainty that organizes the customs of the feuds and the lands kept upon fee. He escapes from both the rules of the society of the lords, and the ones of the countrymen. The exchange of protection by personal provision of service, mutual solidarity, but unequal from the one who grants it and the one who is obliged, the real heredity – and after right – situations which make little sense to the traders who undertake the "great maritime adventure" and to the handcrafters only rich in their arms and competence. One and the other will take long to be considered normal people. Their business escape, in great part, from the Law of jurists, or else, from the Law taught at universities which graduate civil-law jurists and canonist jurists". (FAVIER, Jean. De l´or et des épices : naissance de l´homme d´affaires au Moyen Âge.Paris : Hachette, 2004, p. 99-100).

examined perspectives. GIDDENS, for example, refers to the economic, political and technological globalization[691].

Thus, to a large extent, according to GROSSI globalization means deterritorialization, the economic primacy over the political one, the weakness of the State and sovereignty[692]. The author points out the eminently economic role (preponderance of the Market), the use of new technologies and the pressure for the normative production by the Market (plural, informal, factual, non-textual sources[693]), stressing, yet, the privatization and fragmentation of the sources of production of Law[694].

> Si el derecho moderno puede considerarse un derecho todo él convertido en público, dado que el Estado se preocupa hasta la disciplina de las relaciones privadas em la vida diaria de los particulares (...), con el derecho de la globalización aparece nuevamente (como existía em el Antiguo Régimen antes de la Revolución Francesa) un derecho producido por particulares.[695]

While MISTELIS associates the political globalization to the diffusion of the Human rights and a non-domestic analysis of their violations[696], BENYEKHLEF argues the transformations of the traditional legal concepts (internal and external Law, hierarchy, autonomy of Law)[697], FAUVARQUE–COSSON mentions the increasing internationalization of certain fields of Law (trade, transportation, investments), recognizing, however, that the essence of the Civil Law would remain under national influence[698]. GALGANO, in turn, sees not only the formation of a non-state Law, but equally the possibility of a national Law to govern the transnational relations (*lex shopping*)[699].

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[691] GIDDENS, Anthony. Mundo em descontrole: o que a globalização está fazendo de nós. 3. Ed. São Paulo: Record, 2003, p. 21.
[692] GROSSI, Paolo. De la codificación..., p. 384.
[693] GROSSI, Paolo. O Direito entre..., p. 70-86.
[694] GROSSI, Paolo. Primeira lição..., p. 60.
[695] GROSSI, Paolo. De la codificación..., p. 387.
[696] MISTELIS, Loukas. Op. cit.,
[697] BENYEKHLEF, Karim. Op. cit., p. 86
[698] FAUVARQUE-COSSON, Bénédicte. Op. cit., p. 55.
[699] GALGANO, Francesco. El contrato en las relaciones transnacionales. In: FERRER VANRELL, Ma Pilar; MARTÍNEZ CAÑELLAS, Anselmo. (Dir.). Principios de Derecho Contractual Europeo y Principios de UNIDROIT sobre Contratos Comerciales Internacionales: actas del Congreso Internacional celebrado en Palma de Mallorca, 26 y 27 de abril de 2007. Madrid: Dykinson, 2009, p. 24.

As for GRAU, the globalization in itself is not a new phenomenon, but its association to a certain economic philosophy which starts to affect the Law[700] for interest of a "Market" that is confused with the capitalist model of production[701]. This "restructuring of capitalism" would take consequences: "commoditization" of knowledge, decrease of State autonomy to implement public policies, economic specialization, industrial "relocation" and weakening of the idea Nation State[702]; erosion of the social brakes and mechanisms of control of individual behavior[703].

Under the human perspective, for instance, it has never been so simple to live with and know diversity[704], even technology favors this interaction, at the same time when new legal challenges are presented[705]. On the other hand, it can also be noticed ascending poverty, the formation of racial, cultural, ethnic, and religious ghettos, and exclusion. In a certain way, the same phenomenon that brings them together, ends up taking them apart, polarizing the social relations[706] and being reflected as a contradiction[707].

This same duality may be noticed under the geographical scope ("global village" *versus* new ghettos[708]; global versus local[709]; under the perspective of time (solidity of past and perspective of future *versus* immediate present[710]);

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[700] GRAU, Eros Roberto. O Direito posto e o Direito pressuposto. 7. ed. São Paulo: Malheiros, 2008, p. 277-279.
[701] Ibidem, p. 334-335.
[702] FARIA, José Eduardo. Direito e conjuntura. São Paulo: Saraiva, 2008, p. 11-28.
[703] KEENAN, Patrick J. Do norms still matter? The corrosive effects of Globalization on the vitality of norms. In: Vanderbilt Journal of Transnational Law, v. 41, n. 2, 2008, p. 327-379.
[704] Even if since the Classical antiquity some of the very cosmopolitan Hellenic polis may have been considered (as Alexandria in Egypt) the level of cultural diversification in some of the main cities of some European countries, some Asian countries and American ones, greatly surpass all the previous perspective.
[705] In this sense, MCGOWAN can be mentioned, as he presents the challenge to adequate to the traditional legal treatment (in American terms) to the electronic commerce, especially the one involving license of intellectual property (in American terms). MCGOWAN, David. Recognizing usages of trade: a case study from electronic commerce. In: Journal of Law and Policy, v. 8, 2002, p. 167-213.
[706] BAUMAN, Zygmunt. Globalização: as conseqüências humanas. Rio de Janeiro: Jorge Zahar, 1999, p. 08-09.
[707] IANNI, Octavio. Nação: província da sociedade global? In: SANTOS, Milton; SOUZA, Maria Adélia A de; SILVEIRA, Maria Laura. (Orgs.). Território: globalização e fragmentação. 4. ed. São Paulo: HUCITEC, 1998, p. 83-84. In this sense: SANTOS, Boaventura de Sousa. O processo de globalização. In: _____. (Org.). A Globalização e as ciências sociais. 2. ed. São Paulo: Cortez, 2002, p. 54-55.
[708] Such as the isolation of the elites (BAUMAN, Zygmunt. Op. cit., p. 27-33); "sanity" isolation of poverty (Ibidem, p. 83-84), urban distinction between the Center and the outskirts (CARLOS, Ana Fani Alessandri. A natureza do espaço fragmentado. In: SANTOS, Milton; SOUZA, Maria Adélia A de; SILVEIRA, Maria Laura. (Orgs.). Op. cit., p. 191-197), isolation of the individual.
[709] BOSQUE MAUREL, Joaquín. Globalização e regionalização da Europa dos Estados à Europa das regiões: o caso da Espanha. In: SANTOS, Milton; SOUZA, Maria Adélia A de; SILVEIRA, Maria Laura. (Orgs.). Op. cit., p. 29-41.
[710] MARQUES, Mário Reis. A hipertrofia do presente no direito da era da globalização. In: Revista Lusófona de Humanidades e Tecnologia, n. 12, 2008, p.127.

under the material, political[711] and social[712] perspectives, besides the cultural bias (homogenization and consensus[713] *versus* multiculturalism). As for from the human legal project point of view, it can be observed, on the one hand, the universalizing tendency of a liberal speech, non-economic, but social, to protect the human being. On the other hand, it is located the ascending perspective of respect to the differences, and cultural and religious[714] idiosyncrasies, and the pressure for local autonomy[715].

If globalization is thought about by means of contractual Law, whose interest is immediate, it can be noticed great concentration on the questioning over the sovereign sufficiency of the State and its increasing absence as an outstanding actor in international private relations. It seems plausible, however, to equally sustain that the empire of the state cannot be substituted for the cold calculation of the Market.

This set of phenomena would keep binding with the economic justification[716], which intended to assure the existence of its own space for

[711] "Before this scenery, the national States stop controlling their internal economies, losing political relevance, while the transnational companies take command of the world economy, having a dominant position over the flux of information and technologies, like: a) micro-electronics, development of electronic equipment produced with the use of minute components, employed in the industry of computing science, telecommunications, entertaining, computers, automation of production through robots, replacing the less qualified labor; b) bio-technology, the application of technical and scientific principles to the industry of food, drinks, medicine, pharmacy, through organisms, animal cells, vegetables and enzymes; development of new materials not found in nature, and because of that, produced in labs through the alteration of the properties of atoms, such as the gallium arsenide, replaced by silicon, which offers the possibility to increase in one thousand times the speed to provide information and sharply decrease the size of equipment". (OLIVEIRA, Odete Maria de. Integração: um desafio à Globalização. In: Revista da Faculdade de Direito da Universidade Federal de Santa Catarina. Síntese. v. 1, 1998, p.134). In the same sense, see: SANTOS, Boaventura de Sousa. Op. cit., p. 35-44.

[712] "The society of global village is permeated by distinct subtracts: 1) information is quickly passed on by electronics by using the power of image, in the shape of packages traded all over the world. Like entertaining, ideas are produced, traded and consumed; 2) language is full of meaning, expressing non-codified realities, only suggested ones, which introduce new ways of thinking and acting of individuals, also expanding to the implications of empirical, methodological, scientific, and artistical field; 3) elects the English language as universal. In the four corners of the world this language is in the market and in the product, in the press and electronics, in practice and thinking, in nostalgia and in utopia. It is the language of universal market, the cosmopolitan intellectual person, the epistemology hidden in the computer of the electronic Prometheus". OLIVEIRA, Odete Maria de. Op. cit., p. 132-133. Certain loss of nationality is also highlighted. FAUVARQUE-COSSON, Bénédicte. Op. cit., p. 56.

[713] BAUMAN, Zygmunt. Op. cit., p. 67.

[714] It can be mentioned as an example the instance of polygamy. GALGANO mentions an interesting event in which an immigrant from Morocco was found guilty by the Italian Justice of bigamy, but had equally recognized, by the same sentence, the right to increases of remuneration corresponding to the two women GALGANO, Francesco. La globalizzazione nello specchio Del diritto. Bologna: il Mulino, 2005, p. 217-222.

[715] GIDDENS, Anthony. Mundo..., p. 23.

[716] "At last a radical transformation, where the increased reproduction of the Capital in a worldwide perspective, the maximization of production and profit, the new international division of work and the full change in the external and internal commercial flows, which started to operate in an international scope and demand new dynamics of financial regulation, originated, in the arena of transnational corporations, a tough

acting[717], supported by the liberal consensus of restriction of regulating economic policies, protection to international investment, and the creation, and intellectual property and submission of the public policies for the control of international organisms[718]. Still economically speaking, the asymmetries which are generated are more outstanding than the uniformities (cultural, social, consumption, etc.) that are provided[719].

Nonetheless, the same movement would improve the international exchanges; it would decentralize the productive process, making them flexible, it would reinforce the economic role of multinational companies and the financial market, and it would promote the formation of regional economic blocks[720]; in short, it would apparently bring social and political benefits.[721] In spite of that, the understanding of globalization cannot be limited to its more noticeable economic aspects, since the process of globalization may be demonstrated at three distinct levels: (i) company, (ii) Market and (iii) "regulation".[722] This last perspective is the one which would interest us more, as it presents the discussion over the production of Law beyond the model based on State sovereignty.

It is also equally important to point out that this process does not eliminate the national territorial boundaries (in this sense, different from imperialism), even though it makes them flexible (e.g., multinational companies acting globally).[723] Yet, the process of globalization does not impose normative unification, although it greatly promotes a true process of harmonization, being it legislative or not.[724] Its proceduralization would be carried out through three

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competition over the control of the major markets in the world". OLIVEIRA, Odete Maria de. Op. cit., p. 129-130.

[717] These one, according to OLIVEIRA, would be a way to "assure its own commercial financial room, a regional market, directing, at a second stage, in the admission of the world market undermined by competition and challenges of the transnational corporations, under arguments and mechanisms of the globalization phenomenon". (Ibidem, p. 130). Still according to the author, at a certain extent this protection would occur by the adoption of protectionism of the market (Ibidem, p. 136).

[718] SANTOS, Boaventura de Sousa. Op. cit., p. 31.

[719] NUSDEO, Ana Maria de Oliveira. Op. cit., p. 147.

[720] NUSDEO, Ana Maria de Oliveira. Defesa da concorrência e globalização econômica: o controle da concentração de empresas. São Paulo: Malheiros, 2002, p. 139.

[721] WAINCYMER, Jeff. Op. cit., p. 301.

[722] DRAHOS, Peter; BRAITHWAITE, John. Op. cit., p. 103-128.

[723] "Gli Stati sovrani, per potenti che essi siano, non sono più altrettanto sovrani quanto in passato. Essi non governano che un minuscolo frammento del mercato globale mentre lemultinazionali sono in grado di controllarlo nella sua interezza". GALGANO, Francesco. Lex mercatoria. Bologna: il Mulino, 2001, p. 14.

[724] Some authors like OSLÉ defend the constitution of global legal Ordination not comparable to the national ordinations, or based on the notion of sovereignty, although equally hierarchized under the pyramid way. Cs.:

mechanisms: (i) by the power of an army, (ii) by the possibility to be offered as a model to be copied and (iii) by the reciprocal economic interests.[725] These last two procedures may be better understood by the ways of globalization rated by SANTOS: the first two ones have a clear market character: (i) globalized localism (a local phenomenon becomes globalized); (ii) localized globalism (a global phenomenon producing local effects); other aspects oppose the previous two; (iii) cosmopolitism (organization of international actors against exclusion) and (iv) common property of humanity (movement of opposition to the mercantilization of resources and environments indispensable to the human life).[726] However, it is important to notice that this explanation is not complete, either.

Partly, all the conceptual and instrumental difficultly to deal with the globalizing phenomena derives from the estrangement with the way the national doctrine, more used to the model centered in the sovereign national State, faces the news. This mismatch, however, may also reflect social isolation. That is because, as GIORGIANNI points out, the traditional privatistic doctrine did not reflect much on the economic changes and the increase of acting of the public sphere in the citizen's life, sticking to the traditional formula and concepts.[727]

On that account, certain "wear of the legal instrument"[728] was revealed and it is still being difficult to replace it by more adequate solutions. The genesis of this problem would be in the distance between the social reality and the positivized Law. GOMES identifies the cult of the text of law and the will of the legislator. The written text, however, would not be able to cover all the variables of life. Neither would the doctrinal criticism be enough followed by the maintenance of its logic, vocabulary and systematization.[729]

This amazement seems to be aggravated by the amplitude that the social events are given in contemporaneous times. The apparent paradox presented by the so-called regulating "globalization" is one example of it:

OSLÉ, Rafael Domingo. Qué es El derecho global? 5. ed. Asunción: CEDEP, 2009, p. 206-207. This Ordination would be centered in the concept of person and protection of the human rights. Ibidem, p. 212-254.

[725] DRAHOS, Peter; BRAITHWAITE, John. Op. cit., p. 112-113.

[726] SANTOS, Boaventura de Sousa. Op. cit., p. 65-71.

[727] GIORGIANNI, Michele. Op. cit., p. 36.

[728] GOMES, Orlando. A evolução do Direito..., p. 121.

[729] Ibidem, p. 124 et seq.

> Effectively, we observed contradictory phenomena: On the one hand, one can easily get free from the ties (sic) of their limited existence: speed, ubiquity, freedom; the space for communication does not exist anymore. Today, events of happiness and sadness join the human beings in a global feeling of solidarity unknown by the previous generations. On the other hand, every catastrophe, in spite of seeming very distant from the sphere of each one's business, in fact ends up reflecting in each one's private life. We experience a feeling of loss of certainty of an existence protected by the traditional institutions, such as the State and the State judges.[730]

Such uncertainty is usually associated with the notion of loss of "sovereignty" of the States. It is the main criticism towards the process of "globalization, even more when strong enough actors handle one of those three mechanisms for the unilateral "globalization" of regulation (e.g. role of the USA in the discussion about the TRIPS – Agreement on Trade Related Aspects of Intellectual Property Right). There still can be mentioned: flexibilization of the working relations which would result in the weakening of the workmen movement, precariousness of jobs, unevenness of wages, transfer of production phases to development countries with low social cost[731]. Weakening of the State and reduction of its capacity to establish political and legal criteria to stand for collective welfare, control of capital flow, and partly, decision-making.[732]

Another criticism to the process of globalization is about the understanding of the role to be performed by the economy. Thus, if in WALD's opinion the Law would act as a "bridge" between the new economy (globalized) and the "archaic"[733] politics, for FARIA the weakening of the State would lead to difficulties in the recognition of the basic rights to great part of the population, deteriorating morality and democracy, making it difficult the fulfillment of the human rights.[734]

Yet, HINKELAMMERT assets that the globalization, associated to the logic of the Market, would have made the search for profit limited, ignoring the

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[730] JAYME, Erik. O Direito Internacional Privado do novo milênio: a proteção da pessoa humana face à globalização. In: MARQUES, Cláudia Lima; ARAÚJO, Nádia de. (Orgs.). O novo direito internacional: estudos em homenagem a Erik Jayme. Rio de Janeiro: Renovar, 2005, p. 04.

[731] FARIA, José Eduardo. Democracia e governabilidade: os direitos humanos à luz da globalização econômica. In: _____. (Org.). Direito e globalização econômica: implicações e perspectivas. São Paulo: Malheiros, 1998, p. 140-142.

[732] FARIA, José Eduardo. Democracia e governabilidade..., p. 140-142.

[733] WALD, Arnoldo. Um novo direito para uma nova economia: a evolução dos contratos e do Código Civil. In: DINIZ, Maria Helena; LISBOA, Roberto Senise. (Coords.). O Direito civil no Século XXI. São Paulo: Saraiva, 2003, p. 81.

[734] FARIA, José Eduardo. Democracia e governabilidade..., p. 148, 159.

own value of the human being.[735] At the same time, the author believes that any resistance to this process would be understood as a clash of civilization, although there is no other social project[736]. He gathers that before relativizing the human being to preserve the Market, its flexibilization would be essential[737]. There are, however, others who recognize some of the effects, such as the decrease of poverty and inequality[738], and the promotion of place, better conditions of life and of the human rights themselves[739].

The perspective to overcome the role traditionally assigned to the State (the questioning on the role of sovereignty and its adaptation, the search for private self-regulation and the approximation of a contractual regulating mark in a global scope)[740], the impracticability of the perspective of a "State-global" (not only theoretical, but for some, economic)[741] and the consequent/concomitant social transformation also led to the need of rethinking the grounds of the classic dogmatism not only in an internal scope[742].

> This publicity of the regulating law of private relations, and the concomitant privatization of the rules applicable to the State activity (...) involves a phenomenon which aims, on the one hand, the renewal of the structures of society, and on the other hand, the adaptation to a new economical-social reality, where the traditional standards were drastically altered, with the internationalization of the social and economic relations, making it rethink the values ideologically established in the legal system and the interdisciplinary influences exerted by the Law in this phase of change.[743]

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[735] "A un mundo, que hoy es global, impusieron una estrategia de acumulación del capital que es incompatible con el hecho de la globalidad del mundo. Es destructora de este mundo. Sin embargo, permite un pillaje sin igual tanto a los seres humanos y a la naturaleza. Para hacerlo, se creó toda una cultura de la desesperanza acompañada por un antiutopismo y un anti humanismo sistemático". HINKELAMMERT, Franz J. La caída de las torres. In: Crítica Jurídica Revista Latinoamericana de política, Filosofia y Derecho. Curitiba: Unibrasil, jun. /jul. 2002, n. 20, p. 93.

[736] HINKELAMMERT, Franz J. Op. cit., p. 81-105.

[737] Ibidem, p. 104.

[738] ALMEIDA, Paulo Roberto. A globalização e seus benefícios: um contraponto ao pessimismo. In: MENEZES, Wagner. (Org.). O Direito internacional e o Direito Brasileiro: homenagem a José Francisco Rezek. Ijuí: UniJuí, 2004, p. 272-284.

[739] CHEN, Jim C. Pax mercatoria: globalization as a second chance at "Peace for our time". In: Fordham International Law Journal, v. 24, 2000, p. 217-251.

[740] NUSDEO, Ana Maria de Oliveira. Op. cit., p. 149-155.

[741] LEESON, Peter T. Does globalization require global government? In: Indiana Journal of Economics & Business, Special Issue, 2007, p. 07-17.

[742] ARNAUD, for example, even defends "global government" as an alternative way, introducing contexts of ethics and multiculturalism, to the classical way of decision–taking on international matters.. ARNAUD, André-Jean. La gouvernance Globale, une alternative au Droit International? In: Revista de Direito Internacional e Econômico, n. 9, out./dez. 2004, p. 123-140.

[743] RAMOS, Carmem Lucia Silveira. Op. cit., p. 11

In brief, according to FARIA, some tendencies could be understood as legal consequences of the globalization process: (i) expansion and flexibilization of the normative sources; (ii) decrease in the level of the imperative nature of the positive Law; (iii) flexibilization of the procedures and legal bureaucracies; (iv) market discipline according to the Anglo-Saxon logic; (v) expansion of the space subjected to contractualization; (vi) weakening of the Labor Law; (vii) relativization of the public character of International Law; (viii) reduction of protection to the social and human rights and (ix) increasing criminalization of conducts[744].

In turn, in normative terms, it can be seen that there is encouragement to standardization as a device to reduce costs of transaction and to suppress barriers to trade[745], not without certain costs and a potential transfer of "contract style"[746].

As it will be further demonstrated, several of these "tendencies" are vital for the understanding of the present work. Anyway, it becomes evident the clash between a monist model and another pluralist one. ROTH claims that this kind of questioning would be some evidence of the weakness of distinction that made the modern State different from the feudal one[747]. If the outlines of modernity are in crisis, maybe, in terms of contracts, an answer could be found in the tendency of harmonization and standardization of the contractual Law, in the formation of a new *Lex mercatoria*[748] and in the review of the theory of the normative sources[749].

4.2. THE TENDENCY TO THE STANDARDIZATION AND HARMONIZATION OF THE CONTRACTUAL LAW IN AN INTERNATIONAL SCOPE

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[744] FARIA, José Eduardo. Direito e conjuntura..., p. 71-109.
[745] WAINCYMER, Jeff. Op. cit., p. 301.
[746] "The story is not as simple as this, however, because the globalization of contract practice involves not only the projection of former domestic contract practices onto a global screen but also a more or less radical change in contracting practices themselves. To put the matter crudely, globalization of contact practices is, to a very great degree, the spread of the American style of long, detailed contract, concocted by large American law firms for a very high fee, to the rest of the world". SHAPIRO, Martin; SWEET, Alec Stone. On law, politics & judicialization. Oxford: Oxford press, 2002, p. 299.
[747] ROTH, André-Noël. O Direito em crise: fim do Estado moderno? In: FARIA, José Eduardo (Org.). Direito e globalização econômica: implicações e perspectivas. São Paulo: Malheiros, 1998, p. 24.
[748] DRAHOS, Peter; BRAITHWAITE, John. Op. cit., p. 112.
[749] BERGER, Klaus Peter. The new law Merchant and the global market: a 21st century view of transnational Commercial law. In: International Arbitration Law Review, v. 3, n. 4, 2000, p. 100-101.

The twentieth century is strongly characterized by attempts of legal harmonization and standardization in several subjects, which formerly concerned only the sovereign exercise of the Nation- State.

In a contractual scope, these attempts are endorsed not only by the work of organisms formed by the States themselves, but also by the United Nations (especially UNCITRAL), and equally by work of private organisms like UNIDROIT and ICC. Along with these more formal attempts of standardization of the contractual Law, some initiatives were noticed as well, with more pragmatic and less general preoccupations, such as the institution of model clauses (several instances of the ICC can be mentioned) or even the arbitral regulations like the London Court of International Arbitration (LCIA)[750], the American Arbitration Association (AAA)[751] or the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)[752].

In BASSO's opinion some of these examples correspond to hypotheses of harmonization of typical characteristics of Soft Law, that is, rules of varied origin which describe phatic situations and expected behaviors without the consequent sanctions (directives, codes of conduct, model laws and principles). Its importance would be the flexibilization that would impose the rules to the conflict, making the sources more dynamic[753]. At least this would be the instance of the works by the Institute of International Law and the works by UNIDROIT[754]. GOODE, KRONKE and MCKENDRICK mention the Principles of International Commercial Contracts and the European Contractual Principles[755] as examples of this same movement and that in their turn can be felt in general legal

[750] Arbitral institution with headquarters in London, internationally recognized for the non-legal solution commercial disputes (http://www.lcia.org/Default.aspx).

[751] "The AAA (American Arbitration Association) founded in 1926, is the main arbitral institution of the United States, and the ICDR (International Center for Dispute Resolution, founded in 1996 (sic), is its international branch." (BAPTISTA, Luiz Olavo. Arbitragem comercial..., p.187). The institution manages national and international procedures of alternative solutions of controversies, covering the most varied themes – from commercial disputes to controversies in the energetic and real estate sectors, for example. - (http://www.adr.org/).

[752] "The Stockholm Chamber of Commerce is one of the oldest, founded in 1917 (...). The institution controls arbitral procedures conducted both by its Regulation, and by other procedures agreed by the parties and arbitrators. The SCC is also known for its experience on the management of arbitrations of investment. (Ibidem, p. 189).

[753] BASSO, Maristela. Curso..., p. 78-80.

[754] Ibidem, p. 83.

[755] GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 505.

contractual terms and also in specific characteristics such as the franchising contracts.[756]

It also appears that the merely State initiative is not enough for the full normatization of the international Contractual Law. That is the reason why different actors seek for models that could help in the normative organization of the legal traffic. In addition, it is equally observed that a lot of these models may be incorporated in wider scopes than the regional or local ones. In other words, theoretically speaking, by criteria of convenience and practicality, at any time the sovereign limitations of the State power may be left aside to boundlessly and adopt normative models of varied origins.

Such initiatives are attempts to guarantee some level of normative predictability to contractual relations, which otherwise could be subjected to several distinct legislative systems and cultural perspectives[757].

This process would be made easier in the Contractual Law, as FRADERA suggests, since there would be a point of approximation between the Civil Law and the Common Law: the system of sources, especially the custom and the written sources[758].

As for ALPA, the justification for the movement, however, would not be only cultural. The author understands that they would be suppositions of legal origins common in the Western contractual Law. His explanation for the interest in the contractual harmonization derives from a common goal: the instrumentalization of economic operations, making it easier the exchange of assets, services and capital[759].

Thus, either by standardization or by proximity, normative systems would share solutions, mechanisms and concepts to provide a more efficient circulation of assets and services, decreasing the costs of a transaction and improving the international trade[760], or avoiding the typical difficulties of conflict of laws[761]. On

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[756] CRETELLA NETO, José. Do contrato internacional de franchising. 2. ed. Rio de Janeiro: Forense, 2002, p. 92-99.
[757] AMISSAH, Ralph. The Autonomous Contract: Reflecting the borderless electronic commercial environment in contracting. Available: www.jus.uio.no/lm//the.autonomous.contract.07.10.1997.amissah/sisu_manifest.html.
[758] FRADERA, Véra Maria Jacob de. Op. cit., p. 65.
[759] ALPA, Guido. Les nouvelles frontières..., p. 1019.
[760] CARBONARA, Emanuela; PARISI, Francesco. The Economics of Legal Harmonization. In: German Working Papers in Law and Economics, n. 1, 2006, p. 02-30.
[761] MORENO RODRÍGUEZ, José Antonio. Temas de contratación..., p. 65.

the other hand, it should be remembered that these processes also have their own problems; there is diversity of cultures and perspectives and also the cost of the unification itself (financial and temporal)[762].

Even though it is not the final aim of the present work, it seems convenient to demonstrate, even if briefly, how the main ways of harmonization and legal unification are carried out in international terms.

4.2.1. Contractual harmonization in an European scope.

According to ALPA the international contractual harmonization has been done: (i) for the creation of an European Law of contracts; (ii) for the project of an European Code of Contracts and (iii) for the writing of uniform principles of the international contract Law. All these initiatives are different in shape, range and aims: (i) while the first one has typical compulsory outlines, formed in the Directives and court precedents guidance, the second has a theoretical approach by the Commission on European Contract Law, and the third one the codification of the international Contract Law by UNIDROIT; (ii) the two first ones are regional (limited to Europe) and the last one is international and (iii) the project of European Code in intended to form the general part of a Civil Code, whereas the UNIDROIT Principles to solve practical issues[763]. Its vision, however, is strictly European.

ROSETT, for example, widens this notion when describing several factors that would support the process of harmonization: (i) revision of national codifications; (ii) creation of international codifications (e.g., the Vienna Convention of 1980); (iii) adoption of regional Conventions whose regency may be elected by the parties (e.g., CIDIPV); (iv) adoption of uniform rules of private origin (e.g., UCP); (v) universal adoption of arbitral procedures to solve trade disputes; (vi) revival of the customary trade practice and (vii) international restatement (e.g., UNIDROIT Principles of International Commercial Contracts)[764] – PICC.

[762] SACCO, Rodolfo. Les problems d´unification du droit. In: VOGEL, Louis. (Direc.). Droit global. Unifier Le droit: Le revê impossible? Paris: LGDJ, 2001, p. 09-16.
[763] ALPA, Guido. Les nouvelles frontières..., p. 1022-1024.
[764] ROSSET, Arthur. UNIDROIT Principles and Harmonization of International Commercial Law: focus on Chapter Seven. Available: <www.unidroit.org/english/publications/review/articles/1997-3.htm>.

Thus, the current scenery of European contract "legislative" harmonization may be described as a process of varied sources and several active agents.

Besides the work carried out by UNIDROIT, which will be more deeply analyzed, other initiatives can be highlighted, such as the production of the Principles of European Contract Law – PECL (Commission on European Contract Law), the principles codified by Translex, the common Core Project and the work by the Acquis group.

The PELC present themselves with articles followed by comments and notes of national application. They were created by the so-called Commission on European Contract Law and their mission was a comparative analysis of the legislation of the States members of the European Union, so as to develop the fundamental "Principles" of the European Contract Law, once their dispositions refer only to the general part of the Law of contracts. Three parts were published and fully completed in 2001[765]. Its scope of application would include the contracts of consumption, but on the other hand, they would be limited to domestic transactions[766]. As a matter of fact, this is its main difference from the PICC[767]. LANDO, nevertheless, proposes its adoption as a legislative model, a basis for trials and Law to rule international contracts[768], such a fact that, in a certain way, opposes the reported object. The author himself, had already mentioned the need for the existence of a global contract code, outlining some of the basic rules using as a starting point the comparison among the PECL, PICC and CISG[769].

At the same time some works were being developed for the European Civil Code by the Study Group on an European Civil Code (SGECC)[770], which

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[765] EUROPA. Comissão Lando. Principles of European Contract Law. Available: <http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/toc.html>.

[766] PEREIRA, Teresa Silva. Proposta de reflexão sobre um Código Civil europeu. In: Revista da Ordem dos Advogados Portugueses, v. 2, nov. 2004. Available: <http://www.oa.pt/Conteudos/Artigos/detalhe_artigo.aspx?idc=31559&idsc=45841&ida=47182>.

[767] LANDO, Ole. Principles of European Contract Law and Unidroit Principles: Similarities, Differences and Perspectives. Available: <http://www.cisg.law.pace.edu/cisg/biblio/lando6.html>; BONELL, Michael Joachim. The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes? In: Uniform Law Review, 1996, p. 229-246.

[768] LANDO, Ole. The Rules of European contract law. Available: <http://www.cisg.law.pace.edu/cisg/biblio/lando2.html>.

[769] LANDO, Ole. CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law. In: American Journal of Comparative Law, v. 53, 2005, p. 379-401.

[770] Study Group on an European Civil Code. Available: <http://www.sgecc.net/>.

apparently occurred after the works by the Commission on European Contract Law, as he uses the PECL as a starting point.

It is still important to stress the role performed by the Acquis group[771] in the survey of the already existing Contract Law in the European Community Law (directives, court precedents, etc.) in order to identify the general principles that they rule and, occasionally, encourage the legislative reform[772]. The "Academy of Pavia"[773] also performed an outstanding role under the co-ordination of Prof. Giuseppe Gandolfi, when he put forward a proposal of code for the European Contract Law[774], claiming that it was not about that liberal model of codification, but a code appropriate to the current times, which had some space left for the complementary and integrative sources[775].

The British Law Commission, entrusted to Harvey Mcgregor[776], and the Common Core Project are also relevant initiatives. The latter one, differently from the other projects, does not seek for harmonization or for the European Contractual Law, but the construction of a common culture[777]. Their working method is based on questionnaires and on the definition of brief concepts, in comparison with the PECL[778], which adopt a structure similar to the one of a compilation.

In 2007, the SGECC and the Acquis group published the Principles, Definitions and Model Rules of the European Private Law, named DCFR (Draft Common Frame of Reference)[779]. Its publishing would be an answer to the Plans of the European Commission for the development of a more coherent European

[771] European Research Group on Existing EC Private Law (Acquis Group). Available: <http://www.acquis-group.org/>.
[772] PONCIBÒ, Cristina. Some thoughts on the methodological approach to EC consumer Law Reform. In: Loyola Consumer Law Review, v. 21, n. 3, 2009, p.353-371.
[773] ACCADEMIA DEI GIUSPRIVATISTI EUROPEI Sotto L'alto Patronato Del Presidente Della Repubblica Italiana. Available: <http://www.accademiagiusprivatistieuropei.it>.
[774] GANDOLFI, Giuseppe. (Coord.). Código Europeu dos contratos: projeto preliminar. Livro primeiro: dos contratos em geral. Curitiba, Juruá, 2008.
[775] GANDOLFI, Giuseppe. L´unificazione del Diritto dei contratti in Europa: mediante o senzala legge? In: Rivista di Diritto Civile, n. 2, 1993, p. 149-158.
[776] MCGREGOR, Harvey. Op. cit., passim.
[777] PEREIRA, Teresa Silva. Op. cit.
[778] LANDO, Ole. The Common Core of European Private Law and the Principles of European Contract Law. In: Hastings International and Comparative Law Review, n. 21, Summer 1998, p. 809-823.
[779] BAR, Christian von; CLIVE, Eric; SCHULTE-NÖLKE, Hans. (Ed.). Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR). Munich: Sellier, 2009; FAUVARQUE-COSSON, Bénédicte. (Dir.). Projet de Cadre Commun de Référence: Principes Contractuels Communs. Paris: Société de Législation Comparée, 2008.

Contractual Law[780]. However, its aim remains uncertain, once it contains all the criticism of the previous projects, or, as BONELL says, represents "a tool box" for the work of the Commission[781].

Together with these private initiatives, whose interest is more immediate, it can also be pointed out that the Parliament and the European Council, following the tradition of the European Community of Edition of Directives[782], had been adopting measures to approximate the Contract Law of Member States and to create a unified European Contract law. As an example of that, there is the report by the Economic and Social Committee on the "Communication of the Commission to the Council and European Parliament about the European Law of contracts", in which it is explicitly asserted the need of preservation of the European social economic public policy, controlled by national judges and mainly protective towards consumers and descriptive of the cross-border contracts[783].

In addition to all these examples, the doctrine still emphasizes the possibility of approximation of the National Rights by the construction of court precedents of the Court of Justice[784].

This movement has been described as the "Europeanization" of the Law of Contracts, motivated by economic issues (economic integration and adjustment to the Market) or cultural[785] ones, even though it is still mostly noticed only in the regulation of the relations of consumption[786].

It must be highlighted the fact that even non-European countries or those which do not belong to the European economic block end up making sense of the effects of this harmonization when they are interested in taking place in the commercial games at a non-regional level. One example is the report by the European Bank on the Reconstruction and Development about transactions in

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[780] BIUKOVIC, L. Anatomy of an experiment: consolidation of EU contractual law. In: University Berkeley Columbia Law Review, v. 41, n. 2, 2008, p. 277-278.
[781] BONELL, Michael Joachim. The CISG, European Contract Law and the Development of a World Contract Law. In: American Journal of Comparative Law, n. 56. Winter 2008, p. 15.
[782] BIUKOVIC, L. Op. cit., p. 287-288.
[783] EUROPE. Comitê Econômico e Social. Parecer do Comité Económico e Social sobre a "Comunicação da Comissão ao Conselho e ao Parlamento Europeu sobre o direito europeu dos contratos". In: Jornal Oficial das Comunidades Européias. 07 out. 2002, C241/1-7.
[784] FRADERA, Véra Maria Jacob de. Op. cit., p. 243-245; 311-322.
[785] TWIGG-FLESNER, Christian. The Europeanisation of contract Law. New York: Routledge-Cavendish, 2008, p. 181-193.
[786] MORAIS, Fabíola. Aproximação do Direito Contratual dos Estados-membros da União Européia. Rio de Janeiro: Renovar, 2007, p. 305-306.

Central Asia, mainly the stress given to the "recent legislative developments" adjusted to the European standards: Banking Legislation in Azerbaijan (2003), Legislation of Telecommunications in Bosnia-Herzegovina (2002), Banking Legislation in Croatia (2002), Czech Commercial Code (2002), Financing Legislation in Lithuania (2003); Monetary Legislation in Lithuania (2002), Polish Monetary Legislation 92002), Legislation of Telecommunications in Rumania (2002), Competitive Legislation in Rumania 92002), Russian Legislation of Telecommunications (2002), Legislation on the Slovakian Accountancy (2003); Banking Legislation in Slovakia (2002), Slovakian Competitive Legislation (2002) and Slovakian Competitive Legislation (2002) and Slovenian Commercial Legislation (2002)[787]. Surely some of these reforms were motivated under the perspective of joining the European Union as a Member State. However, it should be pointed out the inductive role that the European model performed over the other countries (currently, Azerbaijan, Bosnia and Russia).

4.2.2. Harmonizing initiatives promoted by States: Brazilian perspective

Contrary to the European movement, the contract harmonization in the Latin-American countries is incipient. The main Brazilian attempts that deserve some attention were some Court files of the MERCOSUL (restricted to some sectors and applicable only to the Member countries) and some Inter-American Conventions (CIDIPs) which were not very successful.

In an attempt to build up a coherent contract normative fabric in MERCOSUL, Brazil ratified a series of treaties, among which some can be pointed out: the Protocol of Buenos Aires (1994) over contract international jurisdiction[788]; The Argument of Buenos Aires (1998) over international commercial arbitration[789]; The Agreement of Buenos Aires over international

[787] EUROPA. Banco Europeu para Reconstrução e Desenvolvimento - EBRD. In: Law in transition: central Asia. Spring 2003, p. 65-69.
[788] Ratified by Brazil trough Decree n. 2.095/1996. BRAZIL. Decree n. 2.095, of 17 December 1996 which enacts the Buenos Aires Protocolo n International Jurisdiction on Contractual Matters, concluded in Buenos Aires, on 5 August 1994. Federal Official Journal of 18 December 1996.
[789] Ratified by Brazil trough Decree n. 4.719/2003. BRAZIL. Decree n. 4.719 of 4 June 2003 which enacts the Agreement on international commercial arbitration of Mercosul. Federal Official Journal of 5 June 2003.

transportation of cargo[790] (still depending on the approval by Argentina, Paraguay and Uruguay); the Agreement settled among the countries of MERCOSUL, Chile and Bolivia on international commercial arbitration[791].

From the Inter-American point of view, it can be pointed out the codification of the private international Law, even when talking about contracts, represented by the Bustamante Code[792] and the Panama Convention (1975) on commercial international arbitration[793], these ones ratified in Brazil, and the Inter-American Convention of Mexico (1994) CIDIPV, over Law applicable to international contracts[794].

From the global point of view the Convention of Vienna of 1980-CISG stands out; also, we can also mention the UNCITRAL model laws[795], the New York Convention of 1958 on the recognition of foreigner arbitral awards[796], the Montreal Convention for the unification of rules concerning air transport[797], these ones ratified in Brazil; the Convention of 1978 on contract of international

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[790] BRAZIL. Legislative Decree n. 208 of 20 may 2004 which approves the text of the Agreement on the Jurisdiction in the matters of Contracts of International Transportation of Cargo among the Member States of the MERCOSUL, executed in Buenos Aires, on 5 July 2002. Federal Official Journal of 21 May 2004.

[791] BRAZIL. Legislative Decree n. 483 of 28 November 2001 which approves the text of the Agreement on International Commercial Arbitration between MERCOSUL, the Republic of Bolivia and the Republic of Chile, concluded in Buenos Aires, on 23 July 1998. Federal Official Journal of 03 December 2001.

[792] BRAZIL. Decree n. 18.871 of 13 August 1929. It enacts the Convention of private International Law of Havana. Available on: http://ccji.pgr.mpf.gov. br/ccji/legislacao/legislacaodocs/ bustamante.pdf.

[793] Ratified by Brazil through Decree n. 1.902/ 1996 (BRAZIL. Decree n. 1.902 of 09 May 1996 which enacts the Inter-American Convention on International Commercial Arbitration, of 30 January 1975. Federal Official Journal of 10 May 1996).

[794] ORGANIZAÇÃO DOS ESTADOS AMERICANOS. Convenção Interamericana sobre a lei aplicável aos contratos internacionais assinada na cidade do México em 17 de março de 1994. Available: <http://www.oas.org/DIL/CIDIPV_convention_internationalcontracts.htm>. Even though the Convention has been signed by Brazil, it has not yet been ratified. (Information granted by the OAS itself. Inter-American Convention on The Law Applicable To International Contracts. Available on: <http://www.oas.org/juridico/english/sigs/b- 56.html>. Also there is no mention of any legislative Project being prosecuted in the Brazilian Chamber of Deputies whose object is the incorporation of the text of the Convention to the legal system (research carried out on 06 January 2001, having as tool Constant search on the website. BRASIL. Câmara dos Deputados. Available: http://www.camara.gov. br/sileg/default.asp) Looking up in the entries: "convention", "Inter-American", "Mexico",. In this research the kind of proposition was not limited, only the period between 2010 and 1994, obtaining 32 (thirty-two) results.

[795] For Example: on the transfer of international credits, on the execution of public contracts of assets, work by the job and services, on electronic subscriptions and electronic trade, on international insolvency, on international arbitration.

[796] Ratified by Brazil through Decree n. 4311/2002. BRAZIL. Decree n. 4311 of 23 July 2002 which enacts the Convention on the Recognition and Execution of Foreign Arbitral Judgments. Available on: <http://www.planalto.gov. br/ccivil_03/decreto/2002/D4311.htm>.

[797] Ratified by Brazil through Decree n. 5910/2006. BRAZIL. Decree n. 5910 of 27 September 2006 which enacts the Convention for the Unification of Certain Rules Related to International Air Transportation, executed in Montreal, o 28 May 1999. Federal Official Journal of 28 September 2006. Available on: <http://www.planalto.gov. br/ccivil_03/_Ato2004- 2006/2006/Decreto/D5910.htm>.

carriage of goods by the sea ("rules of Hamburg")[798] and the Cape Town Convention on international interests in mobile equipment[799].

Despite of not having complete connection with the Brazilian Law, it is important to remember that the harmonization and unification for State promotion may take place in a national environment. The example par excellence of this last project was the North-American Uniform Commercial Code (UCC), which unified the commercial regime among the different federal States.

4.2.3. Harmonizing initiatives by non-State organisms and private entities.

Apart from the most traditional participation of the States, there are non-state organizations of varied legal constitution which are made to promote the unification and/or harmonization of Law in an international scope.

First of all, it can be mentioned the work developed by the United Nations Commission on International Trade Law (UNICITRAL). Besides being in charge of the preparatory work for the Vienna Convention of 1980 (CISG), several model laws can be highlighted, such as the arbitration and electronic trade.

The Hague Conference of Private International Law is another International organism of permanent character created by an international treaty[800] with the aim of unifying the rules of private international Law[801]. Even

[798] Signed by Brazil, but not ratified. Cs. UNCITRAL. 1978 - United Nations Convention on the Carriage of Goods by Sea - the "Hamburg Rules". Available on: <http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html>.

[799] Recently ratified by Brazil (BRAZIL. Legislative Decree n. 135 May 2011 which approves the texts of the Convention of International Interests in Mobile Equipment and the Protocol to the Convention of International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, both concluded in the City of Cape Town on 16 November 2001, as well as the Final Act of the Diplomatic Conference for the Adoption of the Convention and the Protocol and the statements shall make when joining the Convention and the Protocol. Federal Official Journal of 27 May 2011.) It is characterized by a "new" system of approach in the execution of treaties through the definition of a central set of interests over which there would be no divergence and that end up forming the convention. More controversial issues are left for protocols to be the ratification of the text of the Convention and of a protocol. In addition, the negotiation of each protocol obeys a fast-track system, or else, the text is previously prepared by UNIDROIT which subjects it to the States, decreasing the delay in the rounds of negotiation. SUNDAHL, Mark J. The "Cape Town Approach": A New Method of Making International Law. In: Columbia Journal of International Law, n. 44, 2006, p. 339-376.

[800] "Another characteristic of this subject of public international Law is its own functioning, with its own personnel, budget and venue, where its activities are developed and pursuit their object. These factors guarantee relative independence to the international organization, when in confrontation with its Member States". (RODAS, João Grandino; MONACO, Gustavo Ferraz de Campos. A Conferência de Haia de Direito Internacional Privado: a participação do Brasil. Brasília: Fundação Alexandre Gusmão, 2007, p. 189).

[801] BRAZIL. Decree n. 3.832 of 1 June 2001 which enacts the Statute of the Hague Conference of Private International Law, adopted by the 7th Conference of Hague of Private International Law, from 9 to 31 October 1951. Available: <http://www2.mre.gov. br/dai/diphaia.htm>.

though its operation is based on consensus, it is important to stress that an occasional deliberation does not bound the State. As far as contracts are concerned, their main work is the Convention on the law applicable to international sales of mobile assets and the Convention on the law applicable to agency contracts and representation[802]. Currently it is developed a draft of Convention on the law applicable to international contracts[803].

The work developed by the Institute for the International Unification of Private Law (UNIDROIT) is also internationally outstanding. Its most known projects are the Principles of international commercial contracts (PICC). However, along with them there are projects of Treaties such as the already mentioned Cape Town Convention and the International Convention on the Return of Stolen or Illegally Exported Cultural Items[804].

The International Chamber of Commerce (ICC) is another entity that, through its activities, ended up contributing to the normative harmonization with regards to contracts. Their work of compilation, revision, study and updating of the international terms of international sales (INCOTERM) is well-known. There are also uniform rules on the documentary letter of credit, model clauses (hardship, force, majeure, etc.), arbitral convention and other alternative ways to solve controversies and the own regulation of its arbitral court.

Other initiatives could still be mentioned: the Principles of Center for Transnational Law (Translex) in charge of Prof. Berger[805]; these principles have similar characteristics to the *Black letters* of the PICC (that is, with no comments by the editors); the Society of European Contractual Law (SECOLA)[806] ,whose proposal is to promote debates fort the development and knowledge of the European Contractual Law, or the Casebooks for a common Law of Europe (within the more academic perspective)[807].

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[802] RODAS, João Grandino; MONACO, Gustavo Ferraz de Campos. Op. cit., p. 298-306.
[803] Information and documentation available on: HCCH. Choice of Law in International Contracts. <http://www.hcch.net/index_en. php?act=text.display&tid=49>.
[804] Ratified by Brazil through Decree n. 3.166/1999. Cs.: BRAZIL. Decree n. 3.166 of 14 September 1999 which enacts the UNIDROIT Convention on the Return of Stolen or Illegally Exported Cultural Items, concluded in Rome, on 24 June 1995. Federal Official Journal of 15 September 1999 ,
[805] For full text: BERGER, Klaus Peter. The creeping codification of the new Lex mercatoria. 2. ed. New York: Wolters Kluwer, 2010, p. 371-406.
[806] SECOLA. Discussion and Information Platform: EC Contract Law. Available: <http://www.secola.org/>.
[807] MORENO RODRÍGUEZ, José Antonio. Temas de contratación..., p. 81-82.

It remains clear, thus, that this process is developed in a dynamic way, from the interaction among elements of public and private Law and in order to constitute a regulating regime of contracts which complement the existing legal regimes. The idea behind this movement, as pointed out by BOGGIANO when analyzing the Latin-American participation, would be the formation of a new common law based on the foreign precedents and specialized doctrine in such a way that the national courts would be able to take them into account, even if critically[808].

This process is described as "rough consensus and running code"[809] by CALLIES and ZUMBANSEN and take as a starting point the following premises: (i) there was increment on the number of creative normative agents regulating the scope, making it wider; (ii) these agents generate and disseminate new kinds of rules; (iii) it is necessary the search for a new way to explain this "new order" beyond the replacement of the normative hierarchy process[810]. With regards to contracts, apart from that, this model could be seen as a contemporaneous interpretation of the consuetudinary formation, somehow legitimated by the "global civil society" to substitute for the traditional requirements of the nineteenth century[811]. So, this model would be presented as a complement of "the existing ways of normative creation at the different regulating levels"[812], and as a "private way of social self-governance in a time when normative agents, national or transnational ones, public or private, compete on their authority and regulating competence"[813].

MISTELIS concludes, thus, that the marks of this "new" kind of harmonization process are: (i) replacement of the traditional law reasoning simply with basis on hard law; (ii) search for the standardization of trade laws (iii) tendency to adopt a private international Law based on the choice of applicable

[808] BOGGIANO, Antonio. The experience of Latin American states. In: UNIDROIT. International Uniform Law in Practice: Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law (Rome 7-10 September 1997). New York: Oceana, 1988, p. 47.

[809] "In a discourse theoretical view, rough consensus on the side of norm entrepreneurs stands for a deliberative procedure for creating norms that is geared to the scientific quest for truth. Running code refers to the recognition of such norms by consensus of all affected on the demand side and the implementation of a norm in a regulatory competition that is characterized by networks effects". (CALLIESS, Gralf-Peter. The making of transnational contract law. In: Indiana Journal of Global Legal studies, v. 14, n. 2, 2007, p. 480-481)

[810] CALLIESS, Gralf-Peter; ZUMBANSEN, Peer. Rough consensus and running code: a theory of transnational private law. Oxford: Hart, 2010, p. 274-275.

[811] CALLIESS, Gralf-Peter. Op. cit., p. 482.

[812] CALLIESS, Gralf-Peter; ZUMBANSEN, Peer.Op. cit., p. 277.

[813] CALLIESS, Gralf-Peter; ZUMBANSEN, Peer.Op. cit., p. 277.

law, on material rules and on the *lex mercatoria*; (iv) replacement of the procedural and formal perspective by the material one and (v) the aim of the process seems to facilitate the international trade[814].

For the concrete demonstration of the normative power of the contractual customs, some of these harmonizing tool will be of great interest, specially selected and described in the following items (CISG, PICC, and INCOTERMS).

It is important to keep in mind, however, that besides these unifying or harmonizing initiatives, the proposal of transnational[815] contractual regulation highlights the role of private autonomy as autonomy room of normative construction.

Thus, at the same time plural normative sources are admitted, it is also of major importance the role of the contractual freedom for the definition of the own ruling applicable to these transactions[816].

Besides that, several authors point out that the slowness of this process would generate an atmosphere of uncertainty, demanding a more practical approach to the problem[817], usually identified with the so-called *Lex mercatoria*, or with proper Law of international trade contracts, regardless any jurisdiction.

4.3. THE PRIVATIZATION OF THE SOURCES: LEX MERCATORIA AND PROPER LAW OF CONTRACT

[814] MISTELIS, Loukas. Op. cit.

[815] For the purpose of the present work we will understand "transnational Law" according to an explanation by GOODE, KRONKE e MCKENDRICK: "set of private law principles and rules, from whatever source, which governs international comercial transactions and is common to legal systems generally or to a significant number of legal systems". GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 04. They say, however, that the phrase is usually employed in three different meanings: as the description of the legal regime of the previously made transactions, an "etiquette" for the standardization of the contractual rules and to identify the sources of that regime. As for the lex mercatoria it would be "part of transnational comercial law which consists of the unwritten customs and usages of merchants, so far as these satisfy certain externally set criteria for validation". GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 06. BERGER also identifies this terminological confusion identifying the use of the phrase lex mercatoria as similarities of fact between the different domestic ordinations, uniform Law created by Conventions and uniform contractual dispositions, and from the material point of view, as a set made of rules and principles, set of customary rules and as an autonomous normative system.(BERGER, Klaus Peter. The creeping..., p. 59-63). Thus, even though the "transnational Law" did not confuse with the so-called lex mercatoria they are usually employed as synonyms by the doctrine in general.

[816] AMISSAH, Ralph. Op. cit.

[817] CARLINI, Gabriel A. El contrato de compraventa internacional de mercaderías. Buenos Aires: Ábaco, 2010, p. 39; MEDWIG, Michael T. The new law merchant: legal rhetoric and commercial reality. In: Law and Policy in International Business, v. 24, n. 2, 1993, p. 589-616.

Concerning the international trade law, it is common to recognize the custom as one of its sources of contractual obligations. Such understanding has been so disseminated, that nowadays there can be found grounds to justify the existence of an autonomous normative system and independent from State sovereignty. This autonomy would have been reached with basis on certain uniformity of normative sources, especially based on commercial practice, standard contractual clauses (model contract, corporative regulations, arbitral court precedents and attempts of harmonization of the International Trade Law (UNIDROIT Principles, UNICITRAL, ICSID or OMPI Regulations)[818].

The importance of this discussion lays, precisely, in the role performed by the custom as a source of contractual obligations within a normative logic not strictly related to the State paradigm. It is an opportunity to understand how a pluralist legal system, several obligational sources can live together with no need to be explained from a common origin.

On the other hand, the understanding to the mechanisms typical of the so-called *Lex mercatoria* helps understand the limits that the horizontal explanation of legal system faces. In other words, somehow the systematized unity has to be reached. It is still important to keep in mind the fact that the unification of a transnational trade Law equally runs the risk of extinction of the normative diversity[819].

These worries get very clear if GROSSI'S explanation is accepted. According to him, the *Lex mercatoria* would be a phenomenon full of lights and shadows, that is, at the same time holder of both positive values (since it established the pluralist notion of normativity) and negative ones (since it has the economical pretension to take over of Law which is an instrument of its goals[820]. OPPETIT is also very clear about the methodological importance of the understanding of the phenomenon, especially because in his opinion there is true revival over the discussion on the normative sources[821].

[818] CADENA AFANADOR, Walter René. Op. cit., p. 110-111.
[819] PROCACCIA, Uriel. The Case Against Lex Mercatoria. In: ZIEGEL, Jacob S. (Ed.). New Developments in International Commercial and Consumer Law: proceedings of the 8th Biennial Conference of the International Academy of Commercial and Consumer Law. Oxford: Hart, 1998, p. 89.
[820] GROSSI, Paolo. De la codificación..., p. 357.
[821] "Dès lors, l´inconfort d´une telle situation ne laisse le choix qu´entre deux attiudes: ou bien se résigner à un positivisme légaliste réducteur qui maintient une dogmatique classique des sources du droit au prix du rejet d´une partie du phénomène juridique déqualifié en tant que tel, ou bien accepter une perspective pluraliste au

The alleged space of freedom of normative creation, as it came up, has been named new *lex mercatoria* and may be understood in two ways: adjective or procedural and substantial or material[822], in other words, the role of its different normative sources and how they relate to each other and to the typically state sources can be questioned.

The controversy established leads to an analysis from different theoretical origins[823]: (a) from the strictly positivist point of view (binding obligation to the legislation and the mutual agreement among States); (b) pragmatic and (c) historical.

4.3.1 FROM THE OLD TO THE NEW LEX MERCATORIA

The alleged origins of this autonomous body of rules, the so-called old *Lex Mercatoria* would consist of commercial practices that would surpass the local customs, would end up being admitted by the national Courts, eminently basing themselves on the notion of good faith[824].

The medieval period, mainly due to its normative structure and plural legal system, would have allowed the development of a Law proper to the merchants[825] (proper law), characterized by its universalist and uniform nature, and partly, explained by the need to provide commercial interactions of a more adapted normative system[826].

This medieval Law would have Roman and mixed consuetudinary sources, since the Roman *jus gentium* that performed the role to assure protection to everyone who traded with a Roman citizen. Its main characteristics would be simplicity, protection to good-faith and consent regardless the fulfillment of the formalities of the *jus civile*[827] and based on the British equity[828]. However, some

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prix de l´abandon d´une théorie liée à une certain conception de l´État et du droit". OPPETIT, Bruno. Droit et modernité. Paris: Puf, 1998, p. 58.

[822] NOTTAGE, Luke. Changing Contract Lenses: unexpected supervening events in English, New Zealand, U.S and Japanese, and International Sales Law and Practice. In: Indiana Journal Of Global Legal Studies. v. 14, n. 2, Indiana University School of Law. Summer 2007, p. 386.

[823] CHEN, Jim C. Code, Custom..., p. 100.

[824] DRAHOS, Peter; BRAITHWAITE, John. Op. cit., p. 110; ALTERINI, Atilio Anibal. Contratos civiles, comerciales, de consumo: teoría general. Buenos Aires: Abeledo-Perrot, 2005, p. 117.

[825] CADENA AFANADOR, Walter René. Op. cit., p. 105; BENYEKHLEF, Karim. Op. cit., p. 500.

[826] FERNÁNDEZ ROZAS, José Carlos. Ius mercatorum: autorregulación y unificación Del Derecho de los negocios transnacionales. Madrid: Colegios Notariales de España, 2004, p. 29.

[827] CAETANO, Marcello. Op. cit., p. 82-83.

[828] BERMAN, Harold J.; KAUFMAN, Colin. The law of international commercial transactions (Lex mercatoria). In: Harvard International Law Journal, v. 19, n. 1, 1978, p. 225.

authors claim that the phenomenon lays in even older roots, confusing with the human aurora[829], while other deny the existence of evidence of such origin[830].

On the other hand, the formations of an European "trade" Law usually dated in the second half of the twelfth century with the flourishing of the trade corporations, the trade and agricultural revolution[831], the development of its internal discipline from consuetudinary origin[832], and its own[833] and less formal[834] jurisdiction. It's uniformity and internationalization is outstanding (partly because of the diffusion of usage by caravans and markets[835], and of the crusades[836]), in addition, as it did not know political mediation, it would exercise the Law by the unity of the Market[837]. The wide normative freedom, that is, autonomy in relation to a State or sovereign, would be one of its main characteristics[838].

The conduct codes of the different trade centers would also perform a strong reinforcement role in this set of rules, such as the maritime rules originated from Amalfi, Oleron, Barcelona[839] and Wisby[840].

This Law would be born corporative, objective, universal, based on the reciprocation of right, with participative jurisdiction[841] and exclusive to the traders, but over time, goes beyond its initial narrow boundaries (first of all to

[829] "And then it was, and proved to be true, (...) so that it plainly appeared, that the Law Merchant, may well be as ancient as any humane Law, and more ancient than any written Law. The very moral Law itself, as written by Moses, was long after the customary Law of Merchants, which hath so continued and been daily augmented successively upon new occasions, and was not altogether made in the first foundation, as the Laws whereby the Commonweals of Israel (whose Laws were uniformly made by Moses from God) or those of Crete, Cybaris, Sparta, and Carthage by Minos Charondas, Lycurgus, and Thalcas". (sic) (MALYNES, Gerard. Consuetudo, vel, Lex mercatoria or the ancient Law-Merchant. 3. ed. London: F. Redmayne, 1685, p. 02).

[830] DE LY, Filip. Op. cit., p. 20.

[831] BERMAN, Harold J. Droit et revolution. Aix-en-Provence: Librairie de l´Université, 2002, p. 349-350.

[832] FERNÁNDEZ ROZAS, José Carlos; ARENAS GARCÍA, Rafael; MIGUEL ASENSIO, Pedro Alberto. Derecho de los negocios internacionales. 2. ed. Madrid: Iustel, 2009, p. 37; GALGANO, Francesco. Lex mercatoria..., p. 37.

[833] ASCARELLI, Tullio. Origem do Direito comercial. Tradução de Fábio Konder Comparato. In: Revista de Direito Mercantil, n. 103. São Paulo: RT, jul./set. 1996, p. 90; GONDRA ROMERO, Jose Maria. La moderna "lex mercatoria" y la unificación del derecho del comercio internacional. In: Revista de Derecho Mercantil, n. 127, jan./mar. 1973, p. 19-20; GALGANO, Francesco. Lex mercatoria...., p. 37.

[834] TRAKMAN, Leon E. From the medieval law merchant to e-merchant law. In: University of Toronto Law Journal, v. 53, n. 3, 2003, p. 274; GALGANO, Francesco. Lex mercatoria..., p. 41.

[835] ASCARELLI, Tullio. Op. cit., p. 91-92; CREMADES, Bernardo M.; PLEHN, Steven L. The new lex mercatoria and the harmonization of the laws of International commercial transactions. In: Boston University International Law Review, v. 3, n. 1, 1984, p. 319; BERMAN, Harold J. Op. cit., p. 356.

[836] Ibidem, p. 351-352; GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 13.

[837] GALGANO, Francesco. La globalizzazione..., p. 43.

[838] According to BENYEKHLEF such freedom was due to the fact that traders do not formally belong to the medieval social structure characterized by its distinction in three different orders. BENYEKHLEF, Karim. Op. cit., p. 462.

[839] Described by an editor as the "consuetudinary code of maritime court precedents". DE MONPALAU, Antonio de Capmany y. Codigo de las costumbres maritimas de Barcelona, hasta aqui vulgarmente llamado libro del Consulado. Madrid: Imprenta de Don Antonio de Sancha, 1791, p. 06.

[840] DRAHOS, Peter; BRAITHWAITE, John. Op. cit., p. 110; BERMAN, Harold J. Op. cit., p. 356.

[841] Ibidem, p. 357-364. Objectivity and universality are also mentioned by BENYEKHLEF, Karim. Op. cit., p. 502.

embrace those who traded with merchants to later include those who acted as traders)[842]. In turn, it would create innovations such as the legal integration of the Trade Law (regardless territorial boundaries), use of it instruments of circulation of credit and the diffusion of new social types (e.g., the *comenda*)[843]. So, CREMADES mentions the similarity between the contemporaneous commercial environment and that medieval one which would encourage the resumption of *the lex mercatoria*[844].

Even if it were possible to find interesting parallels between the "old *lex mercatoria*" and the new normative phenomenon, their differences are remarkable. On the one hand, both movements would be formed by usage, commercial usage and uniform spontaneous Law, and would be employed to overcome difficulties driving from the strict application of the technique of conflict of laws. On the other hand, the more contemporaneous movement would have its own sources in addition to a method of specific solution of controversies, outside the international and State system[845]. Moreover, contrary to the medieval *Lex mercatoria*, the contemporaneous movement would not be completely spontaneous[846] or uninterested[847], neither would the custom be recognized and judged by its producers[848].

The same way, the occasional "romanticism"[849] should be left aside, since the medieval normative set was not organized to be universally applied, besides being eminently concentrated on maritime customs[850]. Furthermore, it could

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[842] FERNÁNDEZ ROZAS, José Carlos. Op. cit., p. 32-33.
[843] BERMAN, Harold J. Op. cit., p. 364-371; GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan, p.15.
[844] CREMADES, Bernardo M.; PLEHN, Steven L. Op. cit., p. 347.
[845] FERNÁNDEZ ROZAS, José Carlos. Op. cit., p. 79.
[846] PINHEIRO, Luís de Lima. O Direito autônomo do comércio internacional em transição: a adolescência de uma nova Lex mercatoria. In: Estudos de Direito Civil, Direito Comercial e Direito Comercial Internacional. Coimbra: Almedina, 2006, p. 395.
[847] MOSSET ITURRASPE points out that it is not a spontaneous phenomenon, but strongly characterized by the market interests: "La línea evolutiva passa hoy por la creación de nuevos Estados, denominados comunidades económicas, no más políticas o sociales. Sus fines son básicamente económicos; luego llegarán, si se dan las circunstancias, los fines sociales o ambientales, como acontece en la Unión Europea con el Tratado de Maastricht. Se trata de ' externalidades' que se atenderán cuando se hayan cumplido las metas del mercado". MOSSET ITURRASPE, Jorge. Cómo contratar en una economía de mercado. Buenos Aires: Rubinzal-Culzoni, 2005, p. 115-116.
[848] GÉLINAS, Fabien. Codes, silence et harmonie – réflexions sur les principes généraux ET les usages du commerce dans le droit transnational des contrats. In : Les Cahiers de Droit, v. 46, n. 4, 2005, p. 950.
[849] Expression employed by: TRAKMAN, Leon E. Op. cit., p. 279,but meaning given by FOSTER, Nicholas H. D. Foundation myth as legal formant: the medieval law merchant and the new lex mercatoria. Forum historiae iuris, 2005. Available: <http://www.forhistiur.de/zitat/0503foster.htm>.
[850] GOODE, Roy. Usage and its reception in transnational commercial Law. In: International and Comparative Law Quarterly, v. 46, jan. 1997, p. 05.

prevail over the Roman Law, but not ever the canonic Law, in such a way that the Christian traders would be subjected to the prohibition of usury, for example[851].

In addition to all these, there is also the fact that the historical moments are distinct. While the medieval *lex mercatoria* is introduced in a moment of fragmentation of the Roman empire and its replacement, at least in eastern Europe, by a system of feudal production; the contemporaneous phenomenon is inserted in a moment of internationalization of the economy, decodification of the Trade Law and change of attitude of the State before the economic activity[852].

At last, it is relevant to mention VOCCKART and MANGELS's opinion that the importance of the medieval "commercial institutions" should not be overvalued, mainly because the trade corporations had not been devised for normative promotions, but for the protection of interests of its members; that is because the exchanges were, until the fourteenth century, eminently simultaneous and due to the diverse levels of influence that the traders would perform in their respective towns. On the other hand, the authors also point out that the importance of trade should not be despised either, as in some places the merchants would perform a major social role, reinforced by the local authorities in the protection of their interests. Anyway, even if there is some kind of similarity between the two phenomena, any direct relation to each other would be "a problem"[853].

At a second moment, in the countries of the Civil Law, the decay of the trade corporations and the strengthening of the national States, the prestige of State regulation and the prevalence of the national Trade Law[854] would be relevant, consolidating part of its constructions[855]. The illuminist logic separates Economy from Law, affirming the principle of sovereignty in the exercise normative power. According to Galgano, from this moment on the *"lex*

[851] GALGANO, Francesco. La globalizzazione..., p. 44.
[852] FERNÁNDEZ ROZAS, José Carlos; ARENAS GARCÍA, Rafael; MIGUEL ASENSIO, Pedro Alberto. Op. cit., p. 38-39.
[853] VOLCKART, Oliver; MANGELS, Antje. Are the roots of the modern 'lex mercatoria' really medieval?. In: Southern Economic Journal, v. 65, n. 3, 1999, p. 427-450.
[854] HUCK, Hermes Marcelo. Lex mercatoria: horizonte e fronteiras do Comércio Internacional. In: Revista da Faculdade de Direito da Universidade de São Paulo, 1992, p. 216; FERNÁNDEZ ROZAS, José Carlos. Op. cit., p. 37-39.
[855] TRAKMAN, Leon E. Op. cit., p. 279.

mercatoria is nationalized, replacing the particularism of a class by another: the political particularism[856].

The nomenclature itself also has relationship with the Anglo-Saxon *Law Merchant*, a customary construction characterized by the flexibility used to solve conflicts involving merchants, through specialized courts[857] and that would have existed between the Middle Age and the eighteenth century[858] regulating international trade[859]. The own term *"Lex Mercatoria"* first appears in the compilation of English customs named as *"Felta"* (*circa* 1290)[860] and later, in the work by MALYNES[861]. In CORDES' point of view, the meaning in which the term *"lex mercatoria"* used to be employed is very different from the current one, as it was connected to procedural privileges, and not to a normative set[862].

As years went by, however, the common Law went through a process of nationalization and even codification which deconstituted the transnational nature of the Law[863]. The major feature of this process is the decision in the instance Pilans *versus* Van Mierop (1756), when Lord Mansfield stated that the *law Merchant* was a subject of Law, not of facts to be proved by the parties, and that such rules should be applied to everyone, not only to the merchants[864]. At the same time this decision granted the English Law with a mechanism strongly adapted to the needs of international trade, it gradually contributed to the crystallization of the custom by means of the precedent[865] and the loss of its international characters[866].

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[856] GALGANO, Francesco. La globalizzazione..., p. 47.
[857] WINDBICHLER, C. Lex mercatoria. In: SMELSER, Neil J.; BALTES, Paul B. International Encyclopedia of the Social & Behavioral Sciences. Oxford: Elselvier, 2001, p. 8741.
[858] DALHUISEN, J. H. Dalhuisen on transnational and comparative commercial, financial and trade law. 3. ed. Oxford: Hart, 2007, p. 217.
[859] MAZZACANO, Peter. The lex mercatoria as autonomous law. In: Comparative research in Law & Political Economy, v. 4, n. 6, 2008, 10.
[860] DE LY, Filip. Op. cit., p. 207.
[861] MALYNES, Gerard. Op. cit., passim.
[862] CORDES, Albrecht. The search for a medieval Lex mercatoria. Available: <http://ouclf.iuscomp.org/articles/cordes.shtml>.
[863] Examples of this new way of thinking may be observed in the work by: BEAWES, Wyndham. Lex mercatoria or a complete code of commercial Law. 6. ed. London: [s.n.],1813, v. 2. E SMITH, John William. A compendium of mercantile law. London: Saunders and Benning, 1834.
[864] BERMAN, Harold J.; KAUFMAN, Colin. Op. cit., p. 226; TRAKMAN, Leon E. Op. cit., p. 280-281.
[865] BERMAN, Harold J.; KAUFMAN, Colin. Op. cit., p. 226-227.
[866] BAINBRIDGE, Stephen. Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions. In: Virginia Journal of International Law, v. 24, 1984, p. 627; GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 18.

The setback of this legal system, then, would take place with the formation and centralization of the national States[867]. GALGANO points out that there is a true paradox insofar as the international trade increases, the Law shrinks inside the States borders[868].

The term *lex mercatoria* is currently and widely employed to define a set of rules to discipline the international trade, based on professional rules, customs and arbitral sentences, and that seem to escape from the State influence. Perhaps, according to TRAKMAN, this is precisely the characteristic that saved from the medieval phenomenon, a certain "faith" that the business activity must be exercised according to the pragmatic principles of the Market, and not only closed inside the State jurisdiction[869]. In this sense, the term first appeared in the famous article by GOLDMAN[870] dating back to 1964.

Nonetheless, it acceptance is not unanimous. Its medieval existence, for example, is recognized as doubtful by MICHAELS[871]. It is about the founder myth[872] of the *lex mercatoria*[873], given that the reference to ancient times is more used to grant "*pedigree*"[874] than to explain historical reality[875].

Apparently, its appearance originated from the abstention of the State authorities, to beyond the definition of rules to solve conflicts of laws, the exercise of normatization of the international trade relations[876]. GALGANO adds the globalization of markets and the appearance of the post-industrial entities to the list, which would create the need for a civil Law of the global society[877], in addition to the international diffusion of the commercial contractual technique

[867] PETIT, Carlos. Del usus mercatorum al uso de comercio. Notas y textos sobre La costumbre mercantil. In: Revista da Faculdade de Direito da UFPR, n. 48, 2008, p. 07-38.
[868] GALGANO, Francesco. Los caracteres de la juridicidad en la era de la globalización. In: SILVA, Jorge Alberto. (Coord.). Estudios sobre la lex mercatoria. Una realidad internacional. México: UNAM, 2006, p. 124.
[869] TRAKMAN, Leon E. Op. cit., p. 301.
[870] GOLDMAN, Berthold. Frontières du Droit et Lex mercatoria. In : Archives de Philosophie du Droit, v. 9, n. 9, 1964, p. 177-192.
[871] MICHAELS, Ralf. The true Lex mercatoria: Law Beyond State. In: Indiana Journal of Global Legal Studies, v. 14, n. 2, 2007, p. 453.
[872] HIGHET, Keith. The enigma of lex mercatoria. In: Tulane Law review, v. 65, 1989, p. 613- 628.
[873] FOSTER, Nicholas H. D. Op. cit.
[874] HATZIMIHAIL, Nikitas E. The many lives – and faces – of Lex mercatoria: history as genealogy in international business law. In: Law and contemporary problems, v. 71, 2008, p. 173.
[875] CORDES, Albrecht. Op. cit., passim; FORTUNATI, Maura. La lex mercatoria nella tradizione e nella recente ricostruzione storico-giuridica. In: Sociologia del diritto, n. 2/3, 2005, p. 29- 41; SACHS, Stephen E. From St. Ives to cyberspace: the modern distortion of medieval. In: Law merchant. American University International Law Review, v. 21, n. 5, 2006, p. 685-812.
[876] KAHN, Philippe. La lex mercatoria et son destin. In: VOGEL, Louis (Dir.). L´actualité de La pensée de Berthold Goldman: droit international et européen. Paris: LGDJ, 2004, p. 26.
[877] GALGANO, Francesco. Los caracteres..., p. 127-130.

(e.g., leasing, factoring, etc.), the adoption of trade practices reiterated in certain economy sectors and the role of international arbitral court precedents[878].

Thus, the more contemporaneous understanding started to refer to the new *Lex mercatoria*, binding it to the notion of model contracts, general principles of trade and arbitral court precedent. As for MARQUES, the reformulation of the sources fulfills the imperatives of globalization in terms of immediate adequacy to the present time[879].

This way, it would be bound to the creation of room of freedom for transnational performance, therefore regardless the national States, with "aspiration after the recognition of eligibility and legally of a non-State Law"[880], and in a certain way, reflects the crisis of the model of legal regulation of the trade[881]. This kind of criticism is normally associated to the identification of the performance of the so-called "transnational companies"[882].

According to GOODE, a necessary conclusion would be to locate the *lex mercatoria* as part of the so-called transnational trade law[883], whose rules would not be amended would have a customary nature[884]. Besides that, these rules would be neutralized from strictly national or religious influences, e.g., in such a way as to admit an Islamic financial Law which does not keep immediate relation to the religious Muslim tradition[885].

There is a tendency to identify the *lex mercatoria* as the Law that specifically rules the international trade relation, that is, "every legal material or

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[878] GALGANO, Francesco. La globalizzazione..., p. 58-59.
[879] MARQUES, Mário Reis. A hipertrofia do presente no direito da era da globalização. In: Revista Lusófona de Humanidades e Tecnologia, n. 12, 2008, p. 130.
[880] FIORATI, Jete Jane. A lex mercatoria como ordenamento jurídico autônomo e os Estados em desenvolvimento. In: Revista de Informação Legislativa, n. 164, out./dez. 2004, p. 224.
[881] FERNÁNDEZ ROZAS, José Carlos. Op. cit., p. 41.
[882] "The transnational company, thus, gets closer to the legal concept of group of entities, but with the addition of that it is a group formed by entities bases in different countries, executed under several laws, which one with certain autonomy, acting by themselves, but for common benefit". FIORATI, Jete Jane. A Lex mercatoria: entre o direito e os negócios internacionais. In: Revista Estudos Jurídicos UNESP, n. 9. Franca: UNESP, 2004, p. 224.
[883] Defined by the author as: "Law which is not particular to or the product of any one legal system but represents a convergence of rules drawn from several legal systems or even, in the view of its more expansive exponents, a collection of rules which are entirely anational and have their force by virtue of international usage and its observance by the merchant community". (GOODE, Roy. Usage and its reception..., p. 02).
[884] GOODE, Roy. Usage and its reception..., p. 03. Also in this last sense: LEESON, Peter T. One More Time with Feeling: The Law Merchant, Arbitration, and International Trade. In: Indiana Journal of Economics and business, v. 29, 2007, p. 29-34.
[885] BALZ, Kilian. Islamic Law as Governing Law under the Rome Convention. Universalist Lex Mercatoria v. Regional Unification of Law. In: Uniform Law review, 2001-1, p. 47.

in the legal system that regulates the international trade is "*Nueva lex mercatoria*"[886].

The terminological issue is still debated. The international contracts rarely mention it, even though its reference is common in the treaties and regulations on arbitration[887]. The nomenclature choice, however, does not seem to be unreasonable. Somehow, when reaching the medieval roots, the institute intended eligibility[888], specially compromising the tradition to justify the speech. FOSTER, for instance, associates this way of justification as to a founder myth, that is, with no necessary relation to the historical image[889].

Anyway, however, the proposals are clearly distinct[890], starting from the international character. GONDRA ROMERO stresses that the medieval "*Lex mercatoria*" depended on the local sovereign, despite its universal character[891].

4.3.2. Lex mercatoria: an autonomous legal order?

Another debate established was if its content could be considered legal, and if so, if it could be considered a new legal order, and if this would also be possible, if it would be autonomous in relation to the State Law.

Two positionings were highlighted: (i) those bound to the conception that any legal order necessarily emanates from a legally established authority, assisted with sovereignty and power to impose their decisions[892], and (ii) those who saw the possibility of autonomous normative creation of the concept of sovereignty and State authority.

Within the traditional legal doctrine, this understanding would be summarized in the tendencies already described as monists and pluralists and that agreed on the role of the State before the international normative production.

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[886] CALVO CARAVACA, Alfonso-Luis. Los contratos internacionales y el mito de la nueva lex mercatoria. In: Cadernos da Escola de Direito e Relações Internacionais da UniBrasil, n. 12, 2010, p. 07.
[887] WINDBICHLER, C. Op. cit., p. 8741-8742.
[888] GONDRA ROMERO, Jose Maria. Op. cit., p. 17.
[889] FOSTER, Nicholas H. D. Op. cit.
[890] Being from the territorial, social coverage and normative content perspective. FERRARESE, Maria Rosaria. La lex mercatoria tra storia e attualità: da Diritto dei mercanti a Lex per tutti? In: Sociologia Del Diritto, n. 2/3, 2005, p. 157-178.
[891] GONDRA ROMERO, Jose Maria. Op. cit., p. 19-20.
[892] For example: SCHULTZ, Thomas. The concept of law in transnational arbitral legal orders and some of its consequences. In: Journal of International Dispute Settlement, v. 2, n. 1, 2011, p. 59–85.

The news in the defenders' speech of the new *Lex mercatoria* is not only in the conception that there would be an international legal order to influence the normative power of the State, but that this legal order could be equally autonomous and would not depend on its consent to exist, nor locate itself the traditional levels of dialogues of sovereignty shared among the other States.

GOLDMAN, the pioneer in the discussion, explained that the uncertainty in relation to the rules of conflict or to their legal applications would be enough to explain the flight of the contracting parties with regards to State Law. However, throughout the nineteenth century several initiatives of standardization of trade conditions (model contracts) were successful to provide an interpretative general and applicable picture to those relations. In the same way, the rules on loan transactions, transportation and statutes of international societies[893] had been developed.

Still according to GOLDMAN, when urged to solve occasional conflicts derived from international trade, the arbitral Courts would resort to the usual rules related to that activity, to the detriment of any national regulation, usually insufficient to the solution of the dispute[894].

In short, as for FELDSTEIN, the inadequacy of the national Laws, the arbitral performance as an independent jurisdiction, the procedures of *amiable compositeur* and the formation of arbitral legal precedents would end up favoring the formation of the *Lex mercatoria*[895].

GOLDMAN also rebuts the contractual nature of the *Lex mercatoria*, that is, he denies that its basis is the individual contractual freedom, but the submission to "general and abstract" rules[896]. Even though GOLDMAN, at a second moment, recognized that the lex mercatoria would not be a complete legal system[897], he understood that its rules would have a legal character, because they had a general character, would derive from an authority (even if

[893] GOLDMAN, Berthold. Op. cit., p. 177-183. 899 Ibidem, p. 183-184.
[894] Ibidem, p. 183-184.
[895] FELDSTEIN DE CÁRDENAS, Sara. Contratos internacionales: contratos celebrados por ordenador; autonomía de la voluntad; lex mercatoria. Buenos Aires: Abeledo-Perrot, 1995, p. 166.
[896] GOLDMAN, Berthold. Op. cit., p. 180-181.
[897] GOLDMAN, Berthold. Nouvelles Réflexions sur la Lex Mercatoria. In: Festschrift Pierre Lalive. Frankfurt: 1993, p. 241-255.

non State one) and would be provided with sanction (even if occasionally supplied by the State)[898].

LAGARDE, in turn, had a more critical opinion in relation to GOLDMAN's thesis, mainly if we take into consideration that not every rule identified by him as *lex mercatoria* would have conditions to be considered a non-State legal order, but a simple "international contractual practice"[899]. In other words, it would be formed by an "inorganic" and "fragmented"[900] whole that did not have systematic conditions.

Moreover, according to LAGARDE, to explain the *Lex mercatoria* by the set of rules that form it would make any consequence of the borrowing of the general principles of international Law depend on it[901]. GAILLARD seems to share same ideas; in his opinion the general principles of international trade Law should be understood as rules not bound to a sole legal system, but which would infer from the comparison of the different national Laws or directly from its sources[902]. This way, therefore, they would be distinct from the international trade usages which would be connected to the practices usually followed by a certain commercial field or, more generically, not tidied to other normative sources[903].

KASSIS also follows this explanation leaving it clear that the so-called *lex mercatoria* would not have nature of consuetudinary rule, and so, would not have binding application, and that there would exist, in terms of international trade, only the conventional usages depending on the convention. Thus, the author pointed out that the idea of an anational or transnational Law, could not be accepted, nor could the *lex mercatoria* understood as so[904].

Neither does LAGARDE agree with the statement of the generality which would assume the existence of an autonomous legal order, but "islands of

[898] GOLDMAN, Berthold. Frontières du Droit..., p. 188-192.
[899] LAGARDE, Paul. Approche critique de la Lex mercatoria. In: FOUCHARD, Phillipe et al. (Dir.). Le droit des relations économiques internationales: études offertes à Berthold Goldman. Paris: Librairies Techniques, 1982, p. 130.
[900] GONDRA ROMERO, Jose Maria. Op. cit., p. 23.
[901] LAGARDE, Paul. Op. cit., p. 133
[902] GAILLARD, Emmanuel. La distinction des principles généraux du Droit et des usages du commerce international. In: Etudes offertes à Pierre Bellet. Paris: Litec, 1991, p. 204.
[903] Ibidem, p. 206-207.
[904] KASSIS, Antoine. Théorie générale..., passim. In special the conclusions on pages 577-578.

lex mercatoria", given the punctual verification of submission to it[905]. Still, when proposing to explain the international contract, he openly defends that contractual freedom is the necessary condition (although not enough) to be governed by the *Lex mercatoria*. As for arbitration, for both the clause and the possibility of trial by other rules of Law and general principles of trade, the consensus is also essential[906]. In LAGARDE's opinion, the argument of defense of the *Lex mercatoria* would drive away the possibility of its co-existence with the State legal order.

The idea of jurisdictional autonomy itself could be jeopardized if taken into account the need of State support to execute foreigner arbitral reports[907]. In other words, there would be no jurisdictional exclusivity, as the competence of national Law could not be completely subtracted[908].

This positioning was closer to that one defended by SCHMITTHOFF, in which the *Lex mercatoria* would be conditioned to the limits of public policy and would be based on direct or indirect recognition that somehow the State would tolerate its existence[909].

According LÓPEZ ROBRÍGUEZ, this division between the autonomist and positivist chains would not adequately reflect the phenomenon. That is why on the one hand the *Lex mercatoria* could not exist independent from the State, on the other hand some of its sources exist regardless State approval[910]. Coherent with thought, MOLINEAUX, from arbitral reports in the civil construction sector, claims that the *lex mercatoria* would be a complement to the Law applicable to the contract[911].

Following the same principle, GOODE says that "ningún contrato puede referirse a su propia validez y ningún sistema permite una libertad absoluta a las

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[905] LAGARDE, Paul. Op. cit., p. 140.
[906] Ibidem, p. 140-145.
[907] GONDRA ROMERO, Jose Maria. Op. cit., p. 24.
[908] BRITO, Maria Helena. Direito do Comércio Internacional. Coimbra: Almedina, 2004, p. 123.
[909] SCHMITTHOFF, Clive M. Les nouvelles sources du Droit comercial international. UNESCO. In: Revue Internationale des sciences sociales, v. 15, n. 2, 1963, p. 272.
[910] LÓPEZ RODRÍGUEZ, Ana M. Lex mercatoria and harmonization of contract law in the EU. Copenhagen: DJØF Publishing, 2003, p. 92.
[911] MOLINEAUX, Charles. Moving Toward a Lex Mercatoria - A Lex Constructionis, J. Int'l Arb., v. 14, n. 1, 1997, p. 56. Available on: <http://www.trans-lex.org/126700>.

partes contratantes cuyo acuerdo se ve en todas las partes limitado por reglas de orden públicas y las normas imperativas."[912]

The more contemporaneous doctrine still creates a fourth theoretical variable: the possibility of two orders living together depending on the jurisdiction[913]. Thus, the internal legal order would prevail if the State jurisdiction is called to report on the conflict. On the other hand, the *Lex mercatoria* would prevail if the arbitral jurisdiction were invoked[914], keeping between themselves a regime of sharing competence, reciprocity and co-operation[915]. Anyway it is important to point out that the *lex mercatoria* would not be confused with the existence of an occasional arbitral legal system[916].

It can really be identified, in a certain way, an attempt to codify the phenomenon with the aim to assure the generalized application of a "Law" adequate to the international trade relations, decreasing the costs with research and negotiations, and avoiding the dangers of asymmetry of information[917]. Even if it could be considered paradoxical, the codification, according to ROSEN, would not be inconsistent with the adoption of a solution independent from the rules of conflict of laws (private international Law, based on national Law) and from private autonomy (not always recognized), even though this work was not even spontaneous (as expected in a Customary Law), or anonymous (but created by jurists)[918].

As far as PINHEIRO is concerned, it would be the adult phase of the *Lex mercatoria*, not yet reached, that would stand as a transnational Law capable to

[912] GOODE, Roy. Regla, práctica y pragmatismo en el derecho comercial transnacional. In: BASEDOW, Jürgen; FERNÁNDEZ ARROYO, Diego P.; MORENO RODRÍGUEZ, José A. (Coords.). Cómo se codifica hoy el derecho comercial internacional. Asunción: La Ley/CEDEP, 2010, p. 87.

[913] FERNÁNDEZ ROZAS, José Carlos. Lex mercatoria y autonomía conflictual en La contratación internacional. In: Anuario Español de Derecho Internacional Privado. Madrid: Iprolex, 2004, t. 4, p. 40.

[914] PINHEIRO, Luis de Lima. Direito Internacional Privado: introdução e direito de conflitos. Parte geral. 2. ed. Coimbra: Almedina, 2008, v. 1, p. 118.

[915] OSMAN, Filali. Les príncipes généraux de la lex mercatoria: contribution à l'étude d'um ordre juridique anational. Paris: LGDJ, 1992, p. 456.

[916] According GAILLARD while the discussion on the existence of an arbitral Law would be presented insofar as the arbitral rules would be generically accepted by the international community, the Lex mercatoria could refer to an occasional Law applicable to the issue of the background of the dispute subjected to the arbitral procedure. GAILLARD, Emmanuel. Teoría jurídica del arbitraje internacional. Asunción: La Ley/CEDEP, 2010, p. 44-46.

[917] ROSEN, Mark D. The empirical and theoretical underpinnings of the Law Merchant: do codification and private international Law leave room for a new Law Merchant? In: Chicago Journal of International Law, v. 5, n. 1, Summer 2004, p. 86-87.

[918] Ibidem, p. 89.

regulate the trade international contracts[919], while it still depended on the recognition by the State, even if indirectly, it would not form an autonomous[920] ordination[921]. This opinion is shared by OPPETIT, GOODE, DE LY[922], and others[923] who understood that the *lex mercatoria* could not be considered a complete legal system, but in construction[924], as the national legislation and international conventions would trace its scope, would lack own rules, would not be the basis of validity of an arbitral report, it would not have interpretative and regulating characteristics and it would not be self-sufficient[925]. This way, even if it can be admitted certain autonomy practice (since it is effective and normative), and it may be elected as a set of rules applicable to the contract[926], the *lex mercatoria* would not be absolute[927], since its force and effectiveness[928] would depend on the State. Its relationship would be complementary[929].

Some authors, however, still defend its autonomy. DALHUISEN, for example, understands it as a complete normative system, supplemented by the State Law, and also mandatory in some instances[930], prevailing, this way, over contractual dispositions. In short, according to the author, this system would be formed of essential principles with a *ius cogens* character[931]. As for PELLET, he compares it, legally speaking, to the public international Law[932], claiming that its

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[919] PINHEIRO, Luís de Lima. Direito Internacional Privado: introdução e direito de conflitos. Parte Geral. 2. ed. Coimbra: Almedina, 2008. v. 1, p. 127.
[920] OPPETIT, Bruno. Op. cit., p. 61.
[921] PINHEIRO, Luís de Lima. O Direito autônomo..., p. 427.
[922] Indeed there would be confusion between the autonomous lex mercatoria and the sources of international trade Law. DE LY, Filip. Op. cit., p. 286-288.
[923] GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 35; SARACHO CORNET, Teresita; DREYZIN DE KLOR, Adriana. Derecho internacional privado: uma visión actualizada de las fuentes. Córdoba: Advocatus, 2003, p. 58; CALVO CARAVACA, Alfonso-Luis. Op. cit., p. 09-11; HOWARTH, Richard J. Lex Mercatoria: can general principles of law govern international commercial contracts? In: Canterbury Law Review, v. 10, 2004, p. 75-76.
[924] Even though he understands that his choice as applicable Law may be effective, especially because its normativity would be assured (GOODE, Roy. Usage and its reception..., p. 33).
[925] FELDSTEIN DE CÁRDENAS, Sara. Op. cit., p. 209-213.
[926] GOODE, Roy. Usage and its reception..., p. 93-94.
[927] Ibidem, p. 89.
[928] PINHEIRO, Luís de Lima. Direito Comercial Internacional. Coimbra: Almedina, 2005, p. 43.
[929] GOLDSTAJN, Aleksandar. Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention. In: SARCEVIC, Petar; VOLKEN, Paul. (Eds.). International Sale of Goods: Dubrovnik Lectures. New York: Oceana, 1986, p. 103.
[930] DALHUISEN, J. H. Custom and its revival in transnational private la. In: Duke Journal of comparative & international Law, v. 18, 2008, p. 357. For more details on hierarchy of sources see: DALHUISEN, J. H. Dalhuisen on transnational..., p. 213-216. In the same sense to establish hierarchy of sources see: N GOLDSTAJN, Aleksandar. Op. cit., p. 99.
[931] DALHUISEN, J. H. Dalhuisen on transnational..., p. 218-219.
[932] Even though, apparently, MOLINEAUX does not share the extent of the concept, he argues that denying the existence of the lex mercatoria would be to deny the existence of the international Law itself. Besides that,

sources would be enough to give it completeness and autonomy in order to be constituted in a "competitive" system to the State one[933]. At last, it should be pointed out BERGER's opinion, which supports the existence of an autonomous and spontaneous trade legal system, of transnational character, which would withdraw its "impetus" of the public international Law, the uniform trade Law and the domestic Law, without sharing the legal characteristics with them[934].

Intermediate positions are those which (i) understand that even though it cannot be seen as an autonomous legal system from the positivist point of view, it would be capable of being applied, by means of the arbitral via, as a set of "rules of Law" and, so, ruling the contracts subjected to it[935]; (ii) understand that the legal regime derived from the *lex mercatoria* would be hybrid, not existing that dichotomy between State and non-State sources, being the reason why the control and complement of its content would be necessary[936] (iii) and, denying the systematic character of the *lex mercatoria* without going too deeply into the issue of constituting or not as a method of normative formulation, in the debate on the *lex mercatoria* its methodological importance ends up being recognized as "transnational (private) law laboratory"[937]. Its importance would reside in the adoption of the compared method which would have had "a production relationship with the national contractual laws marked by a continuous evolution of contract legislation and adjudication"[938] to understand the phenomenon of national Law[939].

4.3.3. The repercussion of the debate in the Brazilian doctrine.

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just as in the PIL (Public International Law) the treaties are the ones which provide for Courts and how to perform their decisions, there would be the New York Convention to do the same for the lex mercatoria. MOLINEAUX, Charles. Op. cit., p. 66.

933 PELLET, Alain. La Lex Mercatoria, "Tiers Ordre Juridique"? In: LEBEN, Charles; LOQUIN, Eric; SALEM, Mahmoud. (Ed.). Remarques Ingenues d'un Internationaliste de Droit Public. Souveraineté étatique et marchés internationaux à la fin du 20ème siècle – Mélanges en l'honneur de Philippe Kahn. Paris: Litec, 2000, p. 73-74.

934 BERGER, Klaus Peter. The creeping..., p. 146.

935 GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 35; MANIRUZZAMAN, Abul F. M. The lex mercatoria and international contracts: a challenge for international commercial arbitration. In: American Uniform and International Law Review, v. 14, 1999, p. 732-734.

936 MICHAELS, Ralf. The true Lex..., p. 467-468.

937 CALLIESS, Gralf-Peter; ZUMBANSEN, Peer. Op. cit., p. 33.

938 CALLIESS, Gralf-Peter; ZUMBANSEN, Peer. Op. cit., p. 32.

939 CALLIESS, Gralf-Peter; ZUMBANSEN, Peer. Op. cit., p. 33.

Even though the idea that the commercial customs and practices were relevant in the definitions of the obligations incident on international trade had been accepted for a long time, the Brazilian doctrine did not approach the theme too deeply[940].

The pioneer in the study of the theme of *lex mercatoria* in Brazil was STRENGER, who found in the *lex mercatoria,* " a set procedures which make it possible adequate solutions to the expectations of international trade, with no necessary connections with the national system and in a legally effective way."[941] Such understanding was closer to the idea of "set of rules emerged from private entities"[942] than to the acceptance of a ready and finished system.

Besides that, the author highlighted the role of arbitral court precedents to express the independency of the international market in the construction of the *Lex mercatoria*, being used as a guide for future decisions. This role would be even more relevant, since the international arbitrators would have more freedom to apply or create adequate rules to the international trade, as they would not be bound to national sovereignty[943].

The positioning of other authors varies a lot. Thus, WALD seems to identify it with the general principles of international trade[944]; FIORIATI accepts GOLDMAN's conclusion that there would be a set of rules of arbitral or customary origin and that is applied to international trade[945] ; ARNOLDI and SOUZA identify it with the international customs that would impose a "legislative method of contractual basis"[946]; QUEIROZ identifies it with the principle of objective good faith (which, in turn, identifies itself with reasonability) in the usages of international trade[947]. More recently, BAPTISTA has conceptualized it as a set of rules of conduct and structure, consisting of the

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[940] An exception may be made, especially in relation to the proof of a custom (CONDÉ, Bertho. Princípios de Direito Comercial Internacional. São Paulo: Cultura Moderna, 1938, p. 240- 249).
[941] STRENGER, Irineu. Direito do comércio internacional e Lex mercatoria. São Paulo: LTr, 1996, p. 78.
[942] Ibidem, p. 145.
[943] STRENGER, Irineu. A arbitragem como modo de inserção de normas da Lex mercatoria na ordem estatal. In: Revista de arbitragem, n. 3, jul. /set. 2004, p. 09-11.
[944] WALD, Arnoldo. A introdução da Lex mercatoria no Brasil e a criação de uma nova dogmática. In: Revista de Direito Mercantil, Industrial, econômico e Financeiro, n. 100. out./dez. 1995. São Paulo: RT, p. 21.
[945] FIORATI, Jete Jane. A lex mercatoria como ordenamento jurídico..., p. 26.
[946] ARNOLDI, Paulo Roberto Colombo; SOUZA, Israel Alves Jorge de. A nova Lex mercatoria e o futuro do Direito empresarial brasileiro. In: Revista de Direito Privado, n. 28, out./dez. 2006, p. 216.
[947] QUEIROZ, Everardo Nóbrega de. O princípio da boa-fé objetiva ou da razoabilidade como fundamento jurídico da Lex mercatoria. In: AMARAL JUNIOR, Alberto do. (Coord.). Direito do Comércio Internacional. São Paulo: Juarez de Oliveira, 2002, p. 80.

general principles of Law in an obligational matter, usages and customs, clauses and contracts common to the international trade and the interpretation which is given by the arbitral court precedents[948].

As for HUCK and FIORIATI, they understand that the idea of *Lex mercatoria* and the State would be conflicting, but diverge on the need of State recognition for its efficacy. In HUCK's opinion this approval is necessary because, even if residual, the State intervention in the recognition of international arbitration cannot be ignored, neither the limitations can be imposed by public policy[949]. He still remembers that even the more liberal States act to stimulate the international trade by executing treaties or as contracting parties[950], and that the absolute adoption of the *Lex mercatoria* would establish the market law without the necessary political brakes[951]. FIORATI, in turn, argues that there would be no need for the formal State approval, since the importance of the States in international trade would be lower and lower[952]. MAGALHÃES tends to agree with this statement, as he proposes a performance off the State jurisdiction, backed in the professional community of international trade, even though he recognizes that its rules are not always incompatible with the national systems and that only public policy would drive away its incidence[953]. AMARAL[954] expresses himself in this last sense.

BASSO, in turn, admits the existence of a new normative system created by the international trade, not only geared towards the regulation of its own activities, but equally sanctioning undesirable behavior and all this not tied to the State authority. However, this form would still have certain control of its content, especially with regards to the effects to be domestically produced, and this via public policy (e.g., in recognition of a foreigner arbitral report)[955].

BAPTISTA recognizes the autonomy of the *Lex mercatoria* and also understands it as an autonomous legal system, "as it consists of several rules,

[948] BAPTISTA, Luiz Olavo. Contratos internacionais. São Paulo: Lex Magister, 2011, p. 64-65.
[949] HUCK, Hermes Marcelo. Op. cit., p. 216; 220-223; 225.
[950] Ibidem, p. 223.
[951] Ibidem, p. 233-234.
[952] FIORATI, Jete Jane. A lex mercatoria como ordenamento jurídico..., p. 29.
[953] MAGALHÃES, José Carlos. Lex mercatoria: evolução e posição atual. In: Revista dos Tribunais, n. 709, nov. 1994, p. 43-44.
[954] AMARAL, Antonio Carlos Rodrigues do. (Coord.). Direito do Comércio Internacional: aspectos fundamentais. São Paulo Aduaneiras, 2004, p. 62.
[955] BASSO, Maristela. Curso..., p. 91-92.

which provide a unity and compose a system"[956]. In addition, it would serve as a source of legal model (e.g., INCOTERMS) and "in the hands of court"[957].

As for CRETELLA NETO, he binds the idea of *Lex mercatoria* to the transnational public policy, which would surpass the national idiosyncrasies and that would count on public and private sources (among them, the imperative rules) that would impose to the arbitrator the need to restrict the freedom to contract the parties (positive effect) or nullifying the contract and driving away the originally applicable legislation (negative effect)[958].

Concerning it sources, little questioning is made. The Brazilian doctrine usually lists the model contracts, only, as well as the general sales conditions and the uniform laws[959]. Some authors still add the general principles, the arbitral precedents and the usage of trade[960].

Generally speaking, the Brazilian doctrine still restrains itself to discuss the existence of the *Lex mercatoria* without looking into its relationship with internal Law. When doing so, there is a consensus around its dependency on adequacy to public policy[961].

Regarding the practical application of the theme, WALD incorporates a pragmatic vision: he suggests an active attitude in its construction, together with the knowledge of its content and the defense of national interests[962]. His position allows him to cite illustrative examples of national interest: the exports of coffee in the mid-nineties, when the exporters, with no conditions to ship the goods because they had not yet located the purchases, were made to pre-finance the export. This transaction, called "red clause", but actually and atypical transaction of documentary letter of credit, was later assured by warrant (red clause secured). In some of these instances the validity itself of the warrant was discussed due to disrespect to the formalities of issue, leading to the accountability to the corresponding bank which accepts and receives the warrant, with basis on the Uniform Customs and Practice for Documentary

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[956] BAPTISTA, Luiz Olavo. Arbitragem comercial..., p. 74.
[957] Ibidem, p. 76-77.
[958] CRETELLA NETO, José. Empresa transnacional e Direito Internacional: exame do tema à luz da globalização. Rio de Janeiro: Forense, 2006, p. 165-168.
[959] ENGELBERG, Esther. Contratos internacionais do Comércio. 3. ed. São Paulo: Atlas, 2003; AMARAL, Antonio Carlos Rodrigues do. (Coord.). Op. cit., p. 64.
[960] CARNIO, Thais Cíntia. Contratos internacionais: teoria e prática. São Paulo: Atlas, 2009, p. 155-156.
[961] ARNOLDI, Paulo Roberto Colombo; SOUZA, Israel Alves Jorge de. Op. cit., p. 216.
[962] WALD, Arnoldo. A introdução da Lex..., p. 23.

Credits and the Brazilian legislation[963]. According to the author it was a "real symbiosis between the *lex mercatoria* and the national law"[964].

With regards to cybernetics, which surpasses the narrow boundaries of State sovereignty, others still mention self-regulation for the needs of electronic trade[965], even though for sure few States understand this solution as adequate to the fiscal issue derived from it[966].

4.3.4. The normative consequences of the debate

Although there is no rigidity[967] in its dispositions, this "Law" originated from the trade relations would have legal character and it would be compulsory. Its formal basis would be the customary rule which has the same certainty, predictability and effectiveness of the positive rule, even when derived from professional associations, due to the consensus of its usage (and consequent eligibility)[968]. Its application is usually associated to the arbitral procedure[969]. If, on the one hand, its characteristic is a return to experience, decreasing the distances between the facts and the Law (the fact stops to depend on the legal vesting)[970] on the other hand it can be noticed that it is in the absence of territorial limitations that it gets stronger and convinces in effectiveness[971].

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[963] WALD, Arnoldo. Algumas aplicações da Lex mercatoria aos contratos internacionais realizados com empresas brasileiras. In: BAPTISTA, Luiz Olavo; HUCK, Hermes Marcelo; CASELLA, Paulo Borba. (Coords.). Direito e comércio internacional: tendências e perspectivas. São Paulo: RT, 1994, p. 310-318.

[964] WALD, Arnoldo. Algumas aplicações..., p. 313.

[965] According to FINKELSTEIN the scarce regulation and inadequacy of the classical elements of connection would justify the option for the incidence of the Lex mercatoria in the international contracts electronically executed. (FINKELSTEIN, Cláudio. A E Lex mercatoria. In: Revista de Direito internacional e Econômico, n. 11, abr./jun. 2005, p. 102; 104.). It should be remembered, however, that the international custom established for certain transactions is not always adequate to others. Some authors claim the existence of the Lex electronica which, besides the mentioned advantages, would be universal, uniform and easily adaptable to the new needs, but dependent on the will of the parties and revocable by public policy. OYARZÁBAL, Mario J. A. La lex mercatoria: un common Law del internet? In: DREYZIN DE KLOR, Adriana; FÉRNANDEZ ARROYO, Diego P.; PIMENTEL, Luiz Otávio. (Dir.). DeCita: direito e comércio internacional temas e atualidades. Florianópolis: Boiteux, 2005, p. 365-368.

[966] WINDBICHLER, C. Op. cit., p. 8743.

[967] "En las últimas décadas estamos contemplando la crisis del legalismo y del formalismo, y el triunfo de la historicidad. Un derecho duro y rígido, voluntariamente impermeable a la realidad exterior, está siendo rápidamente sustituido por otro elástico e, insistimos en ello, soft". GROSSI, Paolo. De la codificación..., p. 357-358.

[968] GOLDMAN, Berthold. As fronteiras do Direito e Lex Mercatoria. In: Archives de Philosofie du Droit, v. 9, n. 9, p. 184-185, 1964.

[969] CADENA AFANADOR, Walter René. Op. cit., p. 113; PINHEIRO, Luís de Lima. Direito Internacional Privado..., p. 145-147; CRETELLA NETO, José. Empresa transnacional..., p. 164.

[970] GROSSI, Paolo. De la codificación..., p. 358.

[971] Ibidem, p. 387-388.

The main role performed by the image, in contemporaneous times, would be to solve, in a practical way, "the conflicts that rise in international trade, such as a growing awareness of the legislations and foreign cultures, which allow to assure a fairer international order and an internally better social legal order"[972]. Therefore, it is an alternative to the practical problems derived from the application of the conflicting rule[973], providing more adequate jurisdiction to the trade needs[974]: as the rules of the different national systems are appropriate to internal relations; it would be a contribution to the uniformity of the international system; it leaves the incompleteness and lack of eligibility of the *lex mercatoria* to a second plan[975].

Besides being applied as Law of international contracts[976], the arbitral precedents would have recognized other functions to the *lex mercatoria*: (i) material transnational rules on the existence and duration of arbitral commitments; (ii) transnational rules of private Law; (iii) as material rules related to the merits of dispute and as (iv) transnational public policy[977].

CADENAS AFANADOR still points out the effectiveness reached in complex subjects, neutrality in the management of justice and enhancement of individual autonomy[978]. Although it initially seems to be seductive, the legal construction of the *Lex mercatoria* may be an object of criticism. The most important one would be imprecision, generality and lack of uniqueness of its dispositions and sources; lack of universality; its limited eligibility (strictly bound to a class) and absence of scientific rigor and autonomy (it would depend on the recognition by the different national ordinations)[979]. On the other hand, its defenders argue that although it is not a self-referential system, it could be complemented by the arbitral process of decision-making; it would not be structure deductively, but from cases; it is predictable as long as its arbitral

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[972] WALD, Arnoldo. A introdução da Lex..., p. 20-23.
[973] LÓPEZ RODRÍGUEZ, Ana M. Op. cit., p. 94; SBORDONE, Francesco. Contratti internazionali e lex mercatoria. Napoli: Edizioni Scientifiche Italiane, 2008, p. 122-124; MORENO RODRÍGUES, José Antonio. La nueva lex mercatoria: un fantasma creado por profesores de La Sorbona? Foro de Derecho Mercantil. In: Revista Internacional, n. 1, 2003, p. 112.
[974] MORENO RODRÍGUEZ, José Antonio. Contratación y arbitraje: contribuciones recientes. Asunción: CEDEP, 2010, p. 54-58.
[975] LÓPEZ RODRÍGUEZ, Ana M. Op. cit., p. 109-110.
[976] FERNÁNDEZ ROZAS, José Carlos. Lex mercatoria y autonomía..., p. 76.
[977] LÓPEZ RODRÍGUEZ, Ana M. Op. cit., p. 121-129.
[978] CADENA AFANADOR, Walter René. Op. cit., p. 105.
[979] Ibídem, p. 106-107.

decisions are published, just as data basis and publications on the theme, likewise it could be easily updated according to the social needs[980].

Even if such criticism sounds merely academic, some considerations can be drawn from it, mainly when pointed out the risks inherent to this model: asymmetry of protection between traders and non-traders; among economically more developed States and others which are not yet developed; possibility of abuse of individual autonomy; lack of certainty due to the enhancement of flexibility[981].

These, however, would not seem to be problems faced in the scope of the theory of *Lex mercatoria*. According to DASSER, it would not either be the discussion on the normativity of custom. In fact, its role would be to identify it as an autonomous ordination or as a new conflicting system to replace the State regime[982]. In other words there would be insistence on admitting that the arbitral Courts would create new rules, instead of applying transnational customs[983].

However, it must be firstly pointed out that the *Lex mercatoria* cannot be understood as an own ordination, unaware or concurrent, with the individual protection, the last ground of any legal construction. Even if it is possible to discuss the role of the International Law before the national Law, it becomes necessary to understand that both associate themselves to the individual protection, instrumentalizing their free development and substance. To ignore this logical imperative would be to admit that it is carrying out infinite exercise of metalanguage, criticizing a legal approach for the simple delight to better understand the Law itself.

The key point of this criticism, however, is to accept room for the exercise of the economic freedoms. As RECHSTEINER stresses, part of the defenders of the *Lex mercatoria* argue that the state inaptitude on the regulation of international trade is due to its difficulty in following the pace of

[980] LÓPEZ RODRÍGUEZ, Ana M. Op. cit., p. 105-108.
[981] CADENA AFANADOR, Walter René. Op. cit., p. 114.
[982] DASSER, Felix. Lex Mercatoria – Critical Comments on a Tricky Topic. APPELBAUM, P.; FELSTINER, W. L. F.; GESSNER, V. (Eds.). Rules and Networks, The Legal Culture of Global Business Transactions. Oxford: Hart, 2002, p. 189-191.
[983] DE LY, Filip. Op. cit., p. 276.

trade development[984]. SOARES adds that slowness, publicity and the privileged State venue ended up encouraging the development of the private international arbitration[985]. In addition to them, it can be highlighted the private capacity of production of more flexible and adequate rules[986] and the right of choice of a non-national Law to be applied in an international contract[987]. As for DE LY, he had the impression that the defenders of *lex mercatoria* attempted to limit the scope and effects of the imperative rules of national Law, without, however, the existence of an autonomous set of imperative rules to protect their own interests[988]. After all, this definition of normative content by the interested individuals themselves has "costs" and fulfills interests that must be weighed[989].

It must be admitted that the Market is not capable of organizing, on its own, all the economic activity. Thus, besides room for freedom, there is room for direction, being the State correcting the "inoperability" pointed out by NUSDEO[990], or when recognizing limits to the freedom itself establishing values other than the one which condition the economic activity. Besides that, some authors support the existence of a transnational public policy to enable the control of the *Lex mercatoria* by the arbitrators themselves[991].

The interesting point of this conclusion is that it equally served to formerly point out the insufficiency of the State. If in the past the "frontiers" were placed by the "triumph" of "politics", today they are placed by the establishment of the "technology" and global economies[992]. That is the reason why the understanding of the role of the State and/or the Market cannot be absolute, otherwise it may be converted into an act of faith, more than into a normative explanation. Thus, for instance, FORGIONI states that, as previously

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[984] RECHSTEINER, Beat Walter. Op. cit., p. 66.
[985] SOARES, Guido Fernando Silva Soares. A ordem pública nos contratos internacionais. In: Revista de Direito Mercantil, Industrial, Econômico e Financeiro, n. 55, São Paulo: RT, jul./set. 1984, p. 127-128.
[986] GOODE mentions reasons which would motivate the parties not to choose a national law: non-lay content, need of neutrality, identity of legislations, difficulty in the selection of applicable law, the choice of a certain law is considered unsatisfactory, national legislation seen with distrust by the arbitrators, arbitral Court is compromised with the notion of Lex Mercatoria. GOODE, Roy. Usage and its reception..., p. 30.
[987] ELCIN, Mert. The applicable law to International Commercial contracts and the status of lex mercatoria: with a special emphasis on choice of law rules in the European Community. Boca Raton: Dissertation. com, 2006, p. 77-78.
[988] DE LY, Filip. Op. cit., p. 286.
[989] JOHNS, Fleur. Performing party autonomy. In: Law and contemporary problems, v. 71, 2008, p. 243-271.
[990] NUSDEO, Fábio. Op. cit., p. 23.
[991] JACQUET, Jean-Michel; DELEBECQUE, Philippe. Droit du commerce international. Paris: Dalloz, 1997, p. 92.
[992] GROSSI, Paolo. História da propriedade..., p. 107, 118.

mentioned, "the executions of the contract take place within the limits imposed by the State ordination; the market is shaped by the exogenous rules, and not by its own determinations"[993].

The relationship that is instituted is somehow symbiotic. On the one hand the State cannot simply ignore the existence of the phenomenon named *Lex mercatoria*; on the other hand, the phenomenon *Lex mercatoria* cannot prescind from the State. According to RESCHTEINER one of these possible relationships takes place, for example, when the State is not bound to the trade practices that violate its public policy[994].

VIRALLY precisely comments that the *Lex mercatoria* cannot completely get detached from the State legal order. According to the author, even if the formation of a transnational Law would depend on the tolerance of internal order, among other rules and public policy[995]. Moreover, it is important to remember that the fact Public policy encompasses (to content) of the *lex mercatoria* it would not have the power to limit or deny legality[996].

DE LY claimed, in the early nineties, that the *lex merc*atoria was not frequently applied by the national courts and that the few existing instances could not be understood as recognition[997]. It is important to keep in mind, however, that the UCC prescribes obligatoriness of the customs and equally the Law Merchant (*Lex mercatoria*) as one of its subsidiary sources (art. 1-103, b)[998]. This would also be the tendency of the Brazilian arbitral legislation (art. 2º, § 2º)[999] and the French one (Civil code with text given by the Decree n. 2011-48)[1000]. Apart from that, the State takes part in international acts which end up

[993] FORGIONI, Paula A. Teoria geral..., p. 81.
[994] RECHSTEINER, Beat Walter. Op. cit., p. 69.
[995] VIRALLY, Michel. El devenir del Derecho internacional: ensayos escritos al correr de los años. México: Fondo de Cultura Economica, [199_?], p. 575; 583. No mesmo sentido: DASSER, Felix. Op. cit., p. 184.
[996] OPPETIT, Bruno. Op. cit., p. 60.
[997] DE LY, Filip. Op. cit., p. 266.
[998] "(b) Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions".
[999] FRADERA, Véra Maria Jacob de. Aspectos problemáticos na utilização da arbitragem privada na solução de litígios relativos a direitos patrimoniais disponíveis – Comentários à Lei de Arbitragem. In: MARQUES, Claudia Lima; ARAUJO, Nadia de. (Orgs). O novo direito internacional: estudos em homenagem a Erik Jayme. Rio de Janeiro: Renovar, 2005, p. 418-419.
[1000] Especially art. 1504 (which conceptualizes international arbitration) and 1511 which adopts the formula "règles de droit" and "usages du commerce". It is also important to remember other known events appreciated by the French Court of Cassation: Compania Valenciana de Cementos Portland v. Primary Coal Inc. and Pabalk v. Norsolor on the interpretation of do art. 1504 and the application of the Lex mercatoria.

admitting its existence. One example, even though it has never been in force, is the Inter-American Convention of Mexico 1994 (CIDIP V), which provides for the acceptance of the Law chosen by the parties to govern not only the "positive" Law, but the customs, the general principles of the international trade Law and the usages and practices of the international trade (art. 10)[1001].

Such disposition is identified by MAEKELT as establisher of the *Lex mercatoria*[1002]. MADRUGA FILHO, on the other hand, when interpreting art. 17 of the Convention, understands that there would be limitation in the choice by the contracting parties of the State Law, even though he agrees that the *Lex mercatoria* could help to form the applicable Law, according to art. 10[1003].

This relationship gives rise to another questioning, the normative content that form the *lex mercatoria*. The doctrine, generally speaking, widely mentions its sources: trade practices, arbitral precedents, professional guidelines and codes of conduct[1004]. Some authors still add the international treaties[1005] or refer to the general principles of Law[1006] more extensively, or yet, mention specific tools such as the UNIDROIT Principles, the INCOTERMS, the UCPs, the model laws of UNCITRAL[1007] and the European Principles of contractual Law[1008]. On the other hand, there are also those who deny the character of source to the treaties[1009].

This set of reiterated practices, uniformly abided by the agents of international trade, would surpass, this way, "the barriers of the national Laws to establish a kind of supranational Law"[1010]. As examples of this statement there can be mentioned the Bill of Exchange, whose origin would date from the Middle

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[1001] ORGANIZATION OF AMERICAN STATES. Convenção Interamericana...
[1002] MAEKELT, Tatiana B. de. La flexibilización del contrato internacional en La Convención Interamericana sobre Derecho aplicable a los Contratos Internacionales. In: CASELLA, Paulo Borba. (Coord.). Dimensão Internacional do Direito: estudos em homenagem a G. E. do Nascimento e Silva. São Paulo: LTr, 2000, p. 269-276.
[1003] MADRUGA FILHO, Antenor Pereira. A CIDIP-V e o Direito aplicável aos contratos....
[1004] BRITO, Maria Helena. Op. cit., p. 119.
[1005] CARDENA AFANADOR, Walter René. Impacto en Colombia de la Lex mercatoria. In: Revista electrónica de difusión científica de la Universidad Sergio Arboleda Bogotá, n. 11, dez. 2006 p. 01-21. Available on: <www.usergioarboleda.edu.co/civilizar>.
[1006] FELDSTEIN DE CÁRDENAS, Sara. Op. cit., p. 168-172.
[1007] CARLINI, Gabriel. Op. cit., p. 41-43.
[1008] BRITO, Maria Helena. Portugal. In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guillermo. (Dir.). Op. cit., p. 674.
[1009] Idem.
[1010] GREBLER, Eduardo. O contrato internacional no Direito de empresa. In: Revista de Direito Mercantil, n. 85. São Paulo: RT, jan./mar. 1992, p. 27.

Ages[1011] and the so-called INCOTERMS which regulate the transfer of risks and costs of international sales transactions. Such "standard clauses" were consolidated by the International Chamber of Commerce of Paris, and went through several updates, the most recent one being in 2010. Such clauses became so relevant in the international contractual Law that, in turn, influenced internal transactions despite its origin and grounds[1012].

There can still be mentioned the models of contracts (ICC, UNCITRAL, etc.) which stand for a set of rules aimed at providing the bases of subsequent transactions and that were widely used by the international Law. According to CARREAU and JUILLARD, there would exist a kind of authority of law in these drafts, usually associated with its technicality, capacity of propagation and capacity to take advantage of the general principles of the economic international Law[1013]. On the other hand, the customary nature of these rules are usually emphasized:

> ... lo que constituye propiamente la 'nueva Lex mercatoria' no es otra cosa que un conjunto de reglas de comportamiento y cláusulas de interpretación uniforme y típicas que se generan de manera constante y reiterada en el comercio internacional y que son asumidas por los particulares en virtud de la existencia de una convicción de su carácter vinculante: lo que genéricamente se califica de 'usos y costumbres del comercio internacional', pero que, en un análisis más detenido comprende fundamentalmente: los llamados 'términos comerciales uniformes', la 'condiciones generales de venta' aceptadas en ciertos sectores del comercio internacional, los 'contratos tipo' para la venta de ciertos productos, etc.[1014]

Such approach, however, makes little distinction among the different sources and its conceptual differences. Thus, for example, when subjected to the customary practices focused on the same way, contractual models, private codifications and general principles it is given a uniform treatment to distinct phenomena. This preoccupation, expressed by GAILLARD, becomes relevant conceiving the consequences of freedom/duty of the arbitrators to define applicable Law to the concrete case. Thus, depending on the legal treatment, the arbitrators could choose the applicable rules of Law taking into account the

[1011] DRAHOS, Peter; BRAITHWAITE, John. Op. cit., p. 110.
[1012] GLITZ, Frederico Eduardo Zenedin. Transferência do risco..., p. 111-139.
[1013] CARREAU, Dominique; JUILLARD, Patrick. Op. cit., p. 13.
[1014] FERNÁNDEZ ROZAS, José Carlos. Ius mercatorum..., p. 89.

customs; simply choosing the rules of Law, or yet, taking into account the usages and customs of the international trade (UNICTRAL model)[1015]. The accuracy which would strictly form the customs, and the usages and customs of the international trade could, this way, directly reflect on the arbitrations' conclusion. Because of that it seems to be more adequate to limit the scope of what is understood as *lex mercatoria* to those consuetudinary practices which form part of the intended transnational trade Law[1016].

Moreover, the nature of each one of these sources cannot be confused, as not all of them are in fact consuetudinary. If on the one hand it seems possible to accept the existence of mandatory customs[1017], even if subjected to some kind of control, on the other hand it cannot be said that all the compilations carried out are in fact customary. Thus, PINHEIRO gets to the conclusion that the only ones to be considered sources of autonomous Law of international trade are those with clear consuetudinary nature, those created by the arbitral precedents and by autonomous centers with basis on the private autonomy which would be in force regardless the existence of an own ordination. Thus, the arbitral regulations, the PICC, the contractual models, model clauses, etc., would be excluded[1018].

It is also important to keep in mind the fact that the purely adjudicative law construction or based on precedents is not fully adequate, as: (i) it exclusively approaches anomalous events; (ii) it is usually centered on procedural issues and (iii) it is not formed of binding precedents[1019]. Yet, beyond this, if the *Lex mercatoria* has a customary nature, why would it depend on contractual freedom? These are, therefore, several open doors to imagine the existence of an own system.

> If the contract explicitly directs the arbitrator to apply the lex mercatoria, or if he conceives that the circumstances justify him in treating such a directive as implicit, he will find a way of doing so, notwithstanding the fragmentary nature of the norms so far established. But this is only a small part of the story. The purpose of a commercial legal order is to regulate transactions, not awards or

[1015] GAILLARD, Emmanuel. La distinction..., p. 211.
[1016] GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 06; 35; 38.
[1017] DALHUISEN, J. H. Dalhuisen on transnational and comparative commercial, financial and trade law. 3. ed. Oxford: Hart, 2007, p. 228-231.
[1018] PINHEIRO, Luís de Lima. Direito Comercial..., p. 208-210.
[1019] Ibidem, p. 190-191

> judgments. For the businessman, proceedings in court or arbitration are a wretched last resort, to be avoided at almost any cost and in fact they are avoided in all but a minute proportion of cases. What he requires is a legal framework, sufficient to inform him before any dispute has arisen what he can or must do next. If a dispute does arise he needs to be told whether he can insist or must yield, and how much room he has for maneuver. When asking such a question, the last answer which a businessman wants to hear is that it is a good question.[1020]

Furthermore, when MUSTILL'S text was written, only 20 (twenty) "principles" could be identified by the arbitral adjudicative law[1021], with the *lex mercatoria*. These observations give origin to a questioning of another order.

4.3.5. Lex mercatoria: convenience or opportunity?

Perhaps, in this aspect, MORENO RODRIGUEZ's conclusion may be used, which is that, regardless its nature, it is appropriate to study the *lex mercatoria*, as it will be in the center of the evolution of the contractual Law in the twenty-first century[1022].

Thus, alongside all the theoretical discussion on the autonomy of the *Lex mercatoria* as a normative system and on its set of sources, it also seems essential to consider the convenience of the adoption of a system, even if it is partly autonomous for the application of commercial contractual relations.

That is why, even being an autonomous normative system, it could be introduced as a kind of normative production[1023], based on the private freedom and creativity and subjected to State or non-State normative controls, as it will be shown.

DELAUME, for example, claims that regarding public contracts established between States and investors, the existing conventional system would be better adapted to the practical needs that any form of *Lex mercatoria* which could occasionally be considered[1024]. DAVIES, on the other hand, in a more contemporaneous text, states that the already mentioned Cape Town

[1020] MUSTILL, Michael. The New Lex Mercatoria: The First Twenty-five Years, Arbitration International. v. 4, 1988, p. 116-117.
[1021] Ibidem, p. 110-114.
[1022] MORENO RODRÍGUEZ, José Antonio. Op. cit., p. 124.
[1023] MOSSET ITURRASPE, Jorge; PIEDECASAS, Miguel A. Op. cit., p. 121.
[1024] DELAUME, Georges. Comparative analysis as a basis of la in State Contracts: the myth of the Lex mercatoria. In: Tulane Law Review, v. 63, 1988-1989, p. 611.

Convention would represent a new kind of *Lex mercatoria* for assured international transactions[1025].

GALGANO'S assertion is also interesting: he states that the *lex mercatoria* produces a new kind of eligibility of the Market, since that one (democratic) was standardized for the State formation. In short, there would be no way to reproduce a global entity and without the presence of the State.

Thus, he points out that even though the globalized entity is not capable of politically taking part in a global environment, it may create Law.[1026]

The speech on the *lex mercatoria*, however, is characterized by its lack of objectivity. CALVO CARAVACA and LARRASCOSA GONZÁLEZ, highlight, for example, corporative interests from those who defend it, being them professors or big international conglomerates[1027]. SHAPIRO and SWEET add the lawyers[1028], and FERNÁNDEZ ROZAS, ARENA GARCÍA and MIGUEL ASENSIO identify the existence of "marketing" and "pseudo-doctrinaire" constructions which would not search for "otra cosa que la presencia en el mercado de la solución de controversias mercantiles internacionales"[1029].

Along with this uncertainty of its motivations, its instrumentalization is dubious. PAULSSON, for instance, verifies the application of the concept of *lex mercatoria* in the arbitral reports by ICC, mainly in two different meanings (as sufficient rules to govern a contract and as a reflection of the commercial usage and general principles of trade)[1030], in a study on more updated arbitral reports by ICC, GRANDE demonstrates that the *lex mercatoria* is not an arbitral creation, neither can be autonomously used, since most part of the reports were supported by the local Law, commercial usages and customs, general principles

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[1025] DAVIES, Iwan. The new lex mercatoria: international interests in mobile equipment. In: International and Comparative Law Quarterly, v. 52, jan. 2003, p. 154.
[1026] GALGANO, Francesco. Lex mercatoria e legittimazione. In: Sociologia del Diritto, n. 2 e 3, 1995, p. 201-202.
[1027] CALVO CARAVACA, Alfonso-Luis. Op. cit., p. 15-16.
[1028] "If, however, we look at the world as containing not just two players — those who wish to contract and governments — but instead three players, those who wish to contract, governments, and the legal profession — the freedom picture may not be as clear. It is here that the arguable, but not proved, thesis of globalization as Americanization becomes relevant. To the extent that the American style of contract writing and disputing is becoming global, global freedom of contract maybe, along a certain dimension, illusory or purchased at a very high cost. The lawyers may have become far freer than the contracting parties". SHAPIRO, Martin; SWEET, Alec Stone. Op. cit., p. 322.
[1029] FERNÁNDEZ ROZAS, José Carlos; ARENAS GARCÍA, Rafael; MIGUEL ASENSIO, Pedro Alberto. Op. cit., p. 40.
[1030] PAULSSON, Jan. La Lex Mercatoria dans l'Arbitrage C.C.I. In: Revue d´Arbitrage, 1990, p.55-100.

of Law, etc. Moreover, the arbitrators did not think about the idea of an autonomous legal system[1031].

> Lo único constante en las decisiones arbitrales es la remisión a los usos y las costumbres, y el reconocimiento de la universalidad de principios generales del comercio mayormente plasmados en instrumentos internacionales (convenciones internacionales o principios Unidroit). Como aquellos principios surgen mediante la internacionalización del derecho doméstico, esto podría indicar que no existe un derecho autónomo especialmente creado al margen de los derechos locales. De lo anterior, y debido a que los usos y las costumbres se desarrollan junto con el derecho de fuente local, podría postularse que el derecho Del comercio internacional se estaría gestando en estrecha relación con los derechos domésticos[1032].

DRAZOHAL understands that the generalized adoption, by the parties, of the *lex mercatoria* as a regulation applicable to arbitration would be a myth. Besides that, he points out that when it is usually referred to, it is about a complement to the national legislation[1033], being the same observation expressed in professional associations[1034]. DAVIDSON, analyzing another data basis, draws similar conclusions: the arbitral courts would hesitate to employ the *lex mercatoria* to control conflicts, even when enforced by the parties themselves[1035]. DASSER is also emphatic: the application of the *lex mercatoria* as an alternative of domestic law is rare, although the discussion has been lasting over fifty years[1036] DALHUISEN shares the same opinion[1037].

Even if its application is not as profuse as it could be thought, the *lex mercatoria* engenders the issue of the content of the arbitral decision. Even though they are available rights, as in the arbitration governed by the Brazilian Law, it is necessary to be aware of its inaccuracy and vagueness (if not with regards to the sources, at least, to the content). PARK, for example, defended a certain control of its object, even if not under other empty formula (e.g., public

[1031] GRANDE, Silvana. La Lex Mercatoria en los laudos de la Cámara de Comercio Internacional. In: Díkaion, v. 22, n. 17, 2008, p. 240-241.
[1032] Ibidem, p. 241.
[1033] DRAHOZAL, Christopher R. Busting arbitration myths.in: Kansas Law Review, v. 56, 2008, 672-673.
[1034] DRAHOZAL, Christopher R. Private ordering and international commercial arbitration. In: Penn State Law Review, v. 113, n. 4, 2009, p. 1031-1050.
[1035] DAVIDSON, Matthew T. The Lex Mercatoria in Transnational Arbitration: An Analytical Survey of the 2001 Kluwer International Arbitration Database. Available on: <http://cisgw3.law.pace.edu/cisg/biblio/davidson.html>.
[1036] DASSER, Felix. Mouse or monster? Facts and figures on lex mercatoria. In: ZIMMERMANN, Reinhard. (Ed.). Globalisierung und Entstaatlichung des Rechts. Tübingen: Mohr Siebeck, 2008, p. 153.
[1037] DALHUISEN, J. H. Op. cit., p. 239.

policy)[1038]. The main issue, however, is not the search for a fair decision[1039], only, but adequate to certain values. Thus, it becomes relevant the understanding of how the *lex mercatoria* seems to relate to the different ordinations it meets.

PINHEIRO, for example, claims that the *lex mercatoria* could be directly applied to the controversial relationship, regardless its acceptance by the State Ordination[1040]. This would happen via two procedures; (i) by the application of rules of conflict, that is, deriving from the "conflictual propositions of transnational Law or arbitration"[1041] and (ii) by the application of usages and customs of international trade, even if it was necessary to make a distinction between the national and international customs to achieve this aim[1042], respecting the imperative rules. Their function would originate from each one of their sources, and so the international trade customs would be relevant to the interpretation, integration of contracts and definition of the contract content[1043].

On the other hand, it seems likely to back that the role of the *lex mercatoria* would be more connected to the method of choice of a normative source applicable to the concrete event[1044], than more exactly to the recognition of a set of rules (autonomous or not) of independent existence. As GAILLARD declares, the *lex mercatoria* would be defined by its sources, not by its content[1045]. Thus, in the pursuit of applicable Law, the arbitrators and the parties would not be devoid of sources of inquiry, it would be possible to resort to the Conventions, the doctrine and the work by international organisms[1046]. The

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[1038] PARK, William W. Control mechanisms in the development of a modern lex mercatoria. In: CARBONNEAU, Thomas. (Ed.). Lex mercatoria and arbitration: a discussion of the new law merchant. New York: Transnational Juris, 1990, p. 138.

[1039] "Arbitrators do not make up the law as they go along, and contrary to popular view, most arbitrators do not look first of all for compromise. International arbitrators do seek to achieve just results within a legal framework, and that framework is by definition wider than the frontiers of any state. To me, this is the vision, the promise, and the usefulness of lex mercatoria". LOWENFELD, Andreas F. Lex Mercatoria. In: An Arbitrator's View, Arb. Internl., 1990, p. 150. Available on: <http://www.trans-lex.org/output.php?docid=126000>.

[1040] PINHEIRO, Luís de Lima. Direito Comercial..., p. 216.

[1041] Ibidem, p. 217.

[1042] Ibidem, p. 220.

[1043] Ibidem, p. 227.

[1044] "Les règles transnationales ne résultent pas d'une liste mais d'une méthode. Lorsqu'ils se trouvent confrontés à la nécessité de faire application de règles transnationales, par exemple parce que les parties l'ont voulu". GAILLARD, Emmanuel. Trente ans de Lex Mercatoria pour une application sélective de la méthode des principes généraux du droit. In: Journal du Droit international, n. 1 , 1995, p. 22.

[1045] GAILLARD, Emmanuel. Transnational Law: A Legal System or a Method of Decision Making? In: Arbitration International, v. 17, n. 1, 2001, p. 61.

[1046] GAILLARD, Emmanuel. Trente ans de Lex..., p. 25-26.

solution given to a certain event, for sure, will not always find consensus, given the particularities of the different families and regional principles[1047].

Thus, it is not about questioning the role to be exercised by the *Lex mercatoria*, that is, if it would be interpretative and integrative of the legal transaction[1048] and, occasionally, subsidiary to a State order[1049] or to a set which understands the comparison among several ordinations[1050]. But it is about recognizing a certain applicable "Law" to a given situation by means of an appropriate method which takes into consideration the several existing sources and the concrete situation in terms of Comparative Law. So, it would be about a method of decision[1051]. Maybe in this sense it can be adopted LEDUC's positioning when stating that those who believe that the *lex mercatoria* does not exist are not completely wrong, but undoubtedly there would exist, contemporaneously, a tendency to encourage the emergence of customs and contractual practices[1052].

Even if it is possible to question such extent of autonomy to the rules that form the so-called *lex mercatoria*, it seems reasonable, however, the prominence given to the normative function exercised by each one of them[1053]. This way, as for contractual customs, it would be possible to state that its role in the transaction would depend on the understanding of its normativity in each one of the examining systems. Indeed there would not exist a "*sans loi*" contract, but this "law" would not be limited to the legislative text, but to the "Law" applicable to it[1054].

In the Brazilian instance, as it will be noticed, this "Law" comprises the customs as full normative sources, even capable of creating obligational ties

[1047] Ibidem, p. 30.
[1048] FERNÁNDEZ ROZAS, José Carlos; ARENAS GARCÍA, Rafael; MIGUEL ASENSIO, Pedro Alberto. Op. cit., p. 41.
[1049] PINHEIRO, Luís de Lima. O Direito autônomo..., p. 396.
[1050] "un conjunto normativo que no deriva de un único ordenamiento estatal sino que se desprende de la comparación de los Derechos nacionales, de fuentes internacionales tales como los convenios internacionales, o de la jurisprudencia de los tribunales internacionales". FERNÁNDEZ ROZAS, José Carlos; ARENAS GARCÍA, Rafael; MIGUEL ASENSIO, Pedro Alberto. Op. cit., p. 41.
[1051] GAILLARD, Emmanuel. Transnational Law..., p. 62.
[1052] LEDUC, Antoine. L'émergence d'une nouvelle lex mercatoria à l'enseigne des principles d'UNIDROIT relatifs aux contrats du commerce international: thèse et antithèse. In: Revue Juridique Thémis, v. 35, 2001, p. 450.
[1053] CARA, Jean-Yves de. International trade and the rule of law. In: Mercer Law Review, v. 58, 2007, p. 1380.
[1054] It is important, however, to point out that this thought is not unanimous. GAILLARD himself, for example, claims that in situations when the parties of an arbitral dispute intend to apply a "Law" and not mere "rules of Law", the arbitrator could make use of the transnational Law in similar conditions to the ones of an autonomous ordination, in spite of not recognizing the lex mercatoria as a genuine ordination. GAILLARD, Emmanuel. Transnational Law..., p. 71.

between the contracting parties. Nonetheless, this given role will depend on the room of freedom which is granted to the private parties for normative creation.

Once it is admitted that the grounds of the *Lex mercatoria* is the private autonomy[1055], it is necessary to admit its limitation[1056], as it will be discussed in the next part of this book.

V. TOLERANCE, COEXISTANCE OR DESPISE? THE HARD RELATIONSHIP BETWEEN CONTRACTUAL CUSTOMS AND NATIONAL ORDINATIONS.

5.1. LOCAL, REGIONAL OR NATIONAL CONTRACTUAL CUSTOMS ACCORDING TO THE BRAZILIAN JURISPRUDENCE

In order to make it clear the meaning of the role developed by the custom in the Brazilian Law, the court precedents on the subject could not be left aside. It is important to point out, nevertheless, that for the own limits of the present research a non-exhaustive analysis has been chosen. Among the positioning of all the courts in the country, a deeper analysis was chosen in three of them: Federal Supreme Court, Superior Court of Justice and the Court of Appeals of Paraná.

It is equally important to explain the reasons for such selection. The "Superior Courts" were created due to their role in the unification of the Brazilian adjudicative law. The role of the Superior Court of Justice is, nowadays, with regards to the more outstanding theme of the customs, especially because its competence provides for the analysis of the interpretation on the legislation on appeal (art 105, iii, "c" of the Constitution of Republic). However, before the Constitution of Republic of 1988 was in force, this same role was performed by the Federal Supreme Court, justifying, this way, its selection. At last, the role of the court of Appeals of Paraná is highlighted before the need to demonstrate the local interpretation given to this same phenomenon.

[1055] PINHEIRO, Luís de Lima. O Direito autônomo..., p. 420.
[1056] GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 40.

This research took into consideration differentiated temporal spaces to each court. With regards to the Federal Supreme Court, the oldest court precedents were searched, not least because of its change of competence by the constitutional text of 1988. As for the Superior Court of Justice, the court precedents of the last twenty years were searched, half the period if compared to the Court of Appeals of Paraná. In all the instances there will be older appellate decisions than these limits, as they are paradigmatic events that end up being referred to by the Appellate Judges and Ministers themselves on the grounds of their decisions.

Another major datum is that, associated to the entry "custom" it is common to find references to indigenous customs (e.g. land demarcation), to the crimes (against the customs) and also, labor practices (definition of intervals in the working hours for rural workers or usually granted payments); "good morals" mainly in family law and in the refusal to ratify foreign sentences; to the protection of generic brands and copyright; criminal law and alleged abrogation by the custom (mainly in gambling), among others. Such instances were left aside provided that it was vital the punctual analysis of the events where customs considered contractual ones were involved or discussed.

It is important to point out that the distinction among local, regional and national customs is not relevant to the aims proposed by the present research where it is weighed the apparent attempt by the Brazilian legislation of ignoring the two last hypothesis. Such customs are of interest and object of the research as they reflect the national source of law of contracts, in opposition to the phenomenon of internationalization.

5.1.1. Federal Supreme Court

A first and clear tendency that is observed in the court precedents of the Federal Supreme Court was the preoccupation to deny the existence of a custom contrary to the legal disposition. In these instances the most cited reason for the denying of "validity" would be the subsidiary character of the custom, that is, its tendency to fill in gaps of the positive text. In this sense, it

can be mentioned the positioning in the case judged in the fifties on the commission merchant agreement in the trade of coffee[1057].

> Commercial usages and customs. Its relative validity. Trade: usages and customs are accepted, exceptionally, to fill in gaps or impairments of the law: for **obvious** reason, the courts shall never accept them, against express legal precept. [not printed bold in original]

The minister-rapporteur also pointed out the subsidiary role of the customs, especially considering the commercial practices distinct among the different *commodities*:

> With deep expertise of our usages and customs, the lack of close contact among the trade centers in Brazil, spread in a huge territory, the commercial legislator, aware of the particular rules of the coffee trade, which essentially diverge from the rubber, cocoa beans (*sic*), sugar, etc., cautiously allowed that by the usages and customs it would be possible to fulfil the impairment of cases. (fls.138).

Still more imperative is the judgment of the appeal to the Federal Supreme Court n. 20829 of Sergipe, which understood that "the formation of a legal rule based on the custom, if there is law in force which is barred otherwise"[1058] is not possible. It was related to the instance when it was discussed the nature of the contract executed (if sales argument or if improvement) and, in special, the existence of maximum value for contracts executed verbally. The appellate court had pointed out that

> The trade law is not a strict law as it is the civil law, but ductile (*sic*) and malleable, a law of favor, for merchants' usage, the formula of the transactions get modified and are rushed to meet the needs of the trade. The commercial usages and customs do not form or establish contracts. When necessary, they serve to clarify how to understand and interpret the clauses of the contract, in the sense and way why the local merchants usually explain themselves, in conformity with the rules established by the Commercial Code (arts. 130 and 131). (bold in original)

[1057] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário n. 14.465/SP. João Ferreira Vazin versus Waldemar dos Reis Meireles. Segunda Turma. Relator Min. Afrânio Antônio da Costa, Adjudicated on 02 June 1953.

[1058] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário n. 20829/SE. Epaminondas Ferreira Machado e outros versus S. Barretos e Filhos. Segunda Turma. Relator Min. Abner de Vasconcelos. Adjudicated on 05 August 1952.

This understanding was kept on appeal. From the appellate decision the general conclusion is drawn:

> Even though it is certain the existence of the custom from Sergipe, that the conventions are concluded at any cost, with no written proof, the courts should not adhere to such conventions, making them compulsory, for being contrary to the law. The conventional usage can only be established and admitted by the justice, when the law is silent about it.

This same understanding has been kept as years go by, as demonstrated by the appellate decisions of the Extraordinary Appeal n. 19757/SP and the Extraordinary Appeal n. 58414/GO[1059]. Even in instances of the private international Law, the application of law of introduction leaves no doubt with regards to its prevalence[1060].

During the seventies, the Federal Supreme Court persisted on the positioning that the role of the customs would be to fill in the legislative gap. In this way, it can be mentioned the instance when the local customs were used as interpretative subsidy of a sales agreement of cocoa beans for a term in which the seller intended to be paid compensation for the difference, that is particularly accentuated, of the price obtained by the intermediate purchaser, due to the price oscillation in the market[1061].

If on the one hand the importance in the custom as a legal source is reduced in several precedents, on the other hand there is the positioning of the Federal Supreme Court itself highlighting its role creating obligations, such as in the event when it was discussed, for example, the obligation to provide bags by the purchaser of bags, originated from the commercial custom[1062]; in the instance where the value corresponding to reordering of service was

[1059] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário n. 19.757/SP. Machado Sant´Ana& Cia. Ltda. versus John Hume. Segunda Turma. Relator Min. Afrânio Antonio da Costa. Julgado em 13 de janeiro de 1953; BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 58.414/GO. Antônio de Velasco Figueiredo versus Digo Vila Verde Gutierre. Primeira Turma, Rel. Min. Evandro Lins e Silva. Adjudicated on 12 October 1965.

[1060] BRAZIL. Supremo Tribunal Federal. Agravo de Instrumento n. 34.544/PA. Booth (Brasil) Limited. versus Pedro Martins dos Santos. Segunda Turma, Rel. Min. Hermes Lima. Adjudicated on 15 October 1965.

[1061] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário n. 79.545/BA. Espólio de Antônio Olimpio da Silva versus Mattos, Souza e Cia. Primeira Turma. Relator Min. Aliomar Baleeiro. Adjudicated on 22 November 1974.

[1062] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário n. 72.463/PR. Brasiland Comercial e Agrícola S/A versus Manoel de Deus Rocha. Primeira Turma. Relator Min. Raphael de Barros Monteiro. Adjudicated on 29 October 1971.

established[1063], or yet, when it is recognized the existence of the responsibility when certifying a check, reinforcing credit[1064].

As a comparison, it can be mentioned the American decision cited by BEDERMAN, considered controversial, in which the Fourth Circuit Court, applying the UCC, in the instance *Nitrogen Corp versus Royster*, admitted the contractual custom to the contract[1065].

There is an equal precedent which alleges the obligatoriness of the custom, even though at a certain extent this conclusion may be granted to the confusion with the notion of contractual practices established between the parties[1066]. In each opportunity the Federal Supreme Court expressly produces a statement to justify the obligatoriness of the custom by the desire for the parties[1067].

It can be equally noticed a certain flexibilization of formal requirements when talking about the proof of contract, like in the instance when it was accepted the existence of agricultural partnership agreement, verbally established, for being a local custom[1068]. Another interesting example was the event when it was decided unnecessary the proof of uxorial grant in contracts of donation of cattle, according to the custom of Minas Gerais[1069].

In this aspect there is also terminology confusion, like in the instance of a sales contract of cattle verbally established, when written proof was not

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[1063] BRAZIL. Supremo Tribunal Federal. Embargos no Recurso em Mandado de Segurança n. 19.023/RS. Ulisses Cardoso de Castro e outros versus Demóstenes Silveiro de Castro. Tribunal Pleno, Rel. Min. Hahnemann Guimarães. Adjudicated on 24 June 1955.

[1064] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário n. 57.717/SP. Banco Brasileiro de Descontos S.A. versus Viação Leste-Oeste S.A. Tribunal Pleno, Rel. Min. Victor Nunes Leal. Julgado em 14 de outubro de 1965 e BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 30.125/RJ. Esso Standard do Brasil Inc. versus Francisco Gimeno ou Francisco Henrique Gimeno. Tribunal Pleno, Rel. Min. Victor Nunes Leal. Adjudicated on 16 February 1967.

[1065] BEDERMAN, David. Custom..., p. 85.

[1066] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário n. 12.878/SP. Mançor Daud versus Cia Agrícola e Comissária de São Paulo. Segunda Turma, Rel. Min. Afrânio Costa. Adjudicated on 29 December 1959.

[1067] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário n. 24.150/DF. Carlos Pereira Porto e outros versus Cia Docas da Bahia. Segunda Turma, Rel. Min. Lafayette de Andrada. Adjudicated on 13 October 1953.

[1068] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário n. 76.301/GO. Abel Pedro Coimbra versus Limírio Alves Neto. Primeira Turma. Min. Aliomar Baleeiro. Adjudicated on 31 August 1973.

[1069] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário n. 90.083-7/MG. Elizabeth Oliveira Silva versus Tiago Tavares dos Santos e outros. Primeira Turma, Rel. Min. Carlos Thompson Flores. Adjudicated on 06 May 1980.

required under the basis of the custom, confused with the practices established between the parties[1070].

In a more recent event, even though there is no existence of the expected contractual nature, the Federal Supreme Court took a stand on the so-called *"farra do boi"*. The emphasis given to this appellate decision is precisely the need that the Court found to locate a limit to the custom, apparently imported from Azores and in increasing development on the coast of the State of Santa Catarina.

The State of Santa Catarina, defendant in the lawsuit, argued that it took the necessary measures to curb maltreatment to the animals, but it should equally preserve the custom of the local people. One of the theses put forth by the Association that promoted the Public Civil Action was, precisely, that such practice could not be considered cultural manifestation, but mere violence[1071], and because of that, it should be prohibited. The cote of the Min. Maurício Corrêa is equally cautious when driving away this line of argumentation, pondering that the application of the infra-constitutional legislation should be particular to those who exercised the cultural manifestation to excess.

The line of argumentation which prevailed was that one firstly outlined by the Min. Rezek, who seemed to have agreed with the thesis of inexistence of cultural manifestation and was followed by the Ministers Marco Aurélio (who mentions the repercussion in the media) and Néri da Silveira (who justifies that there is prevalence of the Right to the environment over the cultural manifestation with basis on the way the constitutional devices were written)[1072].

In short, it can be stated, then, that the role which the contractual custom performs in the court precedents of the Federal Supreme Court is residual and it is limited to complement the legal text.

[1070] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário n. 68.704/MG. José Martins Cardoso versus Hermínio Martins Cardoso. Primeira Turma, Rel. Min. Raphael de Barros Monteiro. Adjudicated on 07 November 1969.

[1071] The distrust in the mankind cultural manifestation, engered in this thought, is similar to that one portrayed by ASSIER-ANDRIEU, when explaining the image of the legal fictions, of how a French court resorted to the image of the lycanthrope to justify the inhuman act of cannibalism committed by the defendant... ASSIER-ANDRIEU, Louis. Op. cit., p. 37-38.

[1072] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário n. 153.531-8/SC. Costume. Manifestação cultural. Estímulo. Razoabilidade. APANDE – Associação Amigos de Petrópolis Patrimônio Proteção aos Animais e Defesa da Ecologia e outros versus Estado de Santa Catarina. Segunda Turma, Rel. Min. Marco Aurélio Mello. Adjudicated on 03 June 1997.

5.1.2. Superior Court of Justice

With regards to contracts, the analysis if the Superior Court of Justice is more bound to the interpretation of the transaction, like the one in which the Court employs the "usages and customs" as a way to interpret the contractual gap, in accordance with art. 113 of the current Brazilian Civil Code[1073].

Another extremely interesting event is that one analyzed by the Superior Court of Justice involving the existence, or not, of certain custom in the agency agreement between the companies holding concession of air transport and the travel agencies. It was alleged that percentage was established, by the custom, on account of commission, before the existence of verbal contracts of commercial commission, recognized the possibility of unilateral amendment without cause of the contractual content, decreasing the overdue amounts as commission. With regards to the argument of the custom, the Court made a statement in the sense that it was about a parameter for omission instances, but not to "perpetuate" the overdue amounts[1074].

The Superior Court of Justice also made a statement on the instance of arbitration of medical fees due to the head of the medical team. In this event, the relevant note is that the contractual custom was invoked to justify the eligibility for the head of the team to demand on his/her behalf, with no reference to the members of the team[1075].

On the other hand, in an event involving the commercial custom to handle the expenses of demurrage, the Third Panel recognized the need of

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[1073] BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 715.894/PR. Banco Banestado versus Urbalon Pavimentação e Obras Ltda. Segunda Seção. Relatora Min. Nancy Andrighi. Adjudicated on 26 April 2004. No mesmo sentido: BRAZIL. Superior Tribunal de Justiça. Agravo regimental no agravo de instrumento n. 761.303/PR. Oscar Luiz Cordeiro versus Banco Banestado S/A. Terceira Turma. Relator Min. Paulo Furtado. Adjudicated on 23 June 2009 and BRAZIL. Superior Tribunal de Justiça. Agravo regimental nos embargos de declaração no recurso Especial n. 991037/RS. Terceira Turma. Relatora Min. Nancy Andrighi. Adjudicated on 16 October 2008.

[1074] BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 617244/MG. Atrium Empresa de Viagens e Turismo Ltda e outros versus United Airlines Inc. e outros. Quarta Turma. Relator Min. Cesar Asfor Rocha. Adjudicated on 07 March 2006.

[1075] BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 73.049/SP. Daher Cutait e outro versus Espólio de Nagib Matte Merhej Quarta Turma. Relator Min. Ruy Rosado de Aguiar. Adjudicated on 13 November 1995.

proof, which could be given by any means, however, being privileged in the records of the Registry of Commerce[1076].

At last, it can be mentioned the instance in which the Court recognized the commercial custom to authorize investments verbally, without the corresponding formalization. Besides that, it considered to reiterate the real practice of tacit acceptance of the transaction[1077]. In this aspect the Panel ends up confusing the custom with the contractual practices, exactly like in the instance involving the transfer of values among financial investments adjudicated by the Fourth Panel[1078].

Even though the Superior Court of Justice has adjudicated a few cases involving customs, there is an important precedent in obligational matters. It is about the instance involving the obligation to build provisional hedges (and not merely bear its costs) being defined with basis on the local custom to care for the confinement of cattle[1079].

To sum up, it can be asserted that, according to the legal precedents of the Superior Court of Justice, the importance of the contractual custom would be secondary, being limited to serve as an instrument of interpretation of the legal transaction.

5.1.3. Court of Appeals of Paraná

There were a few instances analyzed and solved by the Court of Appeals of Paraná as well, in the period mentioned, on the grounds of contractual custom.

Among these few events, it can be pointed out the center of appellate decision when it was discussed the instance involving the payment of several freights to Paraguay, and that should be paid there, but weren't. It was not clear

[1076] BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 877.074/RJ. SAB Trading Comercial Exportadora S/A versus TRANSCOCAMAR Transportes e Comércio Ltda. Terceira Turma. Relatora Min. Nancy Andrighi. Adjudicated on 12 May 2009.

[1077] BRAZIL. Superior Tribunal de Justiça. Agravo regimental no agravo de instrumento n. 6418/SP. Maria Elvira Siciliano Villares e outros versus Corretora S. B. Câmbio e Títulos S.A. Terceira Turma. Relator Min. Dias Trindade. Adjudicated on 19 December 1990.

[1078] BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 1.021.605/SP. Artur Construções e Empreendimentos Imobiliários Ltda e outro versus Banco Santander Noroeste S/A. Quarta Turma. Relator Min. Fernando Gonçalves. Adjudicated on 09 February 2010.

[1079] BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 6619/RS. Dimaper Distribuidora de Materiais de Perfuração Ltda versus Willibaldo Hedler. Quarta Turma. Relator Min. Athos Carneiro. Adjudicated on 19 March 1991.

in the records if the condition of road transportation was under the clause CIF or FOB (both adequate to the waterway modal). By reason of this doubt, the court, making use of international usages ("best way (...) to interpret the trade Law, especially with regards to international relations"), kept the importer's sentence, based on the solidarity clause (prescribed in the general conditions of the transportation contract) and on what it considered "common and more logical rule" which provides the payment of freight by the importer or that one who receives the product[1080].

Most of the other instances referred to the custom as criterion of interpretation of contract of rendering of service, being on the price-fixing of overdue amounts to doctors when not previously hired[1081], or on the definition of the possibility or not of termination of mandate right to the compensation[1082].

It should also be pointed out the event in which, based on the customary way to trade cattle for slaughter, the court had to define the legal nature of the intermediate agent who commercially acted between the slaughterhouse and the livestock farms[1083], and the instance when the court drove away the argument of the insurance company that refused to pay compensation for understanding that what the insurance company identified as increased risk, was an usual way of transportation in the region[1084].

Still in interpretative terms, another interesting sentence is that one in which the Court averts the argument of the financing institution that the possibility of charging remuneration interests beyond the legal limits would be

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[1080] PARANÁ. Tribunal de Justiça. Ação monitória. Contrato de transporte internacional por rodovia. Pagamento do frete. Responsabilidade do exportador/vendedor ou do importador/comprador. Cláusula FOB ou CIF. Ônus da prova. Embargos infringentes. Apelação Cível n. 167032-0, Alcan Alumínio do Brasil Ltda. versus Transportadora Alexandra do Brasil Ltda., Rel. Des. Ruy Cunha Sobrinho. Appellate Decision of 03 March 2005.

[1081] PARANÁ, Tribunal de Justiça. Apelação Cível n. 166460-0. Lucia de Fátima Rodrigues Orlandini versus Hiroshi Nakano. Primeira Câmara Cível. Relator Des. Lauro Augusto Fabrício de Melo. Julgado em 27 de março de 2001; PARANÁ, Tribunal de Justiça. Apelação Cível n. 215955-7. Francisca do Espírito Santo e Margot do Espírito Santo Costa versus Luciano Alves Façanha. Décima Câmara Cível. Relator Des. Lauri Caetano da Silva. Adjudicated on 21 August 2003.

[1082] PARANA, Tribunal de Justiça. Apelação Cível n. 424941-6. Rio Paraná Companhia Securitizadora de Créditos Financeiros versus Oliveira Martins dos Reis. Décima segunda Câmara Cível. Relator Des. Ivan Bortoleto. Adjudicated on 28 May 2008.

[1083] PARANA, Tribunal de Justiça. Apelação Cível n. 641552-7. Alceu Silverio de Almeida versus Lagoano Frigorífico e Comércio de Carnes Ltda e Banco Bradesco S/A. Nona Câmara Cível. Relator Des. Renato Braga Bettega. Adjudicated on 26 August 2010.

[1084] PARANA, Tribunal de Justiça. Apelação Cível n. 470210-5. IRB Resseguros Brasil S. A versus Companhia de Seguros do Estado de São Paulo. Oitava Câmara Cível. Relator. Des. José Sebastião Fagundes Cunha. Adjudicated on 08 July 2008.

based on the custom[1085]. There can still be mentioned the event in which the Court considered that, in the sale of cars, the fact of the custom issues debt clearance certificate to DETRAN (Brazilian State Department of Transit) would reinforce the good faith of the third party, oblivious to legal constriction not reported in that organ, driving away the statement of fraud[1086].

The Court of Appeals of Paraná also makes it clear the subsidiary role of the custom when denying the action for damages to fill in the card, but does not say it to the other participants. In this instance, the custom was referred to by the "absence of regulating disposition" on the theme[1087]. The same kind of argument is done involving the legal nature of the clause of "no-show" in hosting contract[1088].

Even if it is not a contractual example, it is suitable to mention the statement of the abolished State Court of Appeals of Limited Jurisdiction of Paraná in an instance involving the removal of crosses by the roads under the regime of public concession in which it supporting the understanding that the custom would be applicable only when the legislation was missing[1089].

Just as in the other Court of Appeals of Paraná there were events of terminology confusion between custom and contractual practices[1090].

5.1.4. Partial conclusion

[1085] PARANA, Tribunal de Justiça. Apelação Cível n. 533995-5. UNIBANCO - União de Bancos Brasileiros AS versus Evandro Cardoso Piperno e outro. Décima Terceira Câmara Cível. Relator Des. Rosana Andriguetto de Carvalho. Julgado em 13 de maio de 2009 e PARANA, Tribunal de Justiça. Apelação Cível n. 558314-6. Antonio Cesar Assunção – ME versus HSBC Bank Brasil SA - Banco Múltiplo. Décima Terceira Câmara Cível. Relator Des. Rosana Andriguetto de Carvalho. Adjudicated on 12 August 2009.

[1086] PARANA, Tribunal de Justiça. Apelação Cível n. 461216-8. Maria da Glória Amorin versus Nair Sant´Ana Mirais. Sétima Câmara Cível. Relator Des. Ruy Francisco Thomaz. Adjudicated on 11 March 2008.

[1087] PARANA, Tribunal de Justiça. Apelação Cível n. 385495-9. Francisco Antônio da Silveira versus Loja Maçônica XV de Novembro, Geni Aparecida Vieira de Oliveira, Genésio Lopes, Altair Pereira da Silva e Sérgio Reis Bordonal. Sexta Câmara Cível. Relator Des. Prestes Mattar. Adjudicated on 13 March 2007.

[1088] PARANA, Tribunal de Justiça. Apelação Cível n. 519237-6. Bella Vista Viagens e Turismo Ltda. versus Atlântica Hotels Internacional Brasil. Décima terceira Câmara Cível. Relator Des. Gamaliel Seme Scaff. Adjudicated on 22 July 2009.

[1089] PARANA, Tribunal de Alçada. Apelação Cível n. 247562-9. Almerina Margarida Sordi Pomin, Cláudio César Pomin, Vânia Maria Pomin Marques, Jacyara Marta Pomin Gomes, Delcides Pomin Júnior, Fernando Luis César Pomin versus Rodovias Integradas do Paraná S.A. Primeira Câmara Cível. Relator Juiz Antônio de Sá Ravagnani. Adjudicated on 09 November 2004.

[1090] PARANA. Tribunal de Justiça. Apelação Cível n. 0553439-8. Zago Imobiliária e Fomento Mercantil Ltda versus Escoelectric Ltda, A. J. Fernandes Equipamentos Ltda e José Renacir Marcondes. Décima Terceira Câmara Cível. Relator Des. Gamaliel Seme Scaff. Adjudicated on 19 August 2009 and PARANÁ. Tribunal de Justiça. Apelação Cível n. 0499103-7. Pedro Pereira Padilha e Souza Cruz S/A versus Pedro Pereira Padilha e Souza Cruz S/A. Sexta Câmara Cível, Relator Des. Sérgio Arenhart. Adjudicated on 30 September 2008.

Generally speaking, thus, it can be concluded that the Courts researched recognize the existence of local and regional contractual customs to the limit in which they do not oppose express provision of law. The roles which are usually granted are the interpretation and contractual integration. More rarely, however, there can be found instances of recognition of the custom as a normative and obligational source.

It can also be noticed that the application of the contractual custom as an argument for the legal decision is not greatly analyzed on its adequacy to the constitutional bases, despite its express protection as a cultural manifestation (art. 215 of the Constitution of Republic). In only one instance ("*farra do boi*"), non-contractual one, there was such conformation and the conclusion seemed to be by the establishment of hierarchy among the basic rights.

Finally, it is appropriate to point out that all the analyzed courts, in some opportunities, ended up confusing established between the parties. There is an equal precedent of the Federal Supreme of Court which lends the same origin of obligatoriness to both.

5.2. INTERNATIONAL CONTRACTUAL CUSTOMS RECOGNIZED BY MEANS OF INTERNATIONAL TREATIES: THE INSTANCES OF THE VIENNA CONVENTION OF 1980 (CISG)

Having finished the analysis of the acceptance of the contractual customs by the Brazilian adjudicative law, it seems convenient to understand how the State can still be part of this recognition in an international sphere. In other words, if the previous item dealt with a typical instance of the exercise of sovereignty on the choice of contractual normative sources within its own national borders, it is now time to analyze this same exercise in an international scope, by means of execution of International Treaties. The focus of the analysis will concern a specific Treaty: the Vienna Convention of 1980 on international sales of products (CISG)

The events before the Vienna Convention of 1980 are the two Hague Conventions of 1964, on the formation of contracts (LUF) and on the sales (LUVI). The accession of these two Conventions was not significant, and so

UNCITRAL revised their texts giving origin to the Vienna Convention of 1980 (which entered into force in January 1988). Its main objective is the unification of the legal regime applicable to international contracts of sales of products[1091]. Despite the intense participation in its preparatory work[1092], Brazil ratified the Vienna Convention of 1980 on international sales of products only in 2014.

The CISG established a unified system to rule the international contracts of sales of products. Nowadays its relevance is basically due to three aspects (i) its wide application in the International Law; (ii) the possibility of the rules of DIPRI to apply law of a signatory country of Convention and (iii) the possibility that both parties may be voluntarily subjected to it. In addition, partial accession to its content is admitted. Through these mechanisms, so, it is estimated that the great majority of freight lines is currently regulated by its dispositions.

It is such major importance that there are several decisions that declare it as an expression of the so-called *Lex mercatoria*, even in instances when the parties were based in countries which had not ratified it[1093], when a specific national law was not applied[1094], whose object of dispute had been prior to its existence[1095], or yet, when its application was agreed by the parties[1096]. KAHN

[1091] GILLETTE, Clayton P.; SCOTT, Robert E. The Political Economy of International Sales Law. In: International Review of Law and Economics, v. 25, set. 2005, p. 446.

[1092] VIEIRA, Iacyr de Aguilar. Brazil. In: FERRARI, Franco. (Ed.). The CISG and its impact on National legal systems. Munich: Sellier, 2008, p. 07-08.

[1093] There can be mentioned the instances: CCI. Arbitral report n. 5713/1989. APPLICATION OF CISG – CISG APPLICABLE AS LEX MERCATORIA (ART. 1 CISG).ARBITRATION - CISG REFLECTION OF TRADE USAGE. CONFORMITY OF GOODS - BUYER'S OBLIGATION WHERE LACK OF CONFORMITY - TIMELY EXAMINATION (ART. 38 CISG). NOTICE OF LACK OF CONFORMITY WITHIN REASONABLE TIME AFTER DISCOVERY (ART. 39 CISG). SELLER'S KNOWLEDGE OF LACK OF CONFORMITY (ART. 40 CISG). DAMAGES - SET OFF FOR LACK OF CONFORMITY. Unknown parties. Adjudicated in 1989. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=16&step=FullText>.

[1094] Cf. ITALIA. Tribunale di Padova - Sez. Este. REFERENCE BY PARTIES TO THE "LAWS AND REGULATIONS OF THE INTERNATIONAL CHAMBER OF COMMERCE, PARIS, FRANCE" AS THE LAW GOVERNING THE CONTRACT – INEFFECTIVE BECAUSE TOO VAGUE AND IMPRECISE - DOES NOT AMOUNT TO AN IMPLIED EXCLUSION OF CISG UNDER ART. 6. REFERENCE BY PARTIES TO LEX MERCATORIA, UNIDROIT PRINCIPLES OR CISG (WHERE THE LATTER IS NOT PER SE APPLICABLE) AS THE LAW GOVERNING THE CONTRACT – NOT VERITABLE CHOICE OF LAW CLAUSE – MERELY AMOUNTS TO INCORPORATION OF SUCH NON-BINDING RULES INTO THE CONTRACT. UNIFORM INTERPRETATION AND APPLICATION OF CISG (ART. 7(1) CISG) – RECOURSE TO INTERNATIONAL CASE-LAW. CONTRACT FOR DELIVERY IN INSTALMENTS AT BUYER'S REQUEST ("REQUIREMENT CONTRACT") – COVERED BY CISG. SELLER'S FAILURE TO DELIVER GOODS - AMOUNTS TO FUNDAMENTAL BREACH (ART. 25 CISG) - BUYER ENTITLED TO TERMINATE CONTRACT (ART. 49(1)(B) CISG) – CONDITIONS. Ostroznik Savo v. La Faraona soc. coop. a r.l. Adjudicated on 11 January 2005. Available on : <http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText>.

[1095] IRAN-UNITED STATES CLAIMS TRIBUNAL. Report n. 370 (429-370-1).APPLICATION OF CISG - CISG APPLICABLE AS 'RECOGNIZED INTERNATIONAL LAW OF COMMERCIAL CONTRACTS'. DAMAGES - DUTY TO MITIGATE - PRESERVATION OF THE GOODS - UNREASONABLE DELAY IN PAYMENT - RIGHT TO SELL - RIGHT TO RETAIN REASONABLE EXPENSE (ART. 88 CISG) Watkins-Johnson Co. & Watkins-Johnson Ltd. v. The Islamic Republic of Iran & Bank Saderat Iran. Adjudicated on 28 July 1989. Available on:

made this same connection in doctrinaire terms[1097], but it is not always immediate. AUDIT, for example, sees a complementary role between the CISG and the *Lex mercatoria*, mainly because of the prevalence of the customs over the applicable law[1098].

The CISG excludes, from its scope of application, the relations of consumption (products of personal, familiar or domestic use), the judicial sale, securities, negotiable instruments, money, electricity, ships, boats and aircrafts. Besides that, the CISG just regulates the formation of the contract, being the regulation of the validity of the contract or of its clause and the regime of transfer of property explicitly exempt from its coverage.

If, on the one hand, given the way the text was prepared, it ended up establishing comprehensible and vague terms[1099] (at least if compared to the usual form of drafting in the system of common Law)[1100], on the other hand, it reflects the solution of commitment that was possible to obtain when so many different and antagonistic interests were at state[1101]. According to DE LY, this model had admitted the application of the Convention as far as possible, while it

<http://www.unilex.info/case.cfm?pid=1&do=case&id=38&step=FullText>; ICC. Arbitral report n. 9474. CONTRACT FOR THE PRINTING AND DELIVERY OF BANK NOTES – NON-PERFORMANCE OF SELLER FOLLOWED BY SO-CALLED EXECUTORY AGREEMENT BETWEEN PARTIES ACCORDING TO WHICH SELLER WAS TO PRINT NEW NOTES MEETING REQUIREMENTS OF ORIGINAL CONTRACT – NOT MERE SALES CONTRACT BUT AGREEMENT INVOLVING ALSO ELEMENTS OF SETTLEMENT – CISG NOT DIRECTLY APPLICABLE. ARBITRAL TRIBUNAL REQUESTED TO APPLY "GENERAL STANDARDS AND RULES OF INTERNATIONAL CONTRACTS" – REFERENCE TO CISG "WHICH EMBODIES UNIVERSAL PRINCIPLES APPLICABLE IN INTERNATIONAL CONTRACTS" AND TO THE UNIDROIT PRINCIPLES AND TO THE PRINCIPLES OF EUROPEAN CONTRACT LAW AS "RECENT DOCUMENTS THAT EXPRESS THE GENERAL STANDARDS AND RULES OF COMMERCIAL LAW". AVOIDANCE OF CONTRACT FOR FRAUDULENT NON-DISCLOSURE OF CIRCUMSTANCES (SEE ARTICLES 3.5 AND 3.8 OF THE UNIDROIT PRINCIPLES; ARTICLE 4.107 OF THE PRINCIPLES OF EUROPEAN CONTRACT LAW). NOTICE OF DEFECTS OF GOODS - SEVERAL MONTHS AFTER DELIVERY - SELLER MAY NOT OBJECT TO LATE NOTICE IF IT KNEW OR OUGHT TO HAVE KNOWN OF THE DEFECTS (ARTICLE 40 CISG). TERMINATION OF CONTRACT FOR NON-PERFORMANCE – NOTICE TO BE GIVEN WITHIN A REASONABLE TIME (SEE ARTICLE 7.3.2 OF THE UNIDROIT PRINCIPLES).Unknown parties. Adjudicated on February 1999. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=716&step=FullText>.

[1096] This would be that case of the Venezuelan Law which authorized the private autonomy for the choice of applicable Law, even when there is no such choice imposing the judge to apply the more binding Law to the contract.. MADRID MARTÍNEZ, Claudia. Venezuela. In: FERRARI, Franco. (Ed.). Op. cit., p. 341.

[1097] KAHN, Philippe. La Convention de Vienne du 11 avril 1980 sur les contrats de vente internationale de marchandises. In: Revue Internationale de Droit Compare, v. 33, n. 4, 1981, p. 961.

[1098] AUDIT, Bernard. The Vienna Sales Convention and the Lex Mercatoria. In: CARBONNEAU, Thomas E. (Ed). Lex Mercatoria and Arbitration, Huntington: Juris Publishing, 1998, p. 175.

[1099] GILLETTE, Clayton P.; SCOTT, Robert E. Op. cit., p. 484.

[1100] GARRO, Alejandro M. Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods. In: International Lawyer, v. 23.1989, p. 453.

[1101] BAINBRIDGE, Stephen. Op. cit., p. 636-637.

kept a modest role for the legal national regime and the private international Law[1102].

The own convenience of the Convention is debated. Even if recognizing as a major step towards the unification of the legal regime of the international contracts of sales, some consider that its usefulness has not yet been demonstrated[1103]. Equally, there are those who defend not only its usefulness as a unifying instrument[1104], but also its positive influence on the national legislations[1105].

The CISG, as previously mentioned, establishes the binding of the usages agreed by the parties and habits established among themselves. The CISG still complements the notion by establishing the presumption of the knowledge of the common customs established in the international trade ("which the parties knew or ought to have known").

Due to the linguistic peculiarity of the common law, there are authors who do not accept the existence of the binding of customs, but only usages and practices[1106]. On the other hand, contrary to other codifications (such as the UCC, for example), and within the same line of national codifications, there is no definition of what the custom is[1107]. Such device generated a strong debate marked by a political attitude[1108].

> Article 9
> (1)The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
> (2)The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties known and which in international trade is widely

[1102] DE LY, Filip. Sources of international sales law: an eclectic model. In: Journal of Law and Commerce, v. 25, jun. 2005, p. 02.
[1103] CUNIBERTI, Gilles. Is the CISG benefiting anybody? In: Vanderbilt Journal of Transnational law, v. 39, 2006, p. 1511-1550.
[1104] ZELLER, Bruno. CISG and the unification of international trade law. New York: Routledge-Cavendish, 2007, p. 106-107.
[1105] DE LY, Filip. Sources of international..., 11-12; WITZ, Claude. Os vinte e cinco anos da Convenção das Nações Unidas sobre os contratos de compra e venda internacional de mercadorias: balanço e perspectivas. In: VIEIRA, Iacyr de Aguilar. (Org.). Estudos de Direito comparado e de Direito internacional privado. Curitiba: Juruá, 2011, t. 2, p. 435.
[1106] "The CISG clearly rejects both custom and customary law as sources of binding usages. Rather the CISG emphasizes current practice with its test of usage widely known and observed". BAINBRIDGE, Stephen. Op. cit., p. 657.
[1107] GOLDSTAJN, Aleksandar. Op. cit., p. 96; PAMBOUKIS, Ch. The concept and function of usages in the United Nations Convention on the international sale of goods. In: Journal of Law and Commerce, v. 25, 2005, p. 131.
[1108] BAINBRIDGE, Stephen. Op. cit., p. 637.

known to, and regularly observed by parties to contracts of the type involved in the particular trade concerned.

The draft of art.9 would demonstrate, according to DE LY, the absence of monopolistic claims by the drafters of the Convention[1109], as the legal regime of the international contract could be admitted by sources other than the Conventional text itself, extrapolating it[1110]. Its draft would also reveal the debate around which of the theories which explained the custom should be adopted by the Vienna Convention.

On the one hand, it seems clear the option for the subjective perspective, that is, that the custom comprises the contract and takes from it its obligatory power (that is why, for example, there is a need to demonstrate the knowledge of the custom[1111]). On the other hand, there was also room for a "brief" objectification when, in art. 9 (2), it was presumed the knowledge related to a specific commercial activity. DE LY alleges that this device has a normative character and does not depend on the knowledge or consent by the contracting parties[1112], whereas BOGGIANO claims that the convention only presumed their will[1113].

The issue on the consent to make the custom compulsory is also outstanding. Apparently, the CISG establishes the binding of the principle in two ways: on the practices and usages (art. 9.1) and on commercial customs (Art. 9.2), in accordance with the distinction previously established[1114] (item 3.3).

It is relevant to point out, nevertheless, the role assigned by the CISG to the private autonomy and if it prevails over the customs. REILEY highlights the fact that, differently from the UCC, the CISG does not establish hierarchy between the contractual conduct of the parties and the custom[1115], but takes into account past conducts solely for the interpretation of past conducts (art. 8.3), besides making it possible to drive away the application of this specific device (

[1109] DE LY, Filip. Sources of international..., p. 05.
[1110] ZELLER, Bruno. Op. cit., p. 31.
[1111] According to GOODE, at a certain extent this requisite would allow the paradox to turn the non-Law into Lay by error. GOODE, Roy. Usage and its reception..., p. 09.
[1112] DE LY, Filip. International business..., p. 159.
[1113] BOGGIANO, Antonio. Contratos internacionales. 2. ed. Buenos Aires: Depalma, 1995, p. 88.
[1114] In the same sense see: OVIEDO ALBÁN, Jorge. Remarks on the Manner in which the UNIDROIT Principles May Be Used to 1nterpret or Supplement CISG Article 9. Available on: <http://www.cisg.law.pace.edu/cisg/biblio/oviedoalban5.html>.
[1115] In the same sense: CARDENA AFANADOR, Walter René. Op. cit., p. 12.

art. 6º)[1116], which is also agreed by AUDIT[1117]. In turn, the customs prevail over the dispositions of the Convention itself, which has an optional part[1118]. Several authors point out that it is a disposition only accepted in the international trade, once it could not be accepted its preponderance over the internal legislation[1119].

It is also argued that the basis of binding of the custom, even under art. 9 (2), would be contractual freedom. Hence, while in the conditions of art. 9(1) it would be talked about agreed practices, the customs would be presumed in art. 9(2)[1120]. This way, at a first moment, the art. 9(1) specifically refers to the private autonomy by the contracting parties which may establish its own contractual practices, limited to the domestic prohibitions which "qualify the customs"[1121]. As for the draft of art. 9(2), for example, it allowed that the parties were obliged by customs they did not agree with or had not expressed their consent[1122]. This last supposition is what GELINAS describes as a "nice legal fiction"[1123].

Some authors, however, criticize this opinion, as apparently it would not make distinction between a normative custom, a mere habit, politeness, convenience or accommodation of interests[1124]. Others would point out the loss of importance of the custom on behalf of the contract practice (course of dealing)[1125], and the lost opportunity to solve the conflict between local and international custom, between the custom that is being made and that old one,

[1116] REILEY, Eldon H. International Sales contracts: the UN Convention and related Transnational Law. Durham: Carolina Academic Press, 2008, p. 159-160; CALVO CARAVACA, Alfonso L.; FERNÁNDEZ DE LA GÁNDARA, Luis. El contrato de compra venta internacional de mercancías. In: CALVO CARAVACA, Alfonso L.; FERNÁNDEZ DE LA GÁNDARA, Luis (Dir.) Contratos Internacionales. Madrid: Tecnos, 1997, p. 185.

[1117] AUDIT, Bernard. Présentation de la Convention. In: DERAINS, Yves; GHESTIN, Jacques. (Dir.). La Convention de Vienne sur la Vente Internationale et les Incoterms: actes du Colloque des 1er et décembre 1989. Paris: LGDJ, 1990, p. 29-31.

[1118] HEUZÉ, Vincent. La vente internationale dee merchandise: Droit uniforme. In: GHESTIN, Jacques. (Dir.). Traité dês Contrats. Paris: LGDJ, 2000, p. 95; CALVO CARAVACA, Alfonso L.; FERNÁNDEZ DE LA GÁNDARA, Luis. Op. cit., p. 185; GOLDSTAJN, Aleksandar. Op. cit., p. 97; GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 291.

[1119] SOARES, Maria Ângela Bento; RAMOS, Rui Manuel Moura. Contratos internacionais: compra e venda, cláusulas penais, arbitragem. Coimbra: Almedina, 1986, p. 40-41.

[1120] GOLDSTAJN, Aleksandar. Op. cit., p. 97.

[1121] SCHLECHTRIEM, Peter; BUTLER, Petra. UN Law on international sales: The UN Convention on the international sale of goods. Berlin: Springer, 2009, p. 59.

[1122] BOUT, Patrick X. Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods. Available on: <http://www.jus.uio.no/pace/trade_usages_article_9_cisg.patrick_x_bout/sisu_manifest.html>.

[1123] The author, however, does not abandon the consensual explanation. According to his explanation, fiction would fall back the consent of a certain economic community. GÉLINAS, Fabien. Op. cit., p. 955.

[1124] GOODE, Roy. Usage and its reception..., p. 10; GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 292.

[1125] DE LY, Filip. Sources of international..., p. 05.

and the establishment of a clear criterion of requirement of knowledge[1126]. There are also some who recognize the existence of these "presumed" customs, even if still in a limited number[1127].

Still, in comparison with its antecessors – LUVI (art.9)[1128] and LUF (art.13)[1129], the CISG prescribes the obligatoriness of the custom only if demonstrated that the contracting parties knew or ought to have known about its existence. The LUVI and the LUF, for example, referred only to the situation in which "reasonable people" are placed in the same conditions, a term which was widely criticized[1130].

If the CISG is compared to more recent models, the situation will not necessarily be the same. The DCFR, for instance, presents another model of positivism: with no reference to the presumed will by the contracting parties, the custom would be binding if respected by those in the same conditions as the contracting parties, if it were reasonable and in accordance with the agreement (1:104)[1131]. Its application, thus, would take place regardless the parties' will[1132].

Some examples of objectiveness, nonetheless, may be withdrawn from legal and arbitral precedents. Thus, for instance, the custom has already been recognized as regularly observed: the revision of price in the trade of manganese[1133]; the employment of the PICC in the "international trade"[1134]; the

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[1126] KACZOROWSKA, Alina. Les usages commerciaux dans les conventions relatives à la vente internationale. In: Revue Juridique Thémis, v. 29, n. 2, 1995, p. 429-456.

[1127] SCHLECHTRIEM, Peter; BUTLER, Petra. Op. cit., p. 59.

[1128] "9. (1) The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves. (2) They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties. (3) Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned".

[1129] "13. (1) Usage means any practice or method of dealing, which reasonable persons in the same situation as the parties, usually consider to be applicable to the formulation of their contract. (2) Where expressions, provisions or forms of contract commonly used in commercial practices are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned".

[1130] BAINBRIDGE, Stephen. Op. cit., p. 653-655.

[1131] II.-1:104: Usages and practices. (1) The parties to a contract are bound by any usage to which they have agreed and by any practice they have established between themselves. (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable. (3) This Article applies to other juridical acts with any necessary adaptations. Available on: <http://translex.uni-koeln. de/output.php?docid=400270>.

[1132] TROIANO, Stefano. The CISG ´s impact on EU legislation. In: FERRARI, Franco. (Ed.). Op. cit., p. 391.

[1133] ICC. Arbitral Report n. 8324/1995. APPLICATION OF CISG - CHOICE BY PARTIES OF THE LAW OF A CONTRACTING STATE AS GOVERNING LAW OF CONTRACT (ART. 1(1)(B) CISG). PRICE - REFERENCE TO CONDUCT AND STATEMENTS OF THE PARTIES TO ESTABLISH WHETHER PRICE IS FINAL OR SUBJECT TO REVISION (ART. 8(1) CISG) - REVISION OF PRICE AS A USAGE IN THE TRADE CONCERNED (ART. 9(2) CISG). DETERMINATION OF PRICE - PRICE SUBJECT TO REVISION - RELEVANCE OF CONDUCT AND

payment of interest rates for delay in the obligational payment of price[1135]; the possibility of delay of the term of obligation maturity day of bill of exchange[1136]; the standard clauses[1137]; the FOB clause in sales contracts[1138]; the INCOTERMS[1139];

PRACTICES OF THE PARTIES (ART. 8(3) CISG). Unknown parties. Adjudicated 1995. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=240&step=FullText>.

[1134] RUSSIA. International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation. Report n. 229/1996. CONTRACT GOVERNED BY CISG – UNIDROIT PRINCIPLES APPLIED AS MEANS TO INTERPRET AND SUPPLEMENT CISG (PREAMBLE OF UNIDROIT PRINCIPLES) – UNIDROIT PRINCIPLES APPLIED AS REFLECTING INTERNATIONAL USAGES (ART. 9(2) CISG). PENALTY CLAUSE – PAYMENT OF PENALTY FOR DELAY IN PAYMENT OF PRICE – MATTER NOT COVERED BY CISG – RECOURSE TO ART.7.4.13 UNIDROIT PRINCIPLES. AMOUNT OF PENALTY EXCESSIVE – REDUCTION TO REASONABLE AMOUNT (ART.7.4.13(2) UNIDROIT PRINCIPLES) Unknown parties. Adjudicated on 05 June 1997. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=731&step=Abstract>.

[1135] ARGENTINA. Juzgado Nacional de Primera Instancia en lo Comercial No. 7. 50272. S COPE OF CISG - MATTERS NOT EXPRESSLY SETTLED IN CISG (ART. 7(2) CISG) - RIGHT TO INTEREST DURING AGREED DELAY FOR DEFERRED PAYMENT - REGULATED BY USAGES (ART. 9(2) CISG). Elastar Sacifia versus Bettcher Industries Inc. Adjudicated on 20 May 1991. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=14&step=FullText>; ARGENTINA. Juzgado Nacional de Primera Instancia en lo Comercial No. 10. INTEREST - PAYMENT OF INTEREST DUE ACCORDING TO INTERNATIONAL TRADE USAGES (ART. 9 CISG). INTEREST RATE - DETERMINED ACCORDING TO INTERNATIONAL TRADE USAGES - PRIME RATE. Aguila Refractarios S.A. s/ Conc. Preventive. Adjudicated on 23 October 1991. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=184&step=FullText>; ARGENTINA. Juzgado Nacional de Primera Instancia en lo Comercial No. 10. 56179. INTEREST RATE DETERMINED ACCORDING TO INTERNATIONAL TRADE USAGES (ART. 9 CISG). Bermatex s.r.l. v. Valentin Rius Clapers S.A. versus Sbrojovka Vsetin S.A. Adjudicated on 06 October 1994. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=178&step=FullText>.

[1136] GERMANY. Landgericht Hamburg.5 o 543/88. APPLICATION OF CISG - RULES OF PRIVATE INTERNATIONAL LAW REFERRING TO LAW OF CONTRACTING STATE (ART. 1(1)(B) CISG). INTERPRETATION OF STATEMENTS AND CONDUCT - UNDERSTANDING OF REASONABLE PERSON (ART. 8 CISG). AGENCY - MATTER EXCLUDED FROM SCOPE OF CISG (ART. 4 CISG) - DOMESTIC LAW APPLICABLE. EXISTENCE OF A COMPANY – MATTER EXCLUDED FROM SCOPE OF CISG (ART. 4 CISG) - DOMESTIC LAW APPLICABLE. MODIFICATION OF CONTRACT (ART. 29 CISG) - PAYMENT DATE DEFERRED TO DATE OF BILL OF EXCHANGE. USAGE (ART. 9(2) CISG) - IMPLIED TERM WHERE WIDELY KNOWN AND REGULARLY OBSERVED. INTEREST - RIGHT TO INTEREST IN CASE OF LATE PAYMENT (ART. 78 CISG) - INTEREST RATE - AVERAGE BANK LENDING RATE AT CREDITOR'S PLACE OF BUSINESS - ACCRUAL FROM THE BILL OF EXCHANGE'S EXPIRATION DATE. Unknown parties. Adjudicated on 26 September 1990. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=7&step=Abstract>.

[1137] HOLLAND. Gerechtshof's Hertogenbosch.456/95/He. FORMATION OF CONTRACT - INCORPORATION OF STANDARD TERMS - RELEVANCE OF USAGES OF THE PARTICULAR TRADE CONCERNED AND PRACTICES ESTABLISHED BETWEEN PARTIES (ART. 9 CISG). E.H.T.M. Peters Versus Kulmbacher Spinnerei & Co. Produktions KG. Adjudicated on 24 April 1996. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=224&step=Abstract>.

[1138] ITALY. Corte di Appello di Genova. 211. FOB CLAUSE - APPLICABILITY TO SALES CONTRACT AS INTERNATIONAL TRADE USAGE BINDING UNDER ART. 9 CISG. Marc Rich & Co. A.G. Versus Iritecna S.p.A. . Adjudicated on 24 March 1995. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=198&step=Abstract>.

[1139] UNITED STATES OF AMERICA. U.S. District Court, Southern District, Texas, Houston Division. Civ. A. H-04-0912. "CIF" DELIVERY TERM IN CONTRACT FOR SALE OF GOODS - TO BE GIVEN THE MEANING PROVIDED FOR IT BY INCOTERMS 1990. INCOTERMS - TO BE CONSIDERED AS INCORPORATED INTO CISG THROUGH ITS ART.9(2).China North Chemical Industries Corporation v. Beston Chemical Corporation. Adjudicated on 07 February 2006. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=1089&step=FullText>; UNITED STATES OF AMERICA. District Court of New York. Civ. 9344 (SHS). St. Paul Guardian Insurance Co., et al. v. Neuromed Medical Systems & Support, et al. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=730&step=FullText>; UNITED STATES OF AMERICA. US Court of Appeals for the Fifth Circuit. 02-20166. EXCLUSION OF CONVENTION (ART. 6 CISG) - CHOICE OF LAW OF CONTRACTING STATE DOES NOT AMOUNT TO IMPLIED EXCLUSION. EXCLUSION OF CONVENTION (ART. 6 CISG) - NEED OF CLEAR LANGUAGE EXPRESSLY STATING THAT CONVENTION

the opportunity of the seller to be present while the buyer examines the goods[1140] and verbal requests, followed by invoices with the terms of sale[1141]. It was been concluded, thus, that the custom of executing a contract by means of a letter of confirmation used to be a local custom (German)[1142].

GOODE stresses that the practice is not always effectively made positive by the Conventions; his concern is the readiness by some arbitral courts to recognize evidence of the existence of a custom through its codification[1143]. GILLETE, in a strictly economics analysis, points out that the customs which have been recognized are those which are revealed through codifications of international associations, or which were easily verifiable[1144].

CALVO CARAVACA and FERNANDEZ DE LA GANDARA highlight that the role of the customs would be to allow a full regulation of instances which

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DOES NOT APPLY AND WHAT LAW SHOULD GOVERN THE CONTRACT. EXCLUSION OF CONVENTION (ART. 6 CISG) - AFFIRMATIVE OPT-OUT REQUIREMENT PROMOTES UNIFORMITY AND OBSERVANCE OF GOOD FAITH IN INTERNATIONAL TRADE (ART. 7(1) CISG). INCOTERMS - INCORPORATED INTO CONVENTION AS USAGES, THOUGH NOT GLOBAL, WELL KNOWN IN INTERNATIONAL TRADE (ART. 9(2) CISG) BP Oil International and BP Exploration & Oil Inc. versus Empresa Estatal Petroleos de Ecuador. Adjudicated on 11 June 2003. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=924&step=FullText>.

[1140] FINLAND. Helsinki Court of Appeal. S 96/1129. CONFORMITY OF GOODS (ART. 35 CISG) - FITNESS FOR ORDINARY OR FOR PARTICULAR PURPOSE - BECAUSE SELLER HAD COMMITTED ITSELF TO DELIVER GOODS THAT MET CERTAIN QUALITY REQUIREMENTS, IT MUST HAVE BEEN AWARE OF THE PURPOSE OF THE GOODS SOLD (ART. 35(2) CISG). TIME FOR EVALUATING CONFORMITY OF GOODS (ART. 36 CISG). BUYERS OBLIGATION TO EXAMINE THE GOODS (ART. 38(1) CISG) - USAGES AND PRACTICES (ART. 9 CISG) - ACCORDING TO TRADE USAGE, BUYER HAD TO GIVE THE SELLER AN OPPORTUNITY TO BE PRESENT WHILE CHECKING GOODS. BUYER'S OBLIGATION TO EXAMINE GOODS – SALE INVOLVING CARRIAGE OF GOODS - EXAMINATION MAY BE DEFERRED UNTIL AFTER THE GOODS HAVE ARRIVED AT THEIR DESTINATION - (ART. 38(2) CISG). PASSING OF RISK IN SALES WITH CARRIAGE (ART. 67 CISG) Unknown parties. Adjudicated on 29 January 1998. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=490&step=Abstract>.

[1141] UNITED STATES OF AMERICA. U.S. District Court, Western District Washington at Tacoma.C05-5538FDB. SCOPE OF CISG – VALIDITY OF CONTRACT PROVISION – MATTER EXCLUDED FROM CISG (ART.4) – DOMESTIC LAW APPLICABLE. MODE OF ACCEPTANCE – THROUGH OTHER CONDUCT INDICATING ASSENT (ART. 18(1) CISG) – PAYMENT OF PRICE (ART. 18(3) CISG).USAGES AND PRACTICES WIDELY KNOWN AND REGULARLY OBSERVED IN INTERNATIONAL TRADE (ART. 9(2) CISG). INTERPRETATION OF ART. 9(2) CISG – REFERENCE TO PRECEDENT OF FOREIGN LAW Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc. Adjudicated on 13 April 2006. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=1105&step=FullText>.

[1142] GERMANY. Oberlandesgericht Frankfurt am Main. 9 U 81/94. USAGE (ART. 9(2) CISG) - IMPLIED TERM WHERE WIDELY KNOWN AND REGULARLY OBSERVED IN INTERNATIONAL TRADE - CONCLUSION OF CONTRACT BY LETTER OF CONFIRMATION – NOT IMPLIED IN A CONTRACT BETWEEN A GERMAN BUYER AND A FRENCH SELLER. ORAL CONCLUSION OF SALES CONTRACT - LETTER OF CONFIRMATION AS CIRCUMSTANTIAL EVIDENCE FOR THE CONCLUSION AND CONTENT OF A CONTRACT. Unknown parties. Adjudicated on 05 July 1995. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=169&step=Abstract>; GERMANY. Oberlandesgericht Dresden. 7 U 720/98.LETTER OF CONFIRMATION FOR THE CONCLUSION AND CONTENT OF A CONTRACT - SILENCE TO LETTER OF CONFIRMATION - USAGE NOT WIDELY KNOWN AND REGULARLY OBSERVED IN INTERNATIONAL TRADE (ART. 9 CISG). Unknown parties. Adjudicated on 09 July 1998. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=502&step=Abstract>.

[1143] GOODE, Roy. Usage and its reception..., p. 20.

[1144] GILLETTE, Clayton P. The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG. In: Chicago Journal of International Law, n. 5, 2004, p. 175.

occasionally would not have international normative provision. However, the authors point out that such flexibility would not leave certainty aside, once, in several occasions, professional associations would be in charge of codifying them. They conclude that

> Sólo así se explicaría la frecuencia, por ejemplo, con que, en el comercio internacional, una de las partes – generalmente el comprador – se dirige a la otra, por medio ordinariamente de una llamada telefónica o de un fax, y se limita a solicitar la entrega de una determinada mercancía y la cantidad. Muy habitualmente no se advierte en él ni del precio ni se espera a la aceptación por escrito del vendedor: será éste que el que deberá contestar sólo en el caso de que no vaya a contratar[1145].

According to SCHLECHTRIEM and WITZ it is about the manifestation of the principle of freedom which allows the parties to define the contractual content. This way, the content of the clause would prevail over the custom[1146]. They also point out that the custom should be international and that this nature would not be lent to that practice just for being known by one of the parties[1147]. The need for the custom to be international and not domestic is reinforced by the greatest part of the doctrine[1148] and some precedents[1149], although with regards to this topic some authors do not find such distinction necessary[1150], but only the demonstration that the customs were applied in international trade[1151].

[1145] CALVO CARAVACA, Alfonso L.; FERNÁNDEZ DE LA GÁNDARA, Luis. Op. cit., p. 178.

[1146] FERRARI, Franco. Relevant trade usage and practices under UN sales law. In: The European Legal Forum (E), n. 5, 2002, p. 275-276.

[1147] SCHLECHTRIEM, Peter; WITZ, Claude. Conention de Vienne sur les Contrats de vente internationale de merchandises. Paris: Dalloz, 2008, p. 74-75.

[1148] CHANDRASENAN, Anukarshan. UNIDROIT Principles to Interpret and Supplement the CISG: An Analysis of the Gap-filling Role of the UNIDROIT Principles. In: Vindobona Journal of International Commercial Law and Arbitration, n. 11, 2007, p.75; CALVO CARAVACA, Alfonso L.; FERNÁNDEZ DE LA GÁNDARA, Luis. Op. cit., p. 186; CARLINI, Gabriel A. Op. cit., p. 120; SCHLECHTRIEM, Peter; BUTLER, Petra. Op. cit., p. 60.

[1149] AUSTRIA. Oberster Gerichtshof. 10 Ob 344/99g. MATTERS EXCLUDED FROM THE SCOPE OF CISG - VALIDITY OF USAGES (ART. 4 CISG). USAGES - USAGES WIDELY KNOWN AND REGULARY OBSERVED IN INTERNATIONAL TRADE - LOCAL USAGES - CONDITIONS FOR THEIR RELEVANCE UNDER CISG - DO NOT NEED TO BE INTERNATIONALLY APPLICABLE - USAGE PREVAILS OVER CISG (ART.9 CISG). LACK OF CONFORMITY OF GOODS – DELIVERY OF GOODS OF A DIFFERENT KIND (ALIUD)DOES NOT CONSTITUTE NON DELIVERY BUT AMOUNTS TO DELIVERY OF NON CONFORMING GOODS (ART. 35 CISG). NOTICE OF NON CONFORMITY - REQUIREMENT FOR NOTICE - SPECIFICATION OF NATURE OF THE LACK OF CONFORMITY - NOTICE WITHIN A REASONABLE TIME - BURDEN OF PROOF (ART. 39 CISG) Unknown parties. Adjudicated on 21 March 2000. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=478&step=Abstract>.

[1150] HUBER, Peter; MULLIS, Alastair. The CISG: a new textbook for students and practitioners. Munich: Sellier, 2007, p. 16-17.

[1151] GOLDSTAJN, Aleksandar. Op. cit., p. 98; HONNOLD, John O. Uniform Law for International Sales under the 1980 United Nations Convention. 3. ed. The Hague: Kluwer Law International, 1999, p. 129; BAINBRIDGE, Stephen. Op. cit., p. 658; FERRARI, Franco. Relevant..., p.274; OVIEDO ALBÁN, Jorge. Costumbre y Prácticas Contractuales en la Convención de Naciones Unidas sobre Contratos de Compraventa Internacional de Mercaderías. In: Cadernos da Escola de Direito e Relações internacionais da UniBrasil, v. 12, 2010, p. 38-39.

VICENTE emphasizes that the CISG is basically made of supplementary rules, that is why the possibility that the customs prevail over its text[1152]. In this way, there are also some precedents[1153] and doctrinal positioning[1154].

Even though the text of CISG requires the demonstration that the contracting parties had or ought to have known about a certain commercial custom so that it could be considered compulsory and even prevail over the conventional text[1155] or in the instance of lack of knowledge by the parties[1156], there are not many details about how this demonstration should happen[1157]. Besides that, it is required that the custom is effectively practiced[1158].

[1152] VICENTE, Dário Moura. A Convenção de Viena sobre a compra e venda internacional de mercadorias: características gerais e âmbito de aplicação. In: PINHEIRO, Luís de Lima. (Coord.). Estudos de Direito Comercial Internacional. Coimbra: Almedina, 2004, V. 1, p. 283.

[1153] There can be mentioned the Austrian, German and American instances: AUSTRIA. Oberster Gerichtshof. 2 Ob 191/98 X. APPLICATION OF CISG PARTIES HAVING SAME CITIZENSHIP BUT PLACES OF BUSINESS IN DIFFERENT CONTRACTING STATES (ART. 1(1)(A) CISG) CITIZENSHIP OF PARTIES NOT RELEVANT. USAGES - USAGES WIDELY KNOWN AND REGULARY OBSERVED IN INTERNATIONAL TRADE (ART. 9 CISG). NOTICE OF NON CONFORMITY (ART. 39 CISG) REQUIREMENT FOR NOTICE MAY BE GIVEN ORALLY PROVIDED THAT PROPERLY TRANSMITTED AND UNDERSTANDABLE BY OTHER PARTY (ART. 27 CISG) Unknown parties. Adjudicated on 15 October 1998. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=386&step=Abstract>; AUSTRIA. Oberster Gerichtshof. 10 Ob 344/99g. MATTERS EXCLUDED FROM THE SCOPE OF CISG - VALIDITY OF USAGES (ART. 4 CISG); USAGES - USAGES WIDELY KNOWN AND REGULARY OBSERVED IN INTERNATIONAL TRADE - LOCAL USAGES - CONDITIONS FOR THEIR RELEVANCE UNDER CISG - DO NOT NEED TO BE INTERNATIONALLY APPLICABLE - USAGE PREVAILS OVER CISG (ART.9 CISG). LACK OF CONFORMITY OF GOODS – DELIVERY OF GOODS OF A DIFFERENT KIND (ALIUD)DOES NOT CONSTITUTE NON DELIVERY BUT AMOUNTS TO DELIVERY OF NON CONFORMING GOODS (ART. 35 CISG). NOTICE OF NON CONFORMITY - REQUIREMENT FOR NOTICE - SPECIFICATION OF NATURE OF THE LACK OF CONFORMITY - NOTICE WITHIN A REASONABLE TIME - BURDEN OF PROOF (ART. 39 CISG). Unknown parties. Adjudicated
on March 2000. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=478&step=Abstract>; JERMANY. Oberlandesgericht Saarbrücken. 1 U 69/92. APPLICATION OF CISG BASED ON CHOICE OF PARTIES (ART. 1 CISG). FORMATION OF CONTRACT - LETTER OF CONFIRMATION CONTAINING STANDARD TERMS - BUYER'S CONDUCT INDICATING ASSENT TO THE OFFER (ART. 18(1) CISG) - INCORPORATION OF THE STANDARD TERMS INTO THE CONTRACT. USAGES (ART. 9 CISG) - USAGES TO PREVAIL OVER PROVISIONS OF CISG UNLESS PARTIES HAVE OTHERWISE AGREED. LACK OF CONFORMITY - TIME OF EXAMINATION - DEFERMENT IN CASE OF REDIRECTION OR REDISPATCH OF THE GOODS BY THE BUYER (ART. 38(3) CISG) – REQUIREMENTS. LACK OF CONFORMITY - NOTICE OF LACK OF CONFORMITY - WITHIN REASONABLE TIME AFTER DISCOVERY (ART. 39(1) CISG) - NOTICE MORE THAN TWO MONTHS AFTER DELIVERY NOT TIMELY. REASONABLE EXCUSE FOR FAILURE TO GIVE TIMELY NOTICE (ART. 44 CISG) - BUYER'S BURDEN OF PROOF. Unknown parties 13 January 1993. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=180&step=Abstract>; UNITED STATES. U.S. District Court, Southern District, Texas, Houston Division. Civ. A. H-04-0912. "CIF" DELIVERY TERM IN CONTRACT FOR SALE OF GOODS - TO BE GIVEN THE MEANING PROVIDED FOR IT BY INCOTERMS 1990. INCOTERMS - TO BE CONSIDERED AS INCORPORATED INTO CISG THROUGH ITS ART.9(2).China North Chemical Industries Corporation v. Beston Chemical Corporation. Adjudicated on 07 February 2006. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=1089&step=FullText>.

[1154] HUBER, Peter; MULLIS, Alastair. Op. cit., p. 18.

[1155] CALVO CARAVACA, Alfonso L.; FERNÁNDEZ DE LA GÁNDARA, Luis. Op. cit., p. 186-187; CARLINI, Gabriel A. Op. cit., p. 120; HONNOLD, John O. Op. cit., p. 131.

[1156] FERRARI, Franco. What sources of law for contracts for the international sales of goods? Why one has to look beyond CISG. In: International Review of Law and economics, v. 25, 2005, p. 336.

[1157] PAMBOUKIS, Ch. Op. cit., p. 131.

[1158] CALVO CARAVACA, Alfonso L.; FERNÁNDEZ DE LA GÁNDARA, Luis. Op. cit., p. 187.

In an interesting precedent the District Court of New York expressly considered, for an analysis purpose on the existence or not of contract, that the contracting parties would be obliged by the terms of the customs related to the specific industry (which would be incorporated to the contract), unless otherwise agreed[1159]. The requirement that the custom was known or ought to have been known was also employed by the Court in New Zealand to analyze the editing of the clause of price fixing in a purchase derived from the leasing of a commercial property[1160].

In the few instances this theme was approached, it is pointed out the interpretations given in three instances of international supply adjudicated by European national courts.

The first instance, adjudicated by the Austrian court, was about the international supply of wood, resulting in the conclusion that for the custom to be compulsory to the contracting parties: (i) it would not be necessary for the custom to be international; being local was enough; (ii) the custom should be recognized by most of those who performed it in that certain business; (iii) it would be assumed the knowledge when the contracting party acted in the geographical area where the custom was applied[1161].

In the second instance, the Dutch court, adjudicating controversy on the interest rate over the international supply of thread, reported in the sense that the mention by the seller of obedience to the "general conditions of the German Association of Thread Merchants" would be enough to make the rate

[1159] UNITED STATES OF AMERICA. U.S District Court, S.D., New York. 98 Civ. 861, 99 Civ. 3607.CONTRACT FORMATION AND INTERPRETATION - LIBERAL APPROACH BY CISG IN APPLICATION OF GENERAL PRINCIPLE OF GOOD FAITH IN INTERNATIONAL TRADE (ART.7 (1)). USAGES AND PRACTICES - INDUSTRY PRACTICE AUTROMATICALLY INCORPORATED INTO ANY AGREEMENT UNLESS EXPLICITLY EXCLUDED (ART. 9). CONTRACT FOR FUTURE SUPPLY OF "COMMERCIAL QUANTITIES" OF GOODS -SUFFICIENTLY DEFINITE (ART. 14 CISG). ACCEPTANCE - PROVISION OF REFERENCE LETTER TO GOVERNMENT AGENCY MAY CONSTITUTE ASSENT TO CONTRACT (ART. 18(3) CISG). IRREVOCABLE OFFER ACCORDING TO ART. 16(2)(B)- PROMISSORY ESTOPPEL DOCTRINE UNDER US LAW – DIFFERENCES. CLAIM BASED ON PROMISSORY ESTOPPEL DOCTRINE UNDER US LAW TO DENY EXISTENCE OF FIRM OFFER – PREEMPTED. SCOPE OF CISG - MATTERS EXCLUDED - CONSIDERATION - QUESTION OF VALIDITY TO BE DECIDED UNDER DOMESTIC LAW (ART. 4(A) CISG). SCOPE OF CISG - TORT CLAIMS GENERALLY NOT PREEMPTED UNDER CONVENTION Geneva Pharmaceuticals Technology Corp. versus Barr Laboratories, Inc., et al. Adjudicated on 10 May 2002. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=739&step=FullText>.

[1160] BUTLER, Petra. New Zealand. In: FERRARI, Franco. (Ed.). Op. cit., p. 254-255.

[1161] AUSTRIA. Oberster Gerichtshof. Ob 344/99g. Partes desconhecidas. Adjudicated on March 21st 2000. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=478&step=Abstract>.

compulsory, especially when the buyer was an active businessman in that field of trade[1162].

In a last instance, the Swiss Court understood that the fact that one of the parties confirmed the execution of the contract through a letter of confirmation, fully accepted by the respective national legislations, would be enough to characterize the international custom, proving the existence of the contract[1163].

The CISG itself provides another example of this kind of binding: the price fixing (art.55 CISG), obliging the contracting parties, in case of omission, for the price usually charged for the product in question in the same circumstances of that field of trade[1164]. However, the role of the custom is usually highlighted as a rule of interpretation, even if the CISG is not clear on this respect[1165]. OVIEDO ALBÁN points out, however, the normative function[1166] in addition to the interpretative one, that is, the creator of imperative behavior even against specific disposition of the conventional text.

VIEIRA still considers the possibility of the CISG to be applied as international customary Law and as *lex mercatoria*[1167]. The own arbitral precedents had already recognized this possibility[1168]. DARANKNOWN, for example, even defends its applications regardless the choices by the parties, as a kind of *lex fori arbitralis,* limiting the freedom of the arbitrators in the ICC system[1169].

The greatest criticism to this argumentation is that the term customary international Law usually refers to the public international Law, backed in art. 38 in the Statute of the International Court of Justice. Its application would require

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[1162] HOLLAND. Gerechtshof's Hertogenbosch.456/95/He.E.H.T.M. Peters versus Kulmbacher Spinnerei & Co. Produktions KG. Adjudicated on April 24 1996. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=224&step=Abstract>.

[1163] SWITZERLAND. Zivilgericht Kanton Basel-Stadt. P4 1991/238. Unknow parts. Adjudicated on december 21st 1992. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=104&step=Abstract>.

[1164] GREBLER, Eduardo. A Convenção das Nações Unidas sobre contratos de venda Internacional de mercadorias e o comércio internacional brasileiro. In: Revista de Direito Mercantil, Industrial, econômico e Financeiro, n. 144, out./dez. 2006, p. 64.

[1165] BAINBRIDGE, Stephen. Op. cit., p. 660-661.

[1166] OVIEDO ALBÁN, Jorge. Costumbre y Prácticas..., p. 40.

[1167] VIEIRA, Iacyr de Aguilar. L´applicabilité et l´impact de la Convention des Nations Unies sur les Contrats de vente Internationale de marchandises au Brésil. Strasbourg: Presses Universitaires, 2010, p. 109; 213-216.

[1168] DIMATTEO, Larry A.; et al. International sales law: a critical analysis of CISG jurisprudence. Cambridge: Cambridge Press, 2005, p. 16.

[1169] DARANKOUM, Emmanuel S. L'application de la Convention des Nations Unies sur les contrats de vente internationale de marchandises par les arbitres de la Chambre de Commerce Internationale en dehors de la volonté des parties est-elle prévisible? In : Revue québécoise de droit international, v. 17, n. 2, 2004, p. 30-31.

to lengthen the concept to cover areas of the private Law normally albeit of the themes usually approached (War Law, Humanitarian Law, etc.)[1170].

Secondly, it should be remembered that the CISG is not a creation of trade practice, but the exercise of sovereignty of the States and that, if the parties agree to be subjected to the CISG, they can do it expressly by the exercise of their freedom, or, if not doing so, it may become an applicable law, as it's within the boundaries of its application[1171].

OVIEDO ALBÁN, after analyzing a series of arbitral precedents, concludes that the arbitral decisions gave origin to anotherr "factor de aplicación de la Convención (...) na medida en que se asume que la Convención refleja los principios universalmente aceptados en materia de compraventa."[1172] VIEIRA draws the same conclusion[1173], and it is reported by ZELLER[1174].

In addition, the Convention widely points out the principle of objective good faith[1175], establishing it as a rule of interpretation of the contract, and also as a generator of obligations to the contracting parties. According to FRADERA, there would be strong influence of the American UCC on the way the objective good faith was accepted as a model of conduct, that is, on the notion of awareness by the merchants themselves and honest pact, whose judgment should be subtracted from the State jurisdiction[1176]. The American Courts themselves seem to hesitate to apply the CISG, given the scarcity of legal precedents[1177].

The little application of the content of the CISG by National Courts, indeed, seems to be an international issue. PRIBETIC, reporting the Canadian

[1170] REILEY, Eldon H. Op. cit., p. 49.
[1171] HEUZÉ, Vincent. Op. cit., p. 116-117.
[1172] OVIEDO ALBÁN, Jorge. Estudios de Derecho Mercantil Internacional: Principios de UNIDROIT, lex mercatoria, compraventa internacional, contratación electrónica, insolvência transfronteriza. Bogotá: Ibáñez, 2009, p. 108.
[1173] VIEIRA, Iacyr de Aguilar. L´applicabilité et l´impact..., p. 216-220.
[1174] ZELLER, Bruno. Op. cit., p. 53-54.
[1175] FERRARI, Franco. Interprétation uniforme de la Convention de Vienne de 1980 sur La vente internationale. In: Revue Internationale de Droit Compare, v. 48, n. 4, 1996, p. 813-852.
[1176] FRADERA, Véra Maria Jacob de. A saga da uniformização da Compra e venda Internacional: da Lex mercatoria à Convenção de Viena de 1980. In: MENEZES, Wagner. (Org.). O Direito Internacional e o Direito brasileiro: homenagem a José Francisco Rezek. Ijuí: UniJuí, 2004, p. 830.
[1177] KILLIAN, Monica. CISG and the problem with common law jurisdiction. In: Journal Transnational Law & Policy, v. 10, n. 2, 2001, p. 243.

instances explains this omission by the lack of familiarity with the CISG[1178] by the contracting parties, judges and lawyers, while others believe in its failure[1179].

Nonetheless, some emphasis must be given to the two recent decisions by the Supreme Court of Colombia which made a statement on the application of the contractual subject as established by the CISG (predictability of damage[1180] and the duty to mitigate the damage[1181]).

At last, it is appropriate to point out that, in spite of not having been ratified by Brazil, its application, however, is possible to contracts with a Brazilian party: it may be through the incidence of art. 9 of the LINDB (establishing the application of law of the signatory country of the Convention[1182]), through the choice by the parties (art. 1 b of the Convention, when not applicable to the Brazilian Law), or through the submission to the arbitral jurisdiction with the choice of its incidence[1183]. There are, yet, those who accept the possibility of choice when the contract is subjected to the arbitral legislation[1184].

According to GREBLER and MARTINS COSTA, the rules of the Convention are very similar to the Brazilian legal system and the adhesion to its content contributes to the standardization of the contractual Law[1185]. Besides that, even if such incorporation does not exist, it can be noticed that some of the

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[1178] PRIBETIC, Antonin. An "Unconventional Truth": Conflict of Laws Issues Arising under the CISG. In: Nordic Journal of Commercial Law, n. 1, 2009, p. 02-03.

[1179] SHEAFFER, Christopher. The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a proposal for a New Uniform Global Code in International Sales Law. In: Cardozo Journal of International Law and Comparative Law, v. 15, 2007, p. 494-495.

[1180] COLOMBIA. Corte Constitucional. Expediente D-8146. Demanda de inconstitucionalidad en contra del inciso primero del artículo 1616 del Código Civil. Enrique Javier Correa de la Hoz, Daljaira Diazgranados Vuelvas, Arlyz Romero Pérez y Miguel Cruz. Relator Dr. Luís Ernesto Vargas Silva. Adjudicated on 09 December 2010. Available on: http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/colom3.htm.

[1181] COLOMBIA. Corte Constitucional. Expediente 11001-3103-008-1989-00042-01. CAJA DE CRÉDITO AGRARIO INDUSTRIAL Y MINERO, ALMACENES GENERALES DE DEPÓSITO DE LA CAJA AGRARIA, IDEMA versus BANCO GANADERO -ALMAGRARIO S.A.- y DISTRIBUIDORA PETROFERT LIMITADA. Relator Dr. Arturo Solarte Rodríguez. Adjudicated on 16 December 2010. Available on: http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/scolo2.htm.

[1182] VIEIRA, Iacyr de Aguilar. Brazil..., p. 15.

[1183] Ibidem, p. 16.

[1184] AYMONE, Priscila Knoll. A regulação do mérito da arbitragem mediante a utilização das regras internacionais de comércio: uma possibilidade decorrente da Lei brasileira de Arbitragem e um paradoxo frente à LICC/42? In: FRADERA, Véra Jacob de; MOSER, Luiz Gustavo Meira. (Orgs.). A compra e venda internacional de mercadorias: estudos sobre a Convenção de Viena de 1980. São Paulo: Atlas, 2010, p. 44-87; SOMENSI, Mariana Furlanetto. As inovações introduzidas pela Lei n. 9.307/96 relativamente à escolha da lei do contrato internacional. In: FRADERA, Véra Jacob de; MOSER, Luiz Gustavo Meira. (Orgs.). Op. cit., p. 88-107.

[1185] GREBLER, Eduardo. O contrato de venda internacional de mercadorias. In: Revista de Direito Mercantil, n. 88. São Paulo: RT, out./dez. 1992, p. 50; MARTINS COSTA, Judith. Os princípios informadores do contrato de compra e venda internacional na Convenção de Viena de 1980. In: CASELLA, Paulo Borba. (Coord.). Contratos Internacionais e Direito econômico no MERCOSUL: após o término do período de transição. São Paulo: LTr, 1996, p. 167.

solutions established to problems typical of international trade exchange end up being incorporated by the internal Law (the clause of *hardship* is the example mentioned by MARTINS COSTA)[1186].

5.3. INTERNATIONAL CONTRACTUAL CUSTOMS RECOGNIZED BY MEANS OF CONSOLIDATIONS OF PRIVATE ORIGIN: THE CASE OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) AND THE *INCOTERMS* OF THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

One last level of concern to be traced to understand how the contractual custom influences the national contractual Law, are those hypotheses in which, in spite of the State participation, its recognition is consolidated. It is precisely in this basic premise that the general notion of *Lex mercatoria* is based, although it has been presented, in this work, as one of the consequences of the movement of globalization and internationalization of the Contractual Law.

If the premises debated are recognized as valid (items 2.3 and 4.1), it is clear that once the State authority is not able to cover all the spectrum of human negotiating activity, a great creative room is open to private initiative. Theoretically there is nothing wrong about it, provided that certain limits are obeyed, as it will be demonstrated in the next stage of the present book. Before that, however, it becomes essential to take notice how private sources act and are understood by the State. The two examples chosen for this analysis are the UNIDROIT Principles of International Commercial Contracts (PICC) and the INCOTERMS.

5.3.1 UNIDROIT Principles of International Commercial Contracts by the International institute for the unification of Private Law – UNIDROIT (2010)

In general, three factors may compromise the international commercial transactions: (i) diversification of the content of the legislation of each country may considerably vary; (ii) its non-adequacy to the specific needs of international trade and, (iii) even though there are several kinds of legislative harmonization,

[1186] MARTINS COSTA, Judith. Os princípios informadores..., p. 164.

their results are not the expected ones[1187]. Because of that, since the decade of 1970, the UNIDROIT has worked in an instrument that, without the intention of being compulsory, could be taken as a model for the national or international legislator in a flexible way, but representing several legal traditions.

The technique adopted in the instance of the PICC and other similar pictures (like the principles of European Contract Law – PECL) is currently called restatement and corresponds to the attempt of legislative harmonization through a kind of codification, of private origin. According to GOODE, KRONKE and MCKENDRICK, the work developed by the Commissions in charge of wide projects was quite influenced by the existing material at that time (e.g. the CISG[1188]) despite of not having been limited by them. Besides that, the mutual influence of the works of UNIDROIT in the Lando Commission, responsible for the European principles, and vice-versa[1189], can still be pointed out. BONELL still highlights the inspiration in the non-legislative work by several professional associations of application in the international trade[1190], which leads GALGANO to classify it as a work of "illuminist technodemocracy"[1191].

The PICC represent the work developed by a group of experts, under the co-ordination of Prof. Joachim Bonell, originally published in 1994 and source of international debate: while some defend the idea that it is an attempt of legislative unification[1192], others believe it is a study of comparative law and solution of commitment[1193], supranational contractual Law expression of the *Lex Mercatoria*[1194], the new *Lex mercatoria*[1195], one of the sources of the *Lex*

[1187] BONELL, Michael Joachim. An international restatement of contract Law: The Unidroit Principles of International Commercial Contracts. 3. ed. Ardsley: Transnational Publisher, 2005, p. 11-25.
[1188] PERALES VISCASILLAS, María del Pillar. Los Principios de Unidroit y CISG: su mutua interacción. In: Contratación internacional. Comentarios a los Principios sobre los Contratos Comerciales Internacionales del Unidroit. Mexico: UNAM, 1998, p. 188.
[1189] GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 508-509.
[1190] BONELL, Michael Joachim. The Unidroit Principles Of International Commercial Contracts: Nature, Purposes and First Experiences in Practice. Available on: <http://www.unidroit.org/english/principles/pr-exper.htm>.
[1191] GALGANO, Francesco. Los caracteres..., p. 133.
[1192] BAPTISTA, Luiz Olavo. Os "Projeto de Princípios para contratos comerciais internacionais" da UNIDROIT, aspectos de Direito Internacional Privado. In: BONELL, M. J.; SCHIPANI, S. (Orgs.). Principi per i contratti commerciali internazionali e il sistema Giuridico Latinoamericano. Padova: CEDAM, 1996, p. 27.
[1193] KESSEDJIAN, Catherine. Op. cit., p. 652.
[1194] AGUIRRE ANDRADE, Alix; MANASÍA FERNÁNDEZ, Nelly. Los principios Unidroit em las relaciones comerciales internacionales. In: Revista de Derecho de Universidad del Norte, n. 25, jul. 2006, p.56; 59.
[1195] TAHAN, Anne-Marie. Les Principes d´Unidroit relatifs aux contrats du commerce international. In: Revue Juridique Thémis, n. 36, 2002, p. 631.

Mercatoria[1196], compilation of *lex mercatoria*[1197], codification of *Lex mercatoria*[1198], level of evolution of *lex mercatoria*[1199], example of *Lex mercatoria*[1200], private codification of international trade[1201], general principles of international commercial Law[1202], codification of essential rules with regards to international contracts[1203], a kind of soft Law, common international contractual Law with no binding power[1204], or yet, general principles of contractual Law, applicable to national and international contracts[1205].

On the other hand, there are equally those who point out that in its body there is not only rules taken from international practice, but which seemed more adequate in the eyes of the drafters[1206], its application as *lex mercatoria* would depend on the choice by the parties and that its dispositions would be adequate to specific cases[1207], or that they would be so generic that would lose the character of consuetudinary rule[1208] and could not be considered general principles[1209].

[1196] BERGER, Klaus Peter. The creeping..., p. 218; MAYER, Pierre. Principes UNIDROIT ET lex mercatoria. In: VOGEL, Louis (Dir.). Op. cit., p. 33.
[1197] GALGANO, Francesco. La globalizzazione..., p. 64-72.
[1198] ALPA, Guido. Les nouvelles frontières..., p. 1025; CARNIO, Thais Cíntia. Op. cit., p. 164.
[1199] MAEKELT, Tatiana B. de. Principios Unidroit sobre los Contratos Comerciales Internacionales. Available on: <http://www.msinfo.info/default/acienpol/bases/biblo/texto/boletin/2005/BolACPS_2005_143_291-06.pdf>.
[1200] MARRELLA, Fabrizio. Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts. In: Vanderbilt Journal of transnational law, v. 36, 2003, p. 1187.
[1201] CHARPENTIER, Élise. Les Principes d´Unidroit: une codification de la lex mercatoria? in: Les Cahiers de Droit, v. 46, n. 1-2, mar./jun. 2005, p. 203-204.
[1202] Art. 9° of CIDIP-V. SAMTLEBEN, Jürgen. Los principios generales Del derecho comercial internacional y la lex mercatoria en la convención interamericana sobre derecho aplicable a los contratos internacionales. In: BASEDOW, Jürgen; FERNÁNDEZ ARROYO, Diego P.; MORENO RODRÍGUEZ, José A. (Coords.). Op. cit., p. 413-426.
[1203] COSMOVICI, Paul Mircea; MUNTEANU, Roxana. Romania. In: BONELL, M. J. (Org.). A new approach to international commercial contracts: the Unidroit Principles of International Commercial Contracts. The Hague: Kluwer Law, 1999, p. 299. The authors, in this case, compare the PICC with the positive Law (to which they assign greater normative importance) and even establish hierarchy; the lex mercatoria (of lower concrete efficacy and higher positive legal value), followed by commercial usages, the general principles of Law and the PICC (which would be in a position of higher efficacy and higher value, but still lower to the one of positive Law). Ibidem, p. 300.
[1204] GAMA JÚNIOR, Lauro. Contratos Internacionais à luz dos Princípios do UNIDROIT 2004: soft Law, arbitragem e jurisdição. Rio de Janeiro: Renovar, 2006, p. 250.
[1205] FERRARI, Franco. Le champ d'application des "Principes pour les contrats commerciaux internationaux" élaborés par Unidroit. In: Revue internationale de Droit Comparé, v. 47, n. 4, out./dez. 1995, p. 993.
[1206] BORTOLOTTI. Fabio. The UNIDROIT Principles and the arbitral tribunals. In : Uniform Law Review, 2000-1, p. 143-145.
[1207] LÓPEZ RODRÍGUEZ, Ana M. Op. cit., p. 180.
[1208] GOTANDA, John Y. Using the Unidroit Principles to fill gaps in the CISG. Contract Damages: Domestic and International Perspectives. Oxford: Hart Publishing, 2008, p. 132.
[1209] PINHEIRO, Luís de Lima. Direito Comercial..., p. 193.

In turn, MORENO RODRÍGUES highlights the capacity of the Principles to unify, in a sole instrument, typical tendencies of the civil Law and common Law, and also leave aside the distinction between business and civil contracts to be excluded only in instances of relations of consumption[1210]. This last characteristic, for example, make them different from the PECL and make the international arbitration the most probable scope of application to the UNIDROIT Principles[1211], mainly because several of its instruments are useful to the arbitral procedure[1212], even if in a limited way[1213].

As for BARON, the PICC support the thesis that sustains the existence of the *Lex mercatoria*, especially because its methodology would assure better predictability and stability, through a coherent and concise system, even with no State origin[1214]. Besides that, the excellence of the work and its growing use in the negotiating practice would provide them authority, even normative one[1215]. The same thing can be said in relation to the need of a more "ethical" contract[1216] and the practicality of choice of the PICC as applicable Law to the contract[1217], making the *lex mercatoria* tangible[1218].

BASEDOW supports the idea that the PICC do not fit in any traditional category, especially overcoming the idea that the process of normative creation is State exclusivity[1219]. Such understanding allowed to assert that the discussion

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[1210] MORENO RODRÍGUEZ, José Antonio. Temas de Contratación..., p. 93-94.

[1211] PERALES VISCASILLAS, Pilar. Principios de UNIDROIT y PDCE en el arbitraje Internacional. In: FERRER VANRELL, Ma. Pilar; MARTÍNEZ CAÑELLAS, Anselmo. (Dir.). Principios de Derecho contractual Europeo y Principios de UNIDROIT sobre Contratos comerciales internacionales: actas del Congreso Internacional celebrado en Palma de Mallorca, 26 y 27 de abril de 2007. Madrid: Dykinson, 2009, p. 162-164; MIGUEL ASENSIO, Pedro A. de. Armonización normativa y régimen jurídico de los contratos mercantiles internacionales. In: Diritto del Commercio Internazionale, v. 12, n. 4, 1998, p. 893.

[1212] HOUTTE, Hans van. Les Principes UNIDROIT et lArbitrage Commercial International. In: ICC. (Ed.). The UNIDROIT Principles for International Commercial Contracts - A New Lex Mercatoria? Paris: ICC, 1995, p. 181-195.

[1213] VAGTS, Detlev F. Arbitration and the UNIDROIT Principles. In: Contratación internacional. Comentarios a los Principios sobre los Contratos Comerciales Internacionales Del Unidroit. Mexico: UNAM, 1998, p. 265-277.

[1214] BARON, Gesa. Do the UNIDROIT Principles of International Commercial Contracts form a new lex mercatoria? Available on: <http://www.cisg.law.pace.edu/cisg/biblio/baron.html>.

[1215] GAMA E SOUZA JÚNIOR, Lauro da. Os Princípios do UNIDROIT relativos aos contratos comerciais internacionais e sua aplicação nos países do MERCOSUL. In: RODAS, João Grandino. (Coord.). Contratos internacionais. 3. ed. São Paulo: RT, 2002, p. 428.

[1216] KING, Donald B. Convergence of Contract Law Systems and the Unidroit Principles of International Commercial Contracts: A Search for the Nature of Contract. In: ZIEGEL, Jacob S. (Ed.). Op. cit., p. 103-104.

[1217] PRUJINER, Alain. Comment utiliser les Principes d´Unidroit dans la pratique contractuelle. In: Revue Juridique Themis, n. 36, 2002, p. 582.

[1218] FERNÁNDEZ ARROYO, Diego P. (Coord.). Derecho internacional privado de los Estado del MERCOSUR. Buenos Aires: Zavalia, 2003, p. 965.

[1219] BASEDOW, Jürgen. Uniform law Conventions and the UNIDROIT Principles Of International Commercial Contracts. In: Uniform Law Review, 2000-1, p. 132-133.

over the normative genesis in transnational Law would no longer have an impact on the eligibility of the *Lex moratoria*, but on the convenience of being an *ad hoc* method of justification of arbitral decision, or if had already been possible to codify it and, if it this last one was possible, which the best way to do it would be[1220]. Finally, DARANKOUM argues that part of the relevance of the UNIDROIT Principles is in the standardization of the internal contractual Law, adapting the "legal" to the economic needs of the international trade[1221].

Somehow the own preamble of the PICC contributed to all this controversy, once it lists a series of ways to employ it[1222], leaving for the arbitrators the need to implement the interpretation of these roles, effectively and coherently[1223].

In research carried out two years after its publishing it was noticed the Principles were used as: pedagogical material, models for national and international legislative development, guide to lead transactions, Law agreed by the contracting parties to execute its international contracts and Law applied by arbitral and judicial procedures (to interpret the local legislation, uniform Law or as Applicable Law)[1224]. However, the level at which each one of these tasks were and will be performed varies according to the normative framework in which the PICC are inserted.

Thus, for instance, in the countries of MERCOSUL, the absence of establishment of private autonomy for the choice of applicable Law to the contract still compromises its adoption at the beginning of the decade of 2000[1225]. Another example is the Chinese Law, where the customs have a limited role as a source of Law, even though by the legislation that governs the arbitral

[1220] BERGER, Klaus Peter. The lex mercatoria doctrine and the UNIDROIT Principles of International Commercial Contracts. In: Law and Policy in International Business, v. 28. n. 4, 1997, p. 943-990.
[1221] DARANKOUM, Emmanuel S. L'application des Principes d'UNIDROIT par les arbitres internationaux et par les juges étatiques. In: Revue Juridique Thémis, n. 36, 2002, p.476-477.
[1222] They must be applied if the parties have agreed that the contract will be governed by them. They may be applied if the parties have agreed that the contract will be governed by general principles of Law, by the Lex mercatoria, or similar ones. VILLELA, João Baptista; et al. (Eds.). Op. cit., p. 01.
[1223] It should be remembered that the greatest and main source of instances on the application of the Principles related to the International Commercial Contracts of UNIDROIT are those ones codified in the website <www.unilex.info>, though the present study has not been limited to this resource, listing, whenever possible, instances not mentioned there. Nonetheless, due to the inexistence of precise data on the total number of existing instances, any attempt of establishment of statistical bases is impossible.
[1224] BONELL, Michael Joachim. The Unidroit Principles in practice – the experience of fist two years. Available on: <http://www.jus.uio.no/pace/upicc_the_experience_of_the_first_two_years.michael_bonell/portrait.a4.pdf>.
[1225] GAMA E SOUZA JÚNIOR, Lauro da. Op. cit., p. 453.

procedure they may be employed as an origin of arbitral decision (LEFEBVRE and JIAO highlight the absence of coherence in the Chinese legislation, which would make it dangerous to subject an international contract to the execution of the PICC)[1226].

This is a key issue. This is because its main basis is still private autonomy[1227], since the PICC explicitly mention the need for the parties to be subjected to it, besides explicitly establishing it, as a basic contractual principle when assuring to the contracting parties, for example, the choice of Law applicable to the execution of the contract.

According to KESSEDJIAN this device could bring complications in its operation, once it would allow the inclusion of the national Law not-bound to the contract, or the usages and customs to the international trade Law, or even the mention to the doctrinal source. Besides that, the mere mention to the *Lex mercatoria* would be silenced[1228]. In turn, while BAPTISTA argues that the possibility of the use of the PCCI to execute a contract would bring problems to the contract "without law", or else, not bound to any Sate ordination[1229]; PRUJINER mentions the issue of the relationship between the PICC and the applicable national legislation[1230], and GOODE, KRONKE and MCKENDRICK sustain that if the contracting parties intend to operate this way, the best would be to associate the arbitral clause subjected to the regulations which would allow the choice of applicable "rules" of Law[1231].

On the other hand, the acceptance of the PICC to the performance of contracts is supported by the doctrine[1232], and numerous international organizations and private associations, which have recommended the adoption of the PICC to perform the respective standard contracts. KRONKE mentions some of them: the model contract for dealership agreements of perishable goods and of joint venture edited by the UNCTAD/WTO, the model contract of

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[1226] LEFEBVRE, Guy; JIAO, Jie. Les Principes d'UNIDROIT et le droit chinois: convergence et dissonance. In: Revue Juridique Thémis, n. 36. 2002, p. 534-537.

[1227] BONELL, Michael Joachim. An international..., p. 78-79; ALPA, Guido. Nuove frontier del diritto contrattuale. Milano: SEAM, 1998, p. 31-32.

[1228] KESSEDJIAN, Catherine. Op. cit., p. 657-659.

[1229] BAPTISTA, Luiz Olavo, Os "Projeto de Princípios..., p. 30.

[1230] PRUJINER, Alain. Op. cit., p. 561-582.

[1231] GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 519-520.

[1232] TALPIS, Jeffrey A. Retour vers le future: application en droit québécois des Principes d´Unidroit au lieu d´une loi nationale. In: Revue Juridique Thémis, n. 36, 2002, p. 609-622.

occasional intermediation and the model contract of international franchising, model contracts of agency adopted by the ICC[1233].

According to DARANKON the first arbitral instance of application of the UNIDROIT Principles, agreed by the parties, took place in 1996 in a report by the Chamber of National and International Arbitration in Milan in an instance involving controversy in the resolution of an agency agreement (n. A–1795/51). It was soon followed by others, like the one adjudicated by the Arbitral Court of the Chamber of Russian Commerce (Case n. 116/1996)[1234] and by the Arbitral Chamber of the ICC (cases n. 7110, 8331 and 8874[1235] or yet cases n. 1065, 11363, 11880 and 12889)[1236].

Anyway its role as an argumentative reinforcement is also valid, as it can be noticed in the Venezuelan precedents in the "Suprema Corte de Justicia"[1237] and the Australian one adjudicated by the Federal Court in which the principle of good faith is recognized as a major principle of international contracts and the Australian Law referring to the way it was made positive in the PICC[1238].

In this decision, another interesting issue mentioned by the Preamble of the principles is raised: the possibility to be employed by the one who judges to support the national legislation. The question is to know if the arbitrator or judge would have the freedom to do it if the parties themselves had not prescribed it in the agreement. Part of the doctrine supports this function[1239], especially when there is an attempt to adequate the national legislation to the international standards, or to locate in the PICC the operational concepts from the international point of view[1240].

[1233] KRONKE, Herbert. The UN sales convention, the Unidroit contract principles and the way beyond. In: Journal of Law and Commerce, v. 25, 2005, p. 453-454.
[1234] DARANKOUM, Emmanuel S. L'application des Principes d'UNIDROIT..., p. 428-430.
[1235] MARRELLA, Fabrizio; GÉLINAS, Fabien. The Unidroit Principles Of International Commercial Contracts in ICC Arbitration. In: ICC International Court of Arbitration Bulletin, v. 10, n. 2. Fall 1999, p. 27-28.
[1236] JOLIVET, Emmanuel. L'harmonisation du droit OHADA des contrats: l'influence des Principes d'UNIDROIT en matière de pratique contractuelle et d'arbitrage. In: Uniform Law Review. 2008, p. 130-132.
[1237] FERNÁNDEZ ROZAS, José Carlos. Un nuevo mundo jurídico: la lex mercatoria em América Latina. In: Estudios sobre Lex Mercatoria. Una realidad internacional. Instituto de Investigaciones Jurídicas. México: UNAM, 2006, p. 120.
[1238] AUSTRALIA. Federal Court of Australia, case n. 558. Hughes Aircraft Systems International versus Airservices Australia. 30.06.1997.
[1239] ZELLER, Bruno. The Unidroit principles of contract law; is there room for their inclusion into domestic contracts? In: Journal of Law and Commerce, v. 26, 2006, p. 115-127.
[1240] DESSEMONTET, François. Use of the UNIDROIT Principles to Interpret and Supplement Domestic Law. In: Bulletin de la Cour internationale d'arbitrage de la ICC. Supplément special, 2002, p. 39-50; BONELL, Michael Joachim. An international..., p. 236.

This role is also relevant in arbitral precedents, as CHARPENTER[1241] avows. Some instances of this employment can be taken from the arbitral precedents of the Arbitral Court of the ICC, such as when it was recognized that the Greek Law would correspond to the tendency of international Law to privilege the objective good-faith and the usages and customs in the interpretation of the contract[1242], or yet, the decisions adjudicated in the cases n. 5835, 8223, 8264, 8486, 8908, 9117, 9333 and 9593[1243]. Several instances can also be found in the Colombian arbitral practice, as reported by OVIEDO ALBÁN[1244].

Other hypotheses may be selected in the national precedents, such as: (i) the decision of the "Cámara Nacional de Apelaciones" of Argentina in an instance involving the charge of alleged expenses not spent by credit cards, having the PICC been employed in the argumentative reinforcement of the local decision with regards to the nature of the offering of the general conditions of the contract[1245]; (ii) the Argentinean condition that accepted them as an argumentative reinforcement for the interpretation on the limitation of compensation prescribed in the Warsaw Convention[1246]; (iii) the decision in New Zealand, in which the PICC were employed in the argumentative basis of the interpretation of the transaction[1247]; (iv) the European decision on the legal nature of pre-contract responsibility in an instance involving the unilateral

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[1241] CHARPENTIER, Élise. Op. cit., p. 200-203.

[1242] ICC – International Court of Arbitration, n. 10.335. Contract governed by a particular domestic law. Reference to the Unidroit Principles to demonstrate that solution found under domestic law corresponds to modern international commercial law. Unknown parties. BONELL, Michael Joachim. (Ed). The Unidroit Principles in Practice. 2. ed. Ardsley: Transnational Publisher, 2006, p. 864-868.

[1243] MARRELLA, Fabrizio; GÉLINAS, Fabien. Op. cit., p. 27-29.

[1244] OVIEDO ALBÁN, Jorge. Estudios..., p. 54-55.

[1245] ARGENTINA. Cámara Nacional de Apelaciones en lo Comercial. AR/JUR/829/2004. CONSENTIMIENTO. CONTRATO DE ADHESION. CONTRATO FORMAL. DEBER DE INFORMACION. DEFENSA DEL CONSUMIDOR. ENTIDAD FINANCIERA. IMPUGNACION DEL RESUMEN DE CUENTA. RESUMEN DE CUENTA. SEGURO DE VIDA. SILENCIO. TARJETA DE CREDITO. Elsa Beatriz Benítez versus Citibank N. A. y otro. Adjudicated on 10 June 2004.

[1246] ARGENTINA. Corte Suprema de Justicia de la Nación. AR/JUR/1634/1992. APERTURA DE LA INSTANCIA EXTRAORDINARIA. CONVENCION DE VARSOVIA. CONVENCION SOBRE TRANSPORTE AEREO INTERNACIONAL. DAÑO RESARCIBLE. DAÑOS Y PERJUICIOS. LIMITACION DE RESPONSABILIDAD.\PROCEDENCIA DEL RECURSO. RECURSO EXTRAORDINARIO. RESPONSABILIDAD DEL TRANSPORTISTA. TRANSPORTE. TRANSPORTISTA. TRATADO INTERNACIONAL. Eduardo Udenio y Cía. Soc. en Com. por Accs. versus Flying Tigers. Adjudicated on 17 November 1992.

[1247] NEW ZELAND. Court of Appeal of New Zealand. Caso n. (2000) NZCA 350. Hideo Yoshimoto versus Canterbury Golf International Limited. Adjudicated on 27 November 2000.

breaking-off transactions in which the PICC were employed as an argumentative reinforcement of the reasoning[1248].

Some Australian instances are also cited: (i) involving the duty to negotiate the solution of controversies before appealing to the judiciary, when the Supreme Court of New South Wales employed the PICC, to partly explain the principle of objective good faith[1249]; (ii) in which the PICC were employed as an argumentative reinforcement on the argument over an occasional breach of objective good faith when the lessee requests the competent authority to look into the conditions of the property safety[1250]; (iii) on the argument about the duty to inform[1251] and (iv) on the recognition of the contractual resolution in case of breach of the contractual conditions, essential or not, but which causes serious loss[1252].

The Spanish events: (i) involving the sales of property and the impossibility to get a loan due to lack of documentation in which the PICC were employed as an argumentative reinforcement to terminate the contract[1253]; (ii) involving the sales of real estate where the basement could not be used due to too much moisture, as an argumentative reinforcement of the duty to compensate for denying to the buyer what he could legitimately expect from the contract[1254]; (iii) involving the nonperformance of an alleged agency agreement and the upstream of profit losses[1255].

[1248] EUROPE. Court of Justice of the European Communities. Caso n. C-334/00.Fonderie Officine Meccaniche Tacconi SpA vs Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS). Adjudicated on 17 September 2002.

[1249] AUSTRALIA. Supreme Court of New South Wales. Case n. NSWSC 996.Aiton v. Transfield. 01.10.1999.

[1250] AUSTRALIA. Supreme Court of New South Wales. Case n. NSWSC 483. Alcatel Australia Ltd. v. Scarcella & Ors. 16.07.1998.

[1251] AUSTRALIA. Supreme Court of Western Australia - Court of Appeal. Case n. FUL 100 of 2001.Central Exchange Ltd v Anaconda Nickel Ltd. 23.04.2002.

[1252] AUSTRALIA. High Court of Australia. Case n. S221/2007.Koompahtoo Local Aboriginal Land Council v. Sanpine Pty Limited, 13.12.2007.

[1253] SPAIN. Audiencia Provincial de Lleida (Cataluna). 289/2007. UNIDROIT PRINCIPLES AND PRINCIPLES OF EUROPEAN CONTRACT LAW AS MEANS OF INTERPRETING DOMESTIC LAW (SPANISH LAW). IMPOSSIBILITY OF PERFORMANCE - EFFECTS OF ORIGINAL IMPOSSIBILITY THE SAME AS THOSE OF SUPERVENING IMPOSSIBILITY (ART. 3.3 (1) UNIDROIT PRINCIPLES; ART. 4:102 PRINCIPLES OF EUROPEAN CONTRACT LAW) Unknown parties. Adjudicated on 13 September 2007. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1215&step=FullText>.

[1254] SPAIN. Tribunal Supremo (Sala de lo Civil). 812/2007.UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING DOMESTIC LAW (SPANISH LAW). RIGHT TO DAMAGES - TO BE GRANTED WHEN DEFAULTING PARTY'S NON-PERFORMANCE SUBSTANTIALLY DEPRIVES AGGRIEVED PARTY OF WHAT IT WAS ENTITLED TO EXPECT UNDER THE CONTRACT (ART. 7.3.1(2)(A) UNIDROIT PRINCIPLES). Unknown parties. Adjudicated on 09 July 2007. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1216&step=FullText>.

[1255] SPAIN. Tribunal Supremo (Sala de lo Civil). 506/2007.UNIDROIT PRINCIPLES AS MEANS OF INTERPRETING DOMESTIC LAW (SPANISH LAW). DAMAGES - PRINCIPLE OF FULL COMPENSATION - AMOUNT OF LOSS INCLUDING FUTURE LOSS TO BE PROVED WITH A REASONABLE DEGREE OF

The British instances: (i) involving the interpretation of a contractual clause of a construction agreement and subsequent sale of estate unities[1256]; (ii) involving the interpretation of a contractual clause in a transaction involving holding in the security sector[1257]; (iii) involving the interpretation of a contractual clause in joint venture in the petrol sector[1258]; (iv) involving the interpretation of a contract in the telecommunications industry (satellites) whose arbitral jurisdiction was questioned[1259] and (v) on the interpretation of option deed[1260].

Or, yet, the Indian events: (i) involving the sales of real estate and the nonperformance of accessory obligations when the PICC were employed in the basis of the interpretation of the contract[1261] and (ii) another sale of real estate in

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CERTAINTY TAKING INTO ACCOUNT WITH RESPECT TO LOSS OF A CHANCE THE PROBABILITY OF OCCURRENCE (ARTICLE 7.4.3 UNIDROIT PRINCIPLES). Unknown parties. Adjudicated on: 16 May 2007. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1217&step=FullText>.

[1256] UNITED KINGDON. Court of Appeal (Civil Division). 2008 EWCA Civ 183. CONTRACT INTERPRETATION ACCORDING TO ENGLISH LAW - TRADITIONAL RULE THAT EVIDENCE OF PRE-CONTRACTUAL NEGOTIATIONS TO INTERPRET CONTRACT CLAUSE INADMISSIBLE – TO BE APPLIED WITH FLEXIBILITY - REFERENCE TO UNIDROIT PRINCIPLES (ART. 4.3) AND CISG (ART. 8). Chartbrook Limited versus Persimmon Homes Limited. Adjudicated on 12 March 2008. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1373&step=FullText>.

[1257] UNITED KINGDOM. Court of Appeal (Civil Division). A3/2006/0290.CONTRACT INTERPRETATION ACCORDING TO ENGLISH LAW - ADMISSIBILITY OF EXTRINSIC EVIDENCE AND IN PARTICULAR OF PRE-CONTRACTUAL NEGOTIATIONS FOR THE PURPOSE OF INTERPRETATION OF WRITTEN CONTRACTS - REFERENCE TO UNIDROIT PRINCIPLES (ARTS. 4.1-4.3) AND CISG (ART. 8).The Square Mile Partnership Ltd versus Fitzmaurice McCall Ltd. Adjudicated on 18 December 2006. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1156&step=FullText>.

[1258] UNITED KINGDOM. High Court of Justice (Queen's Bench Division).2004 Folio 272.Svenska Petroleum Exploration AB, Government of the Republic of Lithuania, AB Geonafta. JOINT VENTURE BETWEEN A SWEDISH COMPANY AND A LITHUANIAN COMPANY - SIGNED ALSO BY THE GOVERNMENT OF LITHUANIA - LITHUANIAN LAW APPLICABLE. INTERPRETATION OF THE AGREEMENT - LIBERAL INTERPRETATION IN ACCORDANCE WITH PARTIES' COMMON INTENTION - RELEVANCE OF PRELIMINARY NEGOTIATIONS - REFERENCE TO ARTICLES 6.193 - 6.195 OF THE LITHUANIAN CIVIL CODE REPEATING ARTICLES 4.1 - 4.6 OF THE UNIDROIT PRINCIPLES. Adjudicated on 04 November 2005. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1122&step=FullText>.

[1259] UNITED KINGDOM. High Court of Justice, Queen's Bench Division, Commercial Court.[2006] EWHC 1664 (Comm). CONTRACT BETWEEN AN ENGLISH COMPANY AND A NIGERIAN COMPANY RELATING TO SATELLITE EQUIPMENT - CONTRACT STATING THAT IT WAS GOVERNED BY ENGLISH LAW AND TO BE INTERPRETED IN ACCORDANCE WITH UNIDROIT PRINCIPLES TO THE EXTENT THEY WERE NOT INCONSISTENT WITH THE FORMER. CONTRACT INTERPRETATION - COURT HELD THAT CONTRACT "BE CONSTRUED USING THE CONVENTIONAL CANONS OF CONSTRUCTION APPLICABLE TO COMMERCIAL CONTRACTS" WITHOUT EXPLICITLY REFERRING TO THE UNIDROIT PRINCIPLES. Econet Satellite Services Ltd. versus Vee Networks Ltd. Adjudicated on 13 July 2006. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1209&step=FullText>.

[1260] UNITED KINGDOM. High Court of Justice, Queen's Bench Division, Commercial Court. Unknown number. CONTRACT INTERPRETATION ACCORDING TO ENGLISH LAW - INTERPRETATION OF AN OPTION DEED - REFERENCE BY PARTY TO PROFORCE RECRUIT V THE RUGBY GROUP CONTAINING A REFERENCE TO UNIDROIT PRINCIPLES (ARTS. 4.1-4.3) IN SUPPORT OF ADMISSIBILITY OF EVIDENCE OF PRE-CONTRACTUAL NEGOTIATIONS - ARGUMENT REJECTED BY COURT. Great Hill Equity Partners II LP versus Novator One LP & Ors. Adjudicated on 22 May 2007. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1210&step=FullText>.

[1261] INDIA. High Court of Delhi. Caso n. CS (OS) No. 1599/1999. Sandvik Asia Pvt. Ltd. versus Vardhman Promoters Pvt. Ltd. Adjudicated on 21 August 2006.

controversy involving price fixation, having the PICC being used as a basis to the rule of interpretation[1262].

Although this possibility is not mentioned by the preamble of the PICC, some authors claim that it is possible that they themselves may be recognized as examples of commercial customs[1263]. BORTOLOTTI adds that this solution, when incorporated to international contracts, usually reveals distrust in relation to the incidence of the domestic legislation of the other contracting party, once it would drive such risk away[1264].

As matter of fact, this positioning has been repeatedly expressed by the arbitral precedents of the ICC, which, in several instances, recognizes the PICC as an expression of international customs[1265]. Here follows some examples of such positioning: (i) the instance of a contract of sales of rice executed between a Vietnamese seller and a Dutch buyer which did not specify the applicable law, but made reference to the INCOTERMS and UCP. The arbitral Chamber understood that this would be evidence of the intention to subject the contract to the international customs from which the PICC and the CISG would be the expression[1266]; (ii) the instance involving dispute on the use of trade name and trademark between Italian companies, having the Court decided to employ the PICC, as they would represent the international customs, even if not

[1262] INDIA. High Court of Delhi. Caso n. RFA (OS) No. 26/1986. Hansalaya Properties and Anr.v. Dalmia Cement (Bharat) Ltd. Adjudicated on 20 August 2008.

[1263] GOODE, Roy; KRONKE, Herbert; MCKENDRICK, Ewan. Op. cit., p. 526; HUBER, Peter; MULLIS, Alastair. Op. cit., p. 36.

[1264] BORTOLOTTI, Fabio. Reference to the Unidroit Principles in Contract practice and Model Contracts. In: ICC International Court of Arbitration Bulletin. Unidroit Principles: New developments and applications. Special Supplement. 2005, p. 60.

[1265] In the instance of the Arbitral Chamber of ICC this tendency is especially relevant insofar as its Statute explicitly establishes freedom for the parties to choose the applied Law to the merit of the dispute (art. 17.1), granting the Court the permission to resort to the commercial usages and customs (art.17.2) (ICC. International Court of Arbitration. Regulation of Arbitration in force from 1January 1998. Paris: ICC, 2010, p. 10). JOLIVET, however, informs two instances adjudicated by the ICC in which the Court, in accordance with art.13.5 of the rules of 1988, did not apply the Principles. He asks himself if in such events the Court did not accept the PICC as relevant customs (Cases n. 10.385 e 9771). JOLIVET, Emmanuel. The Unidroit Principles in ICC Arbitration. ICC International Court of Arbitration Bulletin. In: Unidroit Principles: New developments and applications. (Special Supplement). 2005, p. 70-71.

[1266] ICC. Arbitral report n. 8502. CONTRACT SILENT AS TO APPLICABLE LAW - PARTIES' REFERENCE TO INCOTERMS 1990 AND UCP 500 - ARBITRAL TRIBUNAL'S INFERENCE OF PARTIES' INTENTION THAT CONTRACT BE GOVERNED BY TRADE USAGES AND GENERALY ACCEPTED PRINCIPLES OF INTERNATIONAL TRADE - REFERENCE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND THE UNIDROIT PRINCIPLES AS EVIDENCING ADMITTED PRACTICES UNDER INTERNATIONAL TRADE LAW. DETERMINATION OF DAMAGES DIFFERENCE BETWEEN CONTRACT PRICE AND MARKET PRICE AT TIME OF TERMINATION (ART. 76 CISG; ART. 7.4.6 UNIDROIT PRINCIPLES). Unknown parties. November 1996. Available: <http://www.unilex.info/case.cfm?pid=2&do=case&id=655&step=Abstract>.

completely[1267]; (iii) the event involving the unilateral breach of contract to the improvement of production and export of cement in Lithuania, when the Court understood that the PICC would be codified commercial customs[1268]; (iv) on the partial decision over the applicable law in the previous instance, the court understood that the PICC and the PECL would be codifications of consuetudinary Law which would have binding power when explicitly prescribed by the parties, in this instance, as they were applicable in the Law in Lithuania, they could be applied as relevant commercial customs[1269], but not in an exclusionary way, and (v) the instance involving the interpretation of a contract executed between a corporation in Bermuda and a corporation in Rwanda, in which the Court decided to apply the PICC because the parties, during the procedure, seemed to agree with such application and also because they would reflect the codification of the trade customs[1270]. Finally, it can also be mentioned the arbitral precedents from Puerto Rico[1271].

[1267] ICC. Arbitral report n. 9479. CONTRACT SILENT AS TO THE APPLICABLE LAW – REFERENCE BY ARBITRAL TRIBUNAL TO "USAGES OF INTERNATIONAL TRADE" – REFERENCE TO THE UNIDROIT PRINCIPLES.HARDSHIP – SUPERVENING CHANGES IN THE LAW – HARDSHIP ONLY WHERE CAUSING FUNDAMENTAL ALTERATION OF CONTRACT EQUILIBRIUM (UNIDROIT PRINCIPLES ARTICLES 6.2.1-6.2.3). CONTRACT FOR AN INDEFINITE PERIOD – RIGHT OF TERMINATION - EXCLUDED WHERE PARTIES INTENDED TO CREATE PERPETUAL OBLIGATIONS (UNIDROIT PRINCIPLES, ARTICLE 5.8 [ART. 5.1.8 OF THE 2004 EDITION]). Unknown parties. February 1999. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=680&step=Abstract>.

[1268] ICC. Arbitral report n. 10021. SHAREHOLDERS' AGREEMENT SUBJECT TO A PARTICULAR DOMESTIC LAW (LITHUANIAN LAW) - CONCURRENT APPLICATION OF "RELEVANT TRADE USAGES" ACCORDING TO ARTICLE 17 ICC ARBITRATION RULES - REFERENCE TO THE UNIDROIT PRINCIPLES AS "CODIFIED TRADE USAGES". SHAREHOLDERS' AGREEMENT FOR AN INDEFINITE PERIOD OF TIME - CAN BE ENDED BY EITHER PARTIES ONLY BY GIVING NOTICE A REASONABLE TIME IN ADVANCE (ARTICLE 5.8 [ART. 5.1.8 OF THE 2004 EDITION] OF THE UNIDROIT PRINCIPLES). DESTRUCTION OF MUTUAL TRUST BETWEEN PARTIES TO SHAREHOLDERS' AGREEMENT - NOT NECESSARILY CASE OF HARDSHIP ACCORDING TO ARTICLE 6.2.2 OF THE UNIDROIT PRINCIPLES. TERMINATION OF SHAREHOLDERS' AGREEMENT BECAUSE OF CASE OF HARDSHIP – ONLY IF NEGOTIATIONS FOR ADAPTATION OF TERMS OF AGREEMENT FAIL (ARTICLE 6.2.3 OF THE UNIDROIT PRINCIPLES) Unknown parties. 2000. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=832&step=Abstract>.

[1269] ICC. Arbitral reports n. 10022. ARBITRAL TRIBUNAL REQUESTED TO TAKE INTO ACCOUNT "RELEVANT TRADE USAGES" (ARTICLE 17 ICC RULES OF ARBITRATION) – REFERENCE INCLUDES BUT IS NOT LIMITED TO THE UNIDROIT PRINCIPLES AND THE PRINCIPLES OF EUROPEAN CONTRACT LAW. Unknown parties. 10.2000. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=695&step=FullText>.

[1270] ICC. Arbitral n. 11265. INTERNATIONAL SALES CONTRACT SILENT AS TO THE APPLICABLE LAW – CONTRACT WITH CONTACTS WITH A NUMBER OF JURISDICTIONS (BERMUDA, FRANCE, RWANDA, TANZANIA) NONE OF WHICH CLOSE ENOUGH TO JUSTIFY APPLICATION OF ANY OF THESE DOMESTIC LAWS – APPLICATION OF ANATIONAL PRINCIPLES AND RULES TO BE PREFERRED – PREFERENCE FOR THE UNIDROIT PRINCIPLES RATHER THAN TO VAGUE PRINCIPLES OF LEX MERCATORIA. INTERPRETATION OF CONTRACT – TO BE DECIDED ACCORDING TO CRITERIA LAID DOWN IN ARTICLE 4.1 – 4.3 OF THE UNIDROIT PRINCIPLES. Unknown parties. 2003. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1416&step=Abstract>.

[1271] ROMERO-PÉREZ, Jorge Enrique. Principios generales de Unidroit: el caso de Costa Rica. In: Revista de Ciencias Juridicas, n. 110, maio/ago. 2006, p. 131-160.

GAMA JUNIOR mentions the event involving the dispute on the extinction of the contract of supply between French corporations of perforation and another one from Kazakhstan to supply food products in which the ICC understood them as a codification of usages and customs of international trade, and the instance involving Morgan Stanley and ENEL on sales of fuel oil in which the PICC were employed for the amount of damage[1272].

In addition to the ICC, the court precedents of the International Arbitral Court of the Russian Chamber of Industry and Trade can be cited: (i) like in the event involving contracting parties from Russia and Bulgaria on the dispute over the penalty clause on late payment, having the court employed the PICC to fill in the gap left by the CISG, which governed the contract, and to declare them customs that both parties knew or ought to have known (art. 9 (2) of CISG)[1273]; (ii) the instance involving a breaching party on the delivery of part of the products in the contract of sales executed to apply the PICC, as they had been gradually recognized as established international customs[1274] and (iii) the event involving the interpretation of an arbitral clause in a contract where the Russian and the English languages were equally binding, having the Court chosen to apply the PICC on the grounds that they would be widely used in international trade[1275].

[1272] GAMA JÚNIOR, Lauro. Os Princípios UNIDROIT na prática arbitral: uma análise de casos (1994-2007). In: FERNÁNDEZ ARROYO, Diego P.; DREYZIN DE KLOR, Adriana. (Dir.). DeCita: derecho del comercio internacional tema y actualidades. Contratos internacionales. 9.2008, p. 131-132.

[1273] RUSSIA. International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation. Case n. 229/1996. CONTRACT GOVERNED BY CISG – UNIDROIT PRINCIPLES APPLIED AS MEANS TO INTERPRET AND SUPPLEMENT CISG (PREAMBLE OF UNIDROIT PRINCIPLES) – UNIDROIT PRINCIPLES APPLIED AS REFLECTING INTERNATIONAL USAGES (ART. 9(2) CISG). PENALTY CLAUSE – PAYMENT OF PENALTY FOR DELAY IN PAYMENT OF PRICE – MATTER NOT COVERED BY CISG – RECOURSE TO ART.7.4.13 UNIDROIT PRINCIPLES. AMOUNT OF PENALTY EXCESSIVE – REDUCTION TO REASONABLE AMOUNT (ART.7.4.13(2) UNIDROIT PRINCIPLES). Unknown parties. 05.06.1997. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=669&step=Abstract>.

[1274] RUSSIA. International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation. Case n. 302/1997. CONTRACT SILENT AS TO THE APPLICABLE LAW – INTERNATIONAL SALES CONTRACT – APPLICATION OF THE UNIDROIT PRINCIPLES CONSIDERED TO REFLECT INTERNATIONAL USAGES. AVOIDANCE OF CONTRACT FOR LACK OF AUTHORITY OF AGENT – NOTICE OF AVOIDANCE TO BE GIVEN WITHIN REASONABLE TIME AFTER AVOIDING PARTY KNEW OR COULD NOT HAVE BEEN UNAWARE OF RELEVANT FACTS (ART. 3.15 UNIDROIT PRINCIPLES). Unknown parties. 27.07.1999. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=671&step=Abstract>.

[1275] RUSSIA. International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation. Case n. 217/2001.NTERPRETATION OF CONTRACTS – APPLICABLE DOMESTIC LAW REFERRING TO "TRADE USAGES"(ARTICLE 431 OF THE RUSSIAN CIVIL CODE) – APPLICATION OF THE UNIDROIT PRINCIPLES AS RULES WIDELY USED IN INTERNATIONAL PRACTICE.LINGUISTIC DISCREPANCIES BETWEEN TWO EQUALLY AUTHORITATIVE LANGUAGE VERSIONS OF THE CONTRACT (ARTICLE 4.7 OF THE UNIDROIT PRINCIPLES). Unknown parties. 06.11.2002. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=856&step=Abstract>.

It can also be mentioned the *ad hoc* arbitration carried out between an Argentinean and a Chilean party involving the sales of membership interests of the Argentinean Corporation and the supposed concealed liabilities. Even though both had based their requests in the Argentinean Law, the arbitral court decided to apply as provided in the PICC on the grounds that they would represent the customs of international trade, reflecting the solutions of different systems[1276].

Another example is the arbitration carried out by the commercial and economic arbitral Commission from China which took into consideration the PICC instances of international customs, but limited its application to situations when the national legislation was silent[1277].

There is, equally, opposing positioning, as it can be noticed in the statement by the ICC: (i) when analyzing the instance involving Italian and Austrian companies on the financing of an aeronautic project: in this contract there was a selection clause of the Italian Law and the Court understood that the appeal to the PICC was not the same appeal to the international customs (even though an analysis of isolated disposition had been made)[1278], (ii) when denied the application of the PICC in an instance involving a contract governed by the Mexican Law, as they would not generically reflect the international trade customs (though they could be employed to interpret the national law and solve difficulties in the application of that law in the international contracts)[1279], and

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[1276] ARGENTINA. Ad hoc Arbitration. CONTRACT SILENT AS TO APPLICABLE LAW - PARTIES CLAIMS BASED ON ARGENTINEAN LAW - ARBITRAL TRIBUNAL AUTHORISED BY PARTIES TO ACT AS AMIABLES COMPOSITEURS - APPLICATION OF UNIDROIT PRINCIPLES AS "USAGES OF INTERNATIONAL TRADE REFLECTING THE SOLUTIONS OF DIFFERENT LEGAL SYSTEMS AND OF INTERNATIONAL CONTRACT PRACTICE" IN CONFORMITY WITH ART. 28(4) UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION. NOTICE OF AVOIDANCE (ART. 3.14 UNIDROIT PRINCIPLES).CONFIRMATION OF CONTRACT (ART. 3.12 (AND COMMENT) UNIDROIT PRINCIPLES). CONTRA PROFERENTEM RULE – CONTRACT CLAUSE DRAFTED BY DEFENDANT INTERPRETED MORE FAVOURABLY TO CLAIMANT (ART. 4.6 UNIDROIT PRINCIPLES). Unknown parties.. 10.12.1997. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=646&step=Abstract>.

[1277] CHINA. China International Economic and Trade Arbitration Commission. NIDROIT PRINCIPLES QUALLIFIED BY THE TRIBUNAL AS USAGES APPLICABLE TO THE EXTENT THAT THE ISSUES AT STAKE ARE NOT COVERED BY THE APPLICABLE DOMESTIC LAW. Unknown parties. 2007. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1208&step=Abstract>.

[1278] ICC. Arbitral report n. 9029. PARTIES' CHOICE OF DOMESTIC LAW (ITALIAN LAW) AS LAW GOVERNING THE CONTRACT - ART. 834 ITALIAN CODE OF CIVIL PROCEDURE REQUIRING ARBITRAL TRIBUNAL TO TAKE INTO ACCOUNT "TRADE USAGES" - REQUEST OF APPLICATION OF UNIDROIT PRINCIPLES AS AN "AUTHORITATIVE SOURCE OF KNOWLEDGE OF INTERNATIONAL TRADE USAGES" – REJECTED. ART. 3.10 (GROSS DISPARITY) OF UNIDROIT PRINCIPLES - DISADVANTAGED PARTY'S STATE OF IGNORANCE – CONDITIONS. ART. 6.2.2 (HARDSHIP) - ALTERATION OF EQUILIBRIUM DUE TO EVENT WHERE RISK ASSUMED BY DISADVANTAGED PARTY. Unknown parties. 03.1998. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=660&step=Abstract>.

[1279] ICC. Arbitral report n. 11256. CONTRACT CONTAINING A CHOICE OF LAW CLAUSE IN FAVOUR OF MEXICAN LAW –DEFENDANT INVOKING APPLICATION OF UNIDROIT PRINCIPLES AS "USAGES"

(iii) in an event involving the Japanese legislation in a contract of sales which subscribed the obligation to acquire a minimum amount, in which the application of the PICC was denied on the grounds that they could not be considered trade customs of general coverage[1280]. MARRELLA and GÉLINAS still cite the decision on the case n.9419 of the ICC[1281].

It can be observed the reference to the PICC by several arbitral decisions as an expression of *Lex mercatoria*. Still in the 2000s, BONELL explained that this theme was controversial, mainly because the PICC were one of the several resources available to its formation[1282]. Some authors, however, accept it peacefully[1283].

LALIVE was clear about the "arbitral risks", as he considered that the parties would perform the real diffusion of the practice of the usage of the UNIDROIT Principles, since they would agree on the applicable Law. His vision demonstrated the arbitral report more and more subjected to an analysis and control of the applicable Law[1284].

Nonetheless, several arbitral reports where the PICC were recognized as an expression of the *Lex mercatoria* may be cited: (i) the arbitral report that decided on the controversy involving parties from France and Costa Rica on the breaching party of the contract of joint venture in which the arbitrators considered the PICC "a central component of the principles and rules which govern the international contractual obligations, being international

ACCORDING TO ARTICLE 17(2) ICC RULES OF ARBITRATION – ACCORDING TO ARBITRAL TRIBUNAL UNIDROIT PRINCIPLES "DO NOT GENERALLY REFLECT TRADE USAGES". ROLE OF UNIDROIT PRINCIPLES AS A MEANS "TO INTERPRET THE APPLICABLE DOMESTIC LAW AND SOLVE UNEXPECTED DIFFICULTIES IN APPLYING [THAT LAW] TO AN INTERNATIONAL CONTRACT". Unknown parties. 2003. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1423&step=Abstract>.

[1280] ICC. Arbitral report n. 12446. INTERNATIONAL SALES CONTRACT GOVERNED BY JAPANESE LAW – ONE PARTY INVOKING APPLICATION OF PROVISIONS ON HARDSHIP CONTAINED IN THE UNIDROIT PRINCIPLES – APPLICATION DENIED AS THE UNIDROIT PRINCIPLES, THOUGH INDICATING "WELL THOUGHT GOOD RULES", DO NOT REPRESENT "TRADE CUSTOMS OR USAGES PRACTICED WORLDWIDE BY BUSINESS PEOPLE OR BY JAPANESE BUSINESS PEOPLE" Unknown parties. 2004. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1424&step=Abstract>.

[1281] MARRELLA, Fabrizio; GÉLINAS, Fabien. Op. cit., p. 29.

[1282] BONELL, Michael Joachim. The Unidroit Principles in practice...

[1283] SIQUEIROS, José Luis. Los nuevos princípios de Unidroit 2004 sobre contratos comerciales internacionales. In: Revista de Derecho Privado, n. 11, maio/ago. 2005, p. 134; FAUVARQUE-COSSON, Bénédicte.Les contrats du commerce international, une approche nouvelle: Les principes d'Unidroit relatifs aux contrats du commerce international. In: Revue Internationale de Droit Compare, v. 50, n. 2, 1998, p. 480-482.

[1284] LALIVE, Pierre. L´arbitrage international et les principes UNIDROIT. In: BONELL, Michael Joachim; BONELLI, Franco. (Cur.). Contratti commerciali internazionali e principi Unidroit. Milano: Giuffrè, 1997, p. 88-89.

consensus[1285]; (ii) an instance involving Russian and German parties on the commission payment on the approximation of sale in which the arbitral Chamber applied the PICC as an expression of the *Lex mercatoria*[1286]; (iii) the event when the parties referred to the "international trade custom", the arbitrators decided to apply the PICC[1287]; (iv) the instance when the parties referred to "international Law", the arbitrators decided to apply the PICC[1288]; and (v) the instance in which, being the contract silent on the applicable law and having each part indicated its own domestic law, and only the *Lex Mercatoria* as an alternative, the arbitrators decided to apply the PICC as an expression of the *Lex mercatoria*[1289]; (vi) at last, the instance adjudicated by the arbitral Court of the Chamber of Commerce of Servia, in which the arbitrators, due to the legislation

[1285] COSTA RICA. Arbitral report ad hoc. JOINT VENTURE AGREEMENT BETWEEN A COSTA RICAN AND FRENCH COMPANY - ARBITRATION CLAUSE STATING THAT DISPUTES SHOULD BE SETTLED "ON THE BASIS OF GOOD FAITH AND FAIR USAGES AND WITH REGARD TO THE MOST SOUND COMMERCIAL PRACTICES AND FRIENDLY TERMS" - APPLICATION BY ARBITRAL TRIBUNAL OF THE UNIDROIT PRINCIPLES DEFINED AS "THE CENTRAL COMPONENT OF THE GENERAL RULES AND PRINCIPLES REGULATING INTERNATIONAL CONTRACTUAL OBLIGATIONS AND ENJOYING WIDE INTERNATIONAL CONSENSUS". Unknown parties. 30.04.2001. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1100&step=FullText>.

[1286] RUSSIA. International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. Arbitral report 11/2002. CONTRACT PROVIDING FOR APPLICATION OF BOTH GERMAN AND RUSSIAN LAW AND OF THE "GENERAL PRINCIPLES OF THE LEX MERCATORIA" – APPLICATION OF THE UNIDROIT PRINCIPLES. INTERPRETATION OF CONTRACT – NATURE OF THE CONTRACT AND INTENTION OF THE PARTIES (ARTICLES 4.1 AND 4.3 OF THE UNIDROIT PRINCIPLES). INTEREST PAYABLE ON AMOUNT DUE – MONETARY CLAIM IN EURO – APPLICATION OF THE INTEREST RATE APPLIED BY RUSSIAN BANKS FOR LOANS STIPULATED IN EURO (ARTICLE 7.4.9 OF THE UNIDROIT PRINCIPLES). Unknown parties. 05.11.2002. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=857&step=Abstract>.

[1287] ICC. Arbitral report n. 12.040. PARTIES' REFERENCE TO "INTERNATIONAL TRADE USAGES" AS THE LAW APPLICABLE TO THE MERITS OF THE DISPUTE - ARBITRAL TRIBUNAL DECIDES TO APPLY THE UNIDROIT PRINCIPLES. Unknown parties. 2003. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1418&step=Abstract>.

[1288] ICC. Arbitral report n. 12.111. I NTERNATIONAL SALES CONTRACT REFERRING TO "INTERNATIONAL LAW" AS THE LAW GOVERNING THE CONTRACT - TO BE UNDERSTOOD AS REFERENCE TO THE GENERAL PRINCIPLES OF LAW AND THE LEX MERCATORIA - APPLICATION OF THE UNIDROIT PRINCIPLES (PARAGRAPH 3 OF THE PREAMBLE OF THE UNIDROIT PRINCIPLES). PRINCIPLES OF EUROPEAN CONTRACT LAW – ACADEMIC EXERCISE PRELIMINARY TOan European CIVIL CODE - AS SUCH NOT YET APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS. Unknown parties. 06.01.2003. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=956&step=FullText>.

[1289] ICC. Arbitral report n. 13.012. CONTRACT BETWEEN A FRENCH COMPANY AND A U.S. COMPANY SILENT AS TO THE APPLICABLE LAW – ONE PARTY INVOKED APPLICATION OF FRENCH LAW, THE OTHER APPLICATION OF THE LAW OF THE STATE OF ILLINOIS – ARBITRAL TRIBUNAL FOUND THAT NONE OF THE CONNECTING FACTORS WITH ONE OR THE OTHER DOMESTIC LAW WAS COMPELLING AND DECIDED TO BASE ITS DECISION ON GENERAL PRINCIPLES OF LAW OR THE LEX MERCATORIA – RECOURSE TO THE UNIDROIT PRINCIPLES "AS A PRIMARY SET OF GUIDELINES IN DETERMINING INTERNATIONAL RULES OF LAW APPLICABLE TO THE PARTIES' CONTRACT". Unknown parties. 2004. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1409&step=FullText>.

and treaties applicable to the case, decided to employ the PICC, among other tools, as an expression of the *Lex mercatoria*[1290].

BONELL still cites other more explicit instances where ICC arbitral reports mentioned the relationship between the *lex mercatoria* and the PICC: reports n.7110, 7365[1291],7375[1292] and 8261, while others denied such connection: reports n.8873, 9029 and 9419, mainly on the basis of its non-State nature[1293]. As for GAMA JUNIOR, he identifies events under this hypothesis in which the arbitrators were confronted by excessively open clauses or by hypotheses such as the legislation in Panama which explicitly authorizes the application of the UNIDROIT Principles[1294].

According to BONELL, the PICC work in a system of complementation with the CISG. This is only possible, as while the Convention has a precise theme, the PICC are not only generic, but would also not be imbued in the legislative meaning[1295]. Besides that, according to the author, there would be commercial relations not covered by the Convention which could be governed by the PICC, either by voluntary determination by the parties, or as an expression of

[1290] SERVIA. Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce. Case n. T-9/07. CONTRACT FOR THE SALE OF SUGAR BETWEEN A SERBIAN SELLER AND AN ITALIAN BUYER – CONTRACT GOVERNED BY THE CISG – ARBITRAL TRIBUNAL DECIDES ALSO TO APPLY BOTH THE PRINCIPLES OF EUROPEAN CONTRACT LAW AND THE UNIDROIT PRINCIPLES AS EXPRESSION OF THE TRADE USAGES IT HAD TO TAKE INTO ACCOUNT ACCORDING TO THE RELEVANT ARBITRATION RULES. SELLER'S FAILURE TO DELIVER TOGETHER WITH THE GOODS THE CERTIFICATE OF THEIR ORIGIN AS REQUESTED UNDER THE CONTRACT – AMOUNTS TO A NON-PERFORMANCE (ARTICLES 35(1), 36(1) AND 45(1)(B) CISG)). BUYER'S RIGHT TO DAMAGES FOR THE LOSSES CAUSED BY SELLER'S NON-PERFORMANCE – REFERENCE TO ARTICLE 74 CISG AND TO ARTICLES 9:501 AND 9:502 OF THE PRINCIPLES OF EUROPEAN CONTRACT LAW AND TO ARTICLES 7.4.1 AND 7.4.4 OF THE UNIDROIT PRINCIPLES. RIGHT TO INTEREST – APPLICABLE RATE – REFERENCE TO METHOD OF CALCULATION INDICATED IN ARTICLES 9:508 OF THE PRINCIPLES OF EUROPEAN CONTRACT LAW AND 7.4.9 OF THE UNIDROIT PRINCIPLES Unknown parties. 23.01.2008. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1442&step=Abstract>.

[1291] DARAKOUM comments that in this case, known as Cubic, involving the Islamic Republic of Iran and the company Cubic Defense Systems, on the resolution of a sales contract and the installation of military equipment, the fact that the parties had not explicitly chosen the application of the PICC would not be equivalent to exclude them, once they had explicitly pointed the general principles of International Law as applicable. Cs. DARANKOUM, Emmanuel S. L'application des Principes d'UNIDROIT..., p. 430-432.

[1292] It is about an instance involving controversy on the applicable Law to a procurement contract executed between American and Arabic parties. As the parties had not chosen the applicable law, the Court decided to apply the general principles of Law and the international rules of the contractual Law that had reached international consensus. Under this formula of identification they ended up with the Unidroit Principles. DARANKOUM, Emmanuel S. L'application des Principes d'UNIDROIT..., p. 434-435.

[1293] BONELL, Michael Joachim. The Unidroit Principles in practice...

[1294] As in the event involving a company from Panama and another one from Porto Rico on the contract of distribution of bananas in European and North-American territories, in which the "usages of trade" and the Unidroit Priciples were considered to fix compensation for the breach of contract.. Cs. GAMA JÚNIOR, Lauro. Os Princípios UNIDROIT..., p. 126-129.

[1295] BONELL, Michael Joachim. The UNIDROIT Principles of International Commercial Contracts..., p. 340-342.

the Lex mercatoria[1296]. The author thinks, however, that the application of truly transnational rules like the PICC is still the exception which is normally justified in two situations: instances in which it may be inferred that the contracting parties intend to exclude the application of any national legislation, or instances when there are so many connecting elements, but none of them is sufficiently prevailing to justify the exclusion of the other ones[1297].

One example of the first hypothesis was the basis that the Chamber of Commerce in Stockholm found to apply the UNIDROIT Principles in a dispute on the applicable Law to the conflict involving a Chinese party and an European contracting party of licensing[1298].

There is nothing insignificant about this discussion, since if the PICC are recognized as customs or an expression of the *Lex mercatoria*, its applicability could be based on the will of the contracting parties, and also in the binding of the consuetudinary rule itself[1299].

Perhaps, in this aspect, MARELLA's conclusion may be used: the PICC and other kinds of expression of transnational Law will be more and more employed to define an applicable regime to the arbitration, as a complement of the national legislation and as a way to interpret the international Conventions. On the other hand, the author points out that the derivations between the transnational Law and the domestic legislation tend to dispel as the principles related to international trade are harmonized. Finally, he also observes the proliferation of codifications of non-compulsory contractual rules, but that those ones with a global character like the PICC should prevail[1300].

Moreover, BERGER's positioning deserves to be highlighted; in his opinion, though the PICC are important as one of the possible sources of the *Lex mercatoria*, the technique of restatement which is adopted is not the most adequate one, since it is a "positive" approach (in the sense that it leaves the

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[1296] Ibidem, p. 343-346.
[1297] BONELL, Michael Joachim. An International..., p. 217.
[1298] SUECIA. Arbitration Institute of the Stockholm Chamber of Commerce. Arbitral award n. SCC 117/1999. Applicable Law to the dispute; application of article 24(1) of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. 2001. Stockholm Arbitration Report 2002:1, p. 59-65.
[1299] LOOKOFSKY, Joseph. Denmark. In: BONELL, M. J. (Org.). Op. cit., p. 77.
[1300] MARRELLA, Fabrizio. Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts. In: Vanderbilt Journal of transnational law, v. 36, 2003, p. 1187-1188.

practice aside) and "comparative"[1301]. As a solution to this dilemma, the author puts forward a proposal of the technique of "creeping codification", that is, the production of a non- permanent list of rules and principles applicable to the *Lex mercatoria* (extracted from its several sources), not only contractual ones, relating it to comparative references, even with the arbitral and contractual practice[1302].

Another aspect of major interest for this work is the fact that the PICC establish the so-called primacy of usages and customs with regards to international contracts. In other words, the contracting parties are obliged by the practices established between each other[1303], and also by the usages that they agree with and by the customs regularly observed in international trade.

According to BONELL, the basis of this primacy would be in the possibility of this form to endow the PICC with the flexibility and constant possibility of adaptations to any technical and economic amendment[1304].

It is about art. 1.9, with the following text:

> (1) The parties are bound by the usages and customs to which they have agreed and the practices they have established between themselves.
> (2) The parties are equally bound to every usage and custom, which in international trade, are widely known and regularly observed by persons in the same business field involved, except when the application of such usage and custom is not reasonable[1305].

According to ALPA, a rule like this one is not surprising in the codified body of the PICC, even when, ontologically, is presented "as general rules like those ones to codify the *lex mercatoria*[1306].

In this device it can also be felt the mutual influence between both works of restatement concomitantly conducted[1307]. It is important to remember,

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[1301] BERGER, Klaus Peter. The creeping..., p. 250-252.
[1302] Ibidem, p. 255-258.
[1303] As in the instance appreciated by the Australian Federal Court in which it was alleged the existence of practice between the parties that would allow one of the contracting parties that would proceed to the discount of occasional defect of the product. AUSTRALIA. Federal Court of Australia, case n. ACN 087 011 541 [2008] FCA 1591. Hannaford (trading as Torrens Valley Orchards) versus Australian Farmlink Pty Ltd. 24.10.2008.
[1304] BONELL, Michael Joachim. An international..., p. 97.
[1305] VILLELA, João Baptista; et al. (Eds.). Op. cit., p. 25. Text in PICC 2010.
[1306] ALPA, Guido. Les nouvelles frontières..., p. 1025. In addition, the fact that the European directives did not follow the same tendency would be understandable, since such particularities would not coadunate with the perspective of a common Law. Cs. ALPA, Guido. Italy. In: BONELL, M. J. (Org.). Op. cit., p. 185).

however, that the version in Portuguese does not exactly correspond to the text in English, once it only mentions:

> (2)The parties are bound by **a usage** that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.[1308][1314][no original emphasis].

The same discrepancy may be felt with regards to the other official translations, while the French version mentions:

> (2) Elles sont liées par tout **usage** qui, dans le commerce international, est largement connu et régulièrement observé par les parties à des contrats dans la branche commercial considérée, à moins que son application ne soit déraisonnable[1309] [no original emphasis].

Just like the Spanish version mentions:

> (1) Las partes están obligadas por cualquier **uso** que sea ampliamente conocido y regularmente observado en el comercio internacional por los sujetos participantes en El tráfico mercantil de que se trate, a menos que la aplicación de dicho uso sea irrazonable[1310] [no original emphasis].

In other words, the translation of the terms "usage", "usage" and "use" was made for the national formulae "usages and customs". If taken into account only the translation it could be imagined that art. 1-9 was dictating a hypothesis of establishment of the commercial usages, or else, a situation voluntarily

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[1307] The mentioned influence between the PICC and the PECL is demonstrated in the draft of art. 1:105 of the European Principles which contain vary similar terms to the ones of the UNIDROIT Principles: "(1) The parties are bound by any usage to which they have agreed and by any practice they have established between themselves. (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable". As for the DCFR the customs appear for the interpretation of reasonableness(art.1:104 of book I) "Reasonableness is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices". In addition, it is defined in art. 1:104 of book II: "(1) The parties to a contract are bound by any usage to which they have agreed and by any practice they have established between themselves. (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable. (3) This Article applies to other juridical acts with any necessary adaptations. Other aspects can also be pointed out for the interpretation of contracts (art. II - 8:102 "f"), definition of the content of the contract (art. II - 9:101-1), price (art. II - 9:104), quality of the product (art. II - 9:108), language of the contract (art. II - 9:109); source of obligations (art. III - 1:102-5), definition of the leasing source of obligations (art. IV B - 5:101-2) and notice for termination of agency agreement (art. IV E 2:302-3 "b"). BAR, Christian von; CLIVE, Eric; SCHULTE-NÖLKE, Hans. (Ed.). Op. cit., passim.

[1308] UNIDROIT. Unidroit Principles of International Commercial Contracts 2010. Rome: Unidroit, 2010, p. 02.

[1309] Idem.

[1310] Ibídem.

adopted by the contractual parties. In fact, this occurs in item 1.9 (1) when the UNIDROIT Principles refer to submission, voluntary, of the contracting parties to customs which maybe, are not even part of its specific commercial field[1311].

Besides that, it should be remembered, as stressed in preliminary note (item 33), that the practices established between the parties and sectional usages prescribed in art. 1.9 (1) of the PICC cannot be confused with the trade customs, whose generality exempts the consent by the contracting parties.

As for item 1.9 (2), it refers to what had been called, in a preliminary note (item 3.3), as contractual custom[1312]. The distinction in relation to the binding of behavior becomes evident if taken into account its origin: in the first it is stipulated by the parties themselves, and in the second one, the custom itself.

The interesting fact of this disposition is the omission in relation to the specific and occasionally necessary statement of consent by the contracting parties. It is unnecessary, since it is a custom, and so, binding, as it is general[1313]. It is important to notice, nevertheless, that the comments to the Principles also refer to the binding application of the local and national customs[1314]. In other words, the generality of the custom should not be confused with its territorial extension only, but with its relevance as a regulating rule. In addition, the analysis of generality occurs objectively, as, contrary to the draft of the CISG, the PICC do not refer to the need for the contracting parties to know the customs whose content they are bound to[1315]. On the other hand, the draft would draw the conclusion that while the PECL would also be applied in domestic relations, the PICC would be applied internationally, only[1316].

There is an interesting arbitral precedent, previously mentioned, in which the UNIDROIT Principles were recognized as examples of binding contractual

[1311] VEYTIA, Hernany. El capítulo uno de los principios del Unidroit: "disposiciones generales". In: Contratación internacional. Comentarios a los Principios sobre los Contratos Comerciales Internacionales del Unidroit. México: UNAM, 1998, p. 51-52.
[1312] In the same sense see: OVIEDO ALBÁN, Jorge. Remarks...
[1313] LABARIEGA VILLANUEVA, Pedro Alfonso. Los Principios Unidroit: un código internacional de los contratos mercantiles. In: Revista de Derecho Privado, n. 25, jan./abr. 1998, p. 59-60.
[1314] VILLELA, João Baptista; et al. (Eds.). Op. cit., p. 27.
[1315] CHANDRASENAN, Anukarshan. Op. cit., p.75. On the other hand, BONELL explains that the requirement present in the text of art. 9 (2) of CISG reflects a commitment between the capitalist countries and the socialist block, but that, in his opinion, there would not be great differences of content between the two texts. BONELL, Michael Joachim. An international..., p. 99.
[1316] LANDO, Ole. The role of party autonomy and the relevance of usages. In: BONELL, Michael Joachim; BONELLI, Franco. (Cur.). Op. cit., p. 120.

customs[1317]. It can also be equally mentioned the Australian court precedent in which the binding of the contractual custom was recognized to determine the nature of the negotiating relationship kept by the contracting parties[1318].

As it can be noticed, the custom is treated as a real normative source, so that, as clarified by comments, its content prevails over the Principles themselves and over the voluntary disposition by the parties[1319]. There is, however, a self-imposed limit by the PICC, that is, its reasonableness and the dispositions prescribed by the PICC as mandatory.

According to LANDO such limitations impose to the arbitrator, for example, the restriction in the application of rules which are oppressive, discriminating, or violate rules of public policy like those ones established for the protection of cultural assets by the UNESCO Conventions[1320].

Apart from the disposition on the negotiating sources, the customs are still mentioned by the PICC as interpretative tools (art. 4.3)[1321] and as definers of obligational content of the contract (art.5.1.2)[1322].

[1317] COSTA RICA. Arbitral report ad hoc. JOINT VENTURE AGREEMENT BETWEEN A COSTA RICAN AND FRENCH COMPANY - ARBITRATION CLAUSE STATING THAT DISPUTES SHOULD BE SETTLED "ON THE BASIS OF GOOD FAITH AND FAIR USAGES AND WITH REGARD TO THE MOST SOUND COMMERCIAL PRACTICES AND FRIENDLY TERMS" - APPLICATION BY ARBITRAL TRIBUNAL OF THE UNIDROIT PRINCIPLES DEFINED AS "THE CENTRAL COMPONENT OF THE GENERAL RULES AND PRINCIPLES REGULATING INTERNATIONAL CONTRACTUAL OBLIGATIONS AND ENJOYING WIDE INTERNATIONAL CONSENSUS". Unknown parties. 30 April 2001. Available on: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1100&step=FullText>.

[1318] AUSTRALIA. Federal Court of Australia. Caso n. ACN 087 011 541 [2008] FCA 1591. AGREEMENT BETWEEN AN AUSTRALIAN CHERRY GROWER (CLAIMANT) AND AUSTRALIAN EXPORTER (RESPONDENT) FOR DELIVERY OF CHERRIES TO IMPORTERS IN SINGAPORE AND HONG KONG – AGREEMENT DEFINED AS ONE OF SELLER AND BUYER, NOT AS ONE OF PRINCIPAL AND AGENT – APPLICATION OF THE CISG EXCLUDED. RELEVANCE OF GENERALLY KNOWN PRACTICES AND USAGES OF THE TRADE SECTOR CONCERNED FOR CHARACTERISATION OF NATURE OF RELATIONSHIP BETWEEN PARTIES – REFERENCE TO ARTICLES 9(2) CISG, 1.9(2) UNIDROIT. PRINCIPLES 2004 AND § 1-303 UNIFORM COMMERCIAL CODE. COURSE OF DEALING AS A MEANS OF INTERPRETING AND SUPPLEMENTING TERMS OF THE CONTRACT – REFERENCE TO ARTICLE 9(1) CISG, 1.9(1) AND 5.1.2 UNIDROIT PRINCIPLES 2004 AND § 1-303 UNIFORM COMMERCIAL CODE IN SUPPORT OF CORRESPONDING SOLUTION ACCEPTED IN DOMESTIC LAWS OF COMMON LAW COUNTRIES. PRICE REDUCTION DUE TO QUALITY DEFECTS OF GOODS DELIVERED – BUYER'S RIGHT TO PASS BACK TO SELLER PRICE REDUCTION IT HAD TO ACCEPT FROM ITS FINAL CUSTOMERS – EXISTENCE OF CORRESPONDING COURSE OF DEALING BETWEEN SELLER AND BUYER – TO BE PROVED. Hannaford (trading as Torrens Valley Orchards) *versus* Australian Farmlink Pty Ltd. Adjudicated on 24 October 2008. Available on:<http://www.unilex.info/case.cfm?pid=2&do=case&id=1366&step=FullText>.

[1319] VILLELA, João Baptista; et al. (Eds.). Op. cit., p. 28-29; BONELL, Michael Joachim. (Ed). Op. cit., p. 94.

[1320] LANDO, Ole. The role of party..., p. 116-118.

[1321] "When applying Articles 4.1 and 4.2, all circumstances should be considered, including(...)(f)"usages and customs" VILLELA, João Baptista; et al. (Eds.). Op. cit., p. 126-127.

[1322] "The implicit obligations derive: (...)(b) from the practices established between the parties and the uses and customs. Ibidem, p. 136-137.

If the employment of the PICC is already internationally recognized, even if its nature may be debated, its use in Brazil seems to be behind the possible one.

It may be due to the lack of knowledge by the part of the operators[1323], or the normative complexity of our conflictual system. The PICC would have, according to GAMA JUNIOR, residual application to the international instances of arbitration performed in Brazil, once its election would be possible to govern the conflict[1324]. LEE has a similar opinion, to whom the "application of the *lex mercatoria* and/or UNIDROIT "uniform principles of international contracts" is conditioned to the internationalization of arbitration itself and extension to the internal arbitration is also confronted with public policy. This way, the internal Law of its office is imperatively applied to the internal arbitration[1325]. ARAUJO, in turn, supports the possibility of election of the PICC as applicable Law to domestic and international contracts, subjected to arbitral regime[1326]. However, as it will be later seen, these opinions are not shared by other doctrines.

Another possible way to employ the UNIDROIT Principles by the Brazilian Courts is through the interpretation of domestic legislation. As already seen, such possibility, prescribed in the Preamble, is supported in the notion that the PICC incorporate the legal traditions of several normative systems, making several concepts clearer and operable and consistent with the models internationally adopted. The already mentioned examples of national decision corroborate the usefulness of this technique[1327], even though the court precedents research has not revealed any occurrence in the Brazilian courts researched[1328]. BONNEL mentions the instance *Pro-Force Recruit Ltd. V. The*

[1323] The first "official" version in the Portuguese language was only published in 2009. The previous translation (1994) was provisional, did by the Portuguese Ministry of Justice.
[1324] GAMA JÚNIOR, Lauro. Contratos Internacionais..., p. 441-442.
[1325] LEE, João Bosco. A especificidade da arbitragem comercial internacional. In: CASELLA, Paulo Borba (Coord.). Arbitragem: lei brasileira e praxe internacional, 2. Ed., São Paulo: LTr, 1999, p. 187.
[1326] ARAUJO, Nadia de. A nova lei de arbitragem brasileira e os "Princípios Uniformes dos Contratos comerciais internacionais", elaborados pelo UNIDROIT. In: CASELLA, Paulo Borba (Coord.). Arbitragem: lei brasileria e praxe internacional, 2. Ed., São Paulo: LTr, 1999, p. 158-159.
[1327] CASELLA, Paulo Borba. Utilização no Brasil dos princípios UNIDROIT relativos a contratos comerciais internacionais. In: ____. (Coord.). Contratos Internacionais e Direito Econômico no MERCOSUL. São Paulo: LTr, 1996, p.99.
[1328] Research which took into consideration the entry "Unidroit" in the websites of research of the three courts previously mentioned: Federal Supreme Court, Superior Court of Justice and Court of Appeal of Paraná. The research was carried out on 07 March 2011. The same difficulty was reported by BASEDOW, with regards to the German Law, until 1997. BASEDOW, Jürgen. Germany. In: BONELL, M. J. (Org.). Op. cit., p. 145.

Rugby Group Ltd. as an example of this technique applied by the English Courts[1329].

Its use can also occur, as in the ICC reports n.8769 and 8817[1330], to interpret uniform instruments, like the CISG[1331]. This is mainly because of the probable entry into force of its text in Brazil and the rare interpretative tradition of its content in the Brazilian doctrine. There are, however, some authors who do not accept this position[1332].

KLEINHEISTERKAMP points out that most of the national judicial decisions which invoked the PICC, employ them just as an "adornment", applying them literally. Anyway the need for a uniform and respectful interpretation of compared Law[1333] would persist, and in several instances, adequate to the basic outlines of the national systems where it is applied[1334].

BONNEL still supports the possibility that the UNIDROIT Principles may be applied to replace the national legislation in cases in which it is impossible to establish which domestic Law would be applicable, or when such research involved disproportional efforts and expenses[1335].

Perhaps there would be similar usefulness in instances of double renvoi (not admitted by the Brazilian Law) or prohibition of the application of the foreign Law for violation to international public policy.

[1329] BONELL, Michael Joachim. The UNIDROIT Principles and CISG - Sources of Inspiration for English Courts? In: Pace International Law Review, v. 19, n. 1, 2007, p. 09-27.

[1330] MARRELLA, Fabrizio; GÉLINAS, Fabien. Op. cit., p. 28.

[1331] GOTANDA, John Y. Op. cit., p. 107-135 (with certain limitations); PERALES VISCASILLAS, María del Pillar. Op. cit., p. 207-208; ZIEGEL, Jacob S. The UNIDROIT Contract Principles, CISG and National Law. Available on: <http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html>; KOTRUSZ, Juraj. Gap-Filling of the CISG by the UNIDROIT Principles of International Commercial Contracts. Available on: <http://www.cisg.law.pace.edu/cisg/biblio/kotrusz.html>; FAUVARQUE-COSSON, Bénédicte. Les contrats..., p. 484.

[1332] SICA, Lucia Carvalhal. Gapfilling in the CISG: may the Unidroit principles supplement the gaps in the convention? In: Nordic Journal of Commercial Law, n. 1, 2006, p. 1-28; HUBER, Peter; MULLIS, Alastair. Op. cit., p. 35-36.

[1333] KLEINHEISTERKAMP, Jan. Los principios UNIDROIT en la interpretación del derecho nacional por tribunales estatales. In: FERRER VANRELL, Ma. Pilar; MARTÍNEZ CAÑELLAS, Anselmo. (Dir.). Principios de Derecho contractual Europeo y Principios de UNIDROIT sobre Contratos comerciales internacionales: actas del Congreso Internacional celebrado en Palma de Mallorca, 26 y 27 de abril de 2007. Madrid: Dykinson, 2009, p. 186-187.

[1334] Like, for example, the Danish Law: LOOKOFSKY, Joseph. Op. cit., p. 71-93; the Iranian Law, especially in relation to the custom as the main source of Law. IZADI, Bijan. Iran. In: BONELL, M. J. (Org.). Op. cit., p. 157; the Swedish Law, in relation to the customs as contractual sources: HULTMARK, Christina. Sweden. In: BONELL, M. J. (Org.). Op. cit., p. 305-306, 310.

[1335] BONELL, Michael Joachim. An international..., p. 257.

The possible use of the PICC as a model of occasional future legislation reform[1336] with regards to contracts and obligations is not so relevant (such as the instances from Turkey[1337], China[1338], Quebec[1339], Holland and Russia[1340], and Tunisia and New Zealand[1341] and the project of the Argentinean Civil Code of 1998[1342]), as models of attempts to international legislative harmonization (like in the OHADA instances[1343], or as a model of contractual drafting[1344]. In all these events, however, the role of the contractual customs becomes irrelevant.

5.3.2. International Commercial Terms – INCOTERMS ICC (2010)

The INCOTERMS are typical contractual conditions of international sales agreement[1345], based on private autonomy[1346], to define the program of transfer of risks on the product[1347] to be delivered.

[1336] VEYTIA, Hernany. Los valores que inspiran la contratación internacional. In: Revista de Derecho Privado, n. 17, maio/ago. 1995, p. 85.
[1337] ACAR, Hakan; YILDIRIM, Ahmet Cemil. Op. cit., p. 10-29.
[1338] SHAOHUI, Zhang. L'influence des Principes d'UNIDROIT sur la réforme du droit chinois des obligations. Uniform Law Review, 2008, p. 153-178; LEFEBVRE, Guy; JIAO, Jie. Op. cit., p. 519-537.
[1339] ROLLAND, Louise. Les Principes d'UNIDROIT et le Code civil du Québec: variations et mutations. In: Revue Juridique Thémis, n. 36. 2002, p. 583-608.
[1340] BONELL, Michael Joachim. The Unidroit Principles in practice...
[1341] FAUVARQUE-COSSON, Bénédicte. Les contrats..., p. 485.
[1342] MORENO RODRÍGUEZ, José Antonio. Temas de Contratación..., p. 101.
[1343] UNIDROIT. Avant-projet d'Acte uniforme OHADA sur le droit des contrats. In: Uniform law review, 2008, p. 521-559; CASTELLANI, Luca G. Ensuring Harmonization of Contract Law at Regional and Global Level: the United Nations Convention on Contracts for the International Sale of Goods and the Role of UNCITRAL. In: Uniform law review, 2008, p. 115-126.
[1344] FAUVARQUE-COSSON, Bénédicte. Les contrats..., p. 485.
[1345] The legal nature of the Incoterms can still be debated: they would be form special sales agreements (MARTINS, Fran. O contrato de compra e venda internacional. In: Revista de Direito Mercantil, Industrial, Econômico e Financeiro, n. 33. São Paulo: RT, jan./mar. 1979, p. 33) to type contracts (DERAINS, Yves; GHESTIN, Jacques. (Dir.). Op. cit., p. 39; HEUZÉ, Vincent. Op. cit., p. 229; KASSIS, Antoine. Théorie générale..., p. 274). The majority doctrine, however, consider them special conditions of sales. FONSECA, Patrícia Bezerra de M. Galindo da. Anotações pertinentes à regulamentação sobre transmissão de risco: Convenção da ONU de 1980, Incoterms e Código Civil brasileiro. In: Revista de Informação Legislativa, n. 139. Brasília, jul./set. 1998, p. 47.
[1346] WALD, Arnoldo. Curso de Direito Civil Brasileiro: Obrigações e contratos. 17. ed. São Paulo: Saraiva, 2006, p. 370; BASTOS, Celso Ribeiro; KISS, Eduardo Amaral Gurgel. Contratos internacionais. São Paulo: Saraiva, 1990, p. 21; BARBI FILHO, Celso. Contrato de compra e venda internacional: abordagem simplificada de seus principais aspectos jurídicos. In Revista do Curso de Direito da Universidade Federal de Uberlândia, v. 25. Uberlândia: Universidade Federal de Uberlândia, dez. 1996, p. 30; CALIENDO, Paulo. Incoterms, cláusulas padronizadas de comércio internacional. In: Revista da Faculdade de Direito Ritter dos Reis, v. 1, Porto Alegre, 1998, p. 119; AMARAL, Antonio Carlos Rodrigues do. (Coord.). Op. cit., p. 241; PINHEIRO, Luís de Lima. Estudos de Direito Civil, Direito Comercial e Direito Comercial Internacional. Coimbra: Almedina, 2006, p. 317; DERAINS, Yves; GHESTIN, Jacques (Dir.). Op. cit., p. 39; HEUZÉ, Vincent. Op. cit., p. 230; GRANZIERA, Maria Luiza Machado. Incoterms. In: RODAS, João Grandino. (Coord.). Op. cit., p. 153; CARLINI, Gabriel A. Op. cit., p. 62; COETZEE, Juana. Incoterms and the lex mercatoria. In: Cadernos da Escola de Direito e Relações Internacionais da UniBrasil, n. 12, 2010, p.77.
[1347] DERAINS, Yves; GHESTIN, Jacques (Dir.). Op. cit., p. 39.

Given the variety of sources and versions of consolidations of commercial terms employed in the international trade during the beginning of the twentieth century, the Chamber of International Commerce in Paris (ICC) made a pioneer compilation work that was published in 1936 (with later amendments in 1953, 1967, 1976, 1980, 1990, 2000 and 2010). Such initiative would obey a certain international tendency of standardization of contractual rules[1348], making it easier the interpretation and make them distinct from other negotiating conditions usually employed in international trade "Revised American Foreign Trade Definitions", among others[1349]).

At a certain extent they would be an effective method of stabilization and standardization of contractual clauses so as to reduce transaction expenses, as they would endow the transaction with clarity, predictability and certainty[1350]. Moreover, the transaction risk would be decreased, as there is a reference of consultancy and the contracting parties have a sole meaning of interpretation, being still possible, however, to adjust specific rules if agreed so[1351].

Such clauses, nonetheless, cannot be confused with the mere definition of the price of the product (CIF price or FOB price, for example), as they do not only control the cost of the product, but also the responsibility for risks[1352], contracting (transportation and insurance, for example), license supply and customs clearance. They would also avoid doubts[1353] and repetitions[1354] in the contractual text. On the other hand, they would not be enough to be employed as a sole rule of applicable Law to the contract, since its scope is rather narrow[1355].

[1348] MARTINS COSTA, Judith. Os princípios informadores..., p. 167.
[1349] UNCTAD. United Nations Conference on trade and development. In: Legal aspects of International trade. Geneva: UN, 1999, p. 10.
[1350] COETZEE, Juana. INCOTERMS as a form of standardization in international sales law: an analysis of the interplay between mercantile custom and substantive sales law with specific reference to the passing of risk. Doctorate's thesis. University of Stellenbosch, South Africa. Dec. 2010, p. 327.
[1351] Ibidem, p. 329.
[1352] PINHEIRO, Luís de Lima. Estudos de Direito civil..., p. 320; FONSECA, Patrícia Bezerra de M. Op. cit., p. 47.
[1353] CAMARA, Bernardo Prado da. O contrato de compra e venda internacional de bens. In: Revista de Direito Privado, n. 27. jul./set. 2006, p. 19; BARBI FILHO, Celso. Op. cit., p. 30; AMARAL, Antonio Carlos Rodrigues do. (Coord.). Op. cit., p. 267; GOULART, Monica. Eghrari. A Convenção de Viena e os Incoterms. In: Revista dos Tribunais, v. 856, fev. 2007, p. 73; STRENGER, Irineu. Contratos internacionais do comércio. 4. ed. São Paulo: LTr, 2003, p. 284-285.
[1354] VENOSA, Sílvio de Salvo. Direito civil: contratos em espécie. 5. ed. São Paulo, 2005. v. 3, p. 74-75.
[1355] COETZEE, Juana. Incoterms and the Lex..., p. 78.

The origin of the INCOTERMS is usually associated only to the international commercial customs[1356] or to the consuetudinary international Law confused with the *Lex mercatoria*[1357]. For the UNCTAD, for example, they would be contractual customs, derived from the *lex mercatoria,* but which would not have binding power derived from the legislation[1358].

However, JOLIVEST, analyzing the theme more deeply, states that the INCOTERMS, themselves, do not represent usages or practices, as they would lack antiquity, constancy (remember the amendments every 10 years) and generality. On the other hand, he highlights that the use of INCOTERMS may, by it itself, be characterized as a usage (but not a custom)[1359].

Although its transnational character is highly marked in the doctrine, it is interesting, however, that the Brazilian Court precedents had been recognizing the possibility of the adoption of the INCOTERMS for national transactions and for modalities of transportation different from the ones previously established[1360]. Other kinds of adaptation had already been identified in Europe[1361]. This phenomenon had already been noticed by the ICC[1362], although its regulation had not been originally aimed by it[1363]. On the other hand, although part of the doctrine refuted its possible adaptation to several situations from those originally prescribed, limiting the use of the INCOTERMS to international contracts[1364], there were others who did not oppose to it[1365]. In the recent reform carried out in 2010, the ICC finally recognized the inevitable, and currently

[1356] HEUZÉ, Vincent. Op. cit., p. 230; CARLINI, Gabriel A. Op. cit., p. 61; COETZEE, Juana. Incoterms and the Lex..., p. 77; JACQUET, Jean-Michel; DELEBECQUE, Philippe. Op. cit., p. 80.

[1357] GREBLER, Eduardo. O contrato internacional no Direito..., p. 27; VENOSA, Sílvio de Salvo. Op. cit., p. 74-75; BOITEUX, Fernando Netto. Contratos mercantis. São Paulo: Dialética, 2001, p. 34; GONÇALVES, Carlos Roberto. Direito civil brasileiro: contratos e atos unilaterais. São Paulo: Saraiva, 2004. v. 3, p. 193; CALIENDO, Paulo. Op. cit., p. 123; BAPTISTA, Luiz Olavo. A boa-fé nos contratos internacionais. In: Revista de Direito Bancário, do Mercado de Capitais e da Arbitragem, n. 20. abr./jun. 2003, p. 24-46; GOULART, Monica. Eghrari. Op. cit., p. 69; ARAUJO, Nadia. A cláusula de hardship nos contratos internacionais e sua regulamentação nos Princípios para os contratos comerciais internacionais do UNIDROIT. In: POSENATO, Naiara. (Org.). Contratos internacionais: tendências e perspectivas. Ijuí: UniJuí, 2006, p.322. Como codificação dos costumes e, portanto, fonte formal da Lex mercatoria: OSMAN, Filali. Op. cit., p. 280-281.

[1358] UNCTAD. United Nations Conference..., p. 10.

[1359] JOLIVET, Emmanuel. Les incoterms..., p. 363-375.

[1360] For the content of the appellate decisions, we referred to the text: GLITZ, Frederico Eduardo Zenedin. Transferência do risco..., p. 111-139.

[1361] JOLIVET, Emmanuel. Les incoterms..., p. 375.

[1362] ICC. Incoterms – 2000. São Paulo: Aduaneiras, 2004, p. 12.

[1363] Whose aims would be: "to provide a set of international rules for the interpretation of the terms of trade more commonly used in foreign trade" ICC. Incoterms..., p. 11.

[1364] CALIENDO, Paulo. Op. cit., p. 123; GOULART, Monica. Eghrari. Op. cit., p. 73; VIEIRA, Guilherme Bergmann Borges. Regulamentação no Comércio Internacional. São Paulo: Aduaneiras, 2002, p. 12-13.

[1365] PINHEIRO, Luís de Lima. Estudos de Direito civil..., p. 317.

recognizes that the INCOTERMS are equally applicable to national and international contracts[1366].

The relevance of the INCOTERMS in national and international business offices may be exemplified for being explicitly mentioned by the Cuban legislations for exports[1367], and by Annex 2 (General Regime of Origin) of the MERCOSUL Treaty[1368]. Moreover, the wide treatment by the Brazilian court precedents and the numerous arbitral precedents, mainly when adopted in the decision, on the grounds of its consuetudinary nature, corroborate the statement.

Thus, in an appellate decision, sentenced by the Court of Justice of Rio de Janeiro, the responsibility for the expenses derived from demurrage was assigned to the importer, due to the presence of a FOB clause. The basis of the decision entrusts the "secular international usages and customs" to justify the binding to the referred clause[1369].

The discussion over the binding of the INCOTERMS has already taken place, for example, in the American Law, mainly before the edition of the UCC. In the instance *Kunglig Jarnvãgsstyrelsen versus Dexter & Carpenter*, on the obligation to take out insurance in a CIF contract sales, the Court understood that when a custom becomes uniform in a certain negotiating activity, it could be imposed under express legal disposition, since it responds to typical needs[1370]. The Uruguayan Law can equally be mentioned, whose court precedents have already recognized the carrier's responsibility based on them[1371].

There can be also mentioned the instances *China North Chemical Industries Corporation versus Beston Chemical Corporation*[1372], BP Oil

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[1366] ICC. Incoterms..., p. 10.

[1367] PÉREZ SILVEIRA, Maelia Esther. Cuba. In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guillermo. (Dir.). Op. cit., p. 296-297.

[1368] MORENO RODRÍGUEZ, José Antonio. Paraguay..., p. 584.

[1369] RIO DE JANEIRO. Court of Appeals. Civil Appeal. Procedural Appeal. Contracts. Proof IMport international maritime contract. Civil Appeal n. 16249, MID America Overseas to Brazil versus COP Editora Ltda, Rap. Appellate judge Orlando Secco. Appellate decision of 24 April 2007.

[1370] CHEN, Jim C. Code, Custom..., p. 96.

[1371] HARGAIN, Daniel; MIHALI, Gabriel. Uruguay. In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guillermo. (Dir.). Op. cit., p. 775.

[1372] UNITED STATES OF AMERICA. U.S. District Court, Southern District, Texas, Houston Division. Civ. A. H-04-0912. "CIF" DELIVERY TERM IN CONTRACT FOR SALE OF GOODS - TO BE GIVEN THE MEANING PROVIDED FOR IT BY INCOTERMS 1990. INCOTERMS - TO BE CONSIDERED AS INCORPORATED INTO CISG THROUGH ITS ART.9(2). China North Chemical Industries Corporation v. Beston Chemical Corporation. Adjudicated on 07 February 2006. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=1089&step=FullText>.

International versus Empresa Estatal Pretoleos de Ecuador[1373] and *St. Paul Guardian Insurance Co versus Neuromed Medical, systems & Support*[1374]. In all the events, the argument was about the interpretation of the CIF or CFR clause (in the BP case) and whether the INCOTERMS regulation could be applied to it or not, as they had not been mentioned by the parties. The American Courts understood that the Vienna Convention governed the contract and that the INCOTERMS should be employed in accordance with art.9.2 of the CISG, as they were customs that the contracting parties knew or ought to have known. In the same way a Russian arbitral report[1375] and Argentinean adjudicated ones[1376] have already expressed themselves.

PINHEIRO, just like other authors[1377], uses the same article to defend a similar thesis. However, VALIOTI claims that there are opinions contrary to that, as the INCOTERMS are not a custom in some fields of international trade, the own manual of the ICC mentions the voluntary submission and that there exists distinct versions in some countries (the United States)[1378].

As from the arbitral point of view, it can be pointed out the instance involving a Dutch buyer and an Asian seller in dispute, decided by the ICC, on the delay of the product delivery. As the parties had not chosen the applicable law

[1373] UNITED STATES OF AMERICA. US Court of Appeals for the Fifth Circuit. 02-20166. EXCLUSION OF CONVENTION (ART. 6 CISG) - CHOICE OF LAW OF CONTRACTING STATE DOES NOT AMOUNT TO IMPLIED EXCLUSION. EXCLUSION OF CONVENTION (ART. 6 CISG) NEED OF CLEAR LANGUAGE EXPLICITLY STATING THAT CONVENTION DOES NOT APPLY AND WHAT LAW SHOULD GOVERN THE CONTRACT. EXCLUSION OF CONVENTION (ART. 6 CISG) - AFFIRMATIVE OPT-OUT REQUIREMENT PROMOTES UNIFORMITY AND OBSERVANCE OF GOOD FAITH IN INTERNATIONAL TRADE (ART. 7(1) CISG). INCOTERMS – INCORPORATED INTO CONVENTION AS USAGES, THOUGH NOT GLOBAL, WELL KNOWN IN INTERNATIONAL TRADE (ART. 9(2) CISG) BP Oil International and BP Exploration & Oil Inc. versus Empresa Estatal Petroleos de Ecuador. Adjudicated on 11 June 2003. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=924&step=FullText>.

[1374] UNITED STATES OF AMERICA. District Court of Southern Nova York. Civ. 9344 (SHS). St. Paul Guardian Insurance Co., et al. v. Neuromed Medical Systems & Support, et al. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=730&step=FullText>.

[1375] RUSSIA. Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry.406/1998. Unknown parties. Adjudicated on 06 June 2000. Available on: <http://cisgw3.law.pace.edu/cases/000606r1.html>.

[1376] ARGENTINA. Juzgado Comercial No. 26 Secretaria No. 51, Buenos Aires. Arbatax S.A. Reorganization Proceeding. Adjudicated on 02 July 2003. Available on: <http://cisgw3.law.pace.edu/cases/030702a1.html>.; ARGENTINA. Juzgado Nacional de Primera Instancia en lo Comercial No. 7. 50272. S COPE OF CISG - MATTERS NOT EXPLICITLY SETTLED IN CISG (ART. 7(2) CISG) - RIGHT TO INTEREST DURING AGREED DELAY FOR DEFERRED PAYMENT - REGULATED BY USAGES (ART. 9(2) CISG). Elastar Sacifia versus Bettcher Industries Inc. Adjudicated on 20 May 1991. Available on: <http://www.unilex.info/case.cfm?pid=1&do=case&id=14&step=FullText>.

[1377] COETZEE, Juana. Incoterms and the Lex..., p. 80; HONNOLD, John O. Op. cit., p. 127- 128; HUBER, Peter; MULLIS, Alastair. Op. cit., p. 19. Apparently: PAMBOUKIS, Ch. Op. cit., p.129.

[1378] VALIOTI, Zoi. Passing of the risk in international sale contracts: a comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and Incoterms 2000. In: Nordic Journal of Commercial Law, v. 2, 2004, p. 26.

but had referred to the INCOTERMS, the Court decided to apply "the commercial customs" (comparing several usual contractual decisions) to fix the amount of damage to be paid[1379]. On the other hand, the Arbitral Court of the Chamber of Commerce of Bogota, when adjudicating an instance involving a clause of cost and freight (C&F) understood that the clause on the customs should prevail (identified with the INCOTERMS) and the national applicable legislation[1380].

5.4 PARTIAL CONCLUDING NOTES: INTERNATIONAL CONTRACTUAL CUSTOM RECOGNIZED BY NATIONAL COURTS?

At the end of this second stage it comes the moment to affirm not only the recognition of the custom as a source of contractual obligations, but also the possibility that international customs are accepted by the national order as normative sources of contractual Law, creating contractual obligations.

From the analysis of the way the contractual customs are accepted by the Brazilian court precedents, but especially by the way the contractual custom feed and shape important international initiatives (CISG, PICC and INCOTERMS) it seems plausible to state that its role goes beyond the mere rule of interpretation of the juridical transaction. The custom as an obligational source is able to, autonomously, impose a series of obligations to the contracting parties, to which they have not agreed, but are normative due to its consuetudinary content.

Moreover, as explicitly mentioned in the first part of this book, in an environment where the normative internationalization is thriving and the legal pluralism is imposed, it is necessary to recognize a new role to the contractual custom.

This way, for example, when BASTOS and KISS explain the concept of international contract and see the inevitable: "the international contract is always

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[1379] ICC. Arbitral Report n. 9392/9426. Customs of international trade. Calculation of damages. Unknown parties. Decision of 16 January 1998.

[1380] COLOMBIA, Câmara de Comercio de Bogotá. Instituto de Mercadeo Agrapecuario Idema versus Americana de Gestiones Comerciales Amerco Ltda. Adjudicated on 13 June 1996. CARDENA AFANADOR, Walter René. Op. cit., p. 18-19.

controlled by a national law"[1381], it cannot be literally understood the meaning assigned to the word "statutory law". This is because firstly it seems that the private international law has a greater role than the mere conflict of laws, a reason for which its sources go beyond the national legislation. Secondly, it cannot be kept the idea that, under the obligational terms, the will is the only relevant source of negotiating obligations. This one, as demonstrated, may also originate from contractual customs which the contracting parties are subjected to, whether they want it, or not.

Thirdly, and more relevant to the work developed here, is the fact that the international customs become a part of the system of national normative sources as well, especially in relation to contracts. Thus, we could say that the international contracts would be doubly subjected to the consuetudinary international regime: as sources of international Law in itself and when incorporated to the internal contractual Law, as in the events already demonstrated.

The issue that is raised, however, is to understand how such customs are faced by the domestic Law. FEITOSA describes three possibilities: (i) legislative absorption by the States; (ii) abstention of knowledge and (iii) intervention in the defense of collective interests[1382].

First of all, it seems evident that no way of formal reception is necessary, in the sense of turning the customary rule into a legal and written rule. If this kind of acceptance was compulsory, the autonomy of the custom as a source would be denied, demanding it to be in legislative texts not always sufficient, viable or necessary. It is still important to remember that it is the difficulty itself in legislating on themes covered by the contractual customs that give origin to the search for the *lex mercatoria*. However, nothing impedes the national legislation to do it, but it cannot be denied either the role of the soft law in this process[1383], or the normative autonomy of the custom. Maybe the highest risk to be taken in this option would be, precisely, to turn it into a "contractual paradise" or, on the other hand, adopt a strongly liberal legislative policy[1384], both with the

[1381] BASTOS, Celso Ribeiro; KISS, Eduardo Amaral Gurgel. Op. cit., p. 03.
[1382] FEITOSA, Maria Luiza de Alencar Mayer. Op. cit., p. 264.
[1383] FERNÁNDEZ ROZAS, José Carlos. El Derecho del comercio internacional en El contorno de la globalización. In: Revista del Colegio de Notarios del Estado de México, n. 5, 2000, p. 161-230.
[1384] FEITOSA, Maria Luiza de Alencar Mayer. Op. cit., p. 483-484.

aim of attracting the occasional choice of its legislation as applicable to a contractual relationship. This strategy, however, would have limited effects, mainly when discussed the outlines of the occasional autonomy of choice of the applicable Law to the contract (usually not accepted to govern Brazilian national contracts). Besides that, the unification of the national and international contractual regime would be adopted as a rule, which does not always seem convenient.

A second perspective is that one announced by RAMBERG, when he associates the acceptance as a tendency of the recognition of the *Lex mercatoria*, by the national Law, of the commercial contracts as sources of individual contracts (such as the INCOTERMS, UCPs, and the rules of York and Antwerp on sea transportation) and not its mere replacement, once, even if the local Law did not accept its consuetudinary nature, their express mentioned in the contract would be enough from the point of view of contractual freedom[1385].

The subordination to the contractual freedom, nonetheless, is not enough, either. This is because not every custom is contractual practice, even though they may cause impact, creating contractual obligations. The custom, despite being subjected to the idea of private autonomy, as it will be shown, is not subjected to the selfish interests by the parties. As a matter of fact, in several measures the custom surpasses them. The reason for this conclusion is in the fact that the custom is an autonomous normative source of the legislation (which can recognize it or amend it) and the negotiating freedom, since it can surpass it and does not depend on it.

A third solution could be the recognition of the customs via court precedents granting them, this way, binding effects. MOSSET ITURRASPE and PIEDECASAS, for example, appoint instances adjudicated by the Argentinean court precedents in which the international custom was admitted as a rule of internal Law[1386]. As for BOUTIN, he cites the recognition of the *Lex mercatoria* by the court precedents in Panama, even if occasionally, to solve two instances involving bills of exchange[1387]. The own economic analysis of the Law supports

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[1385] RAMBERG, Jan. The Law and Practice of International Commercial Contracts in the 2000s. In: Scandinavian Studies in Law, v. 39. 2000, p. 431-433.
[1386] MOSSET ITURRASPE, Jorge; PIEDECASAS, Miguel A. Op. cit., p. 77.
[1387] BOUTIN I, Gilberto. Autour de la réception de la lex mercatoria en droit positif panaméen: Développement historique et définition d'un jus mercatorium au Panama. In : Uniform Law Review, 1998, n. 2-3, p. 309-310.

that this strategy seems adequate when it reduces the "costs of the transaction" if compared to the private forms of subjection[1388]. Anyway, it has to be kept in mind the hermeneutical limitations of this last approach[1389].

This answer has some inconveniences, as well: firstly, it makes the normative power of the custom depend on another autonomous source (the court precedents); secondly, it ignores the fact that when deciding on a judicial interpretation, another rule is being created, different from that one of the original international custom; and thirdly, the court precedents already control the content of the consuetudinary rule.

Nonetheless, it seems appropriate to question the issue itself or, in other words, call into question the own premise of the incorporation. Would it be necessary?

FERNANDEZ ROZAS, for example, claims that the choice of the *lex mercatoria* for international control would not be limited to the material autonomy, that is, the inclusion of any of its sources in the contract. Thus, overcoming the distinction between conflicting and material autonomy, the author states that the choice of a non-State law is possible to govern the contract[1390]. OSMAN, in turn, supports a complementary role between the State Law and the anational Law, or else, a real division of competences[1391].

So, it is clear that there is a real symbiosis between the national and international normative sources (being them customs or not) and that this inter-relationship ends up creating the possibility for the national Law to search for typically international solutions to varied dilemmas which present their reality.

On the other hand, there is nothing to impede that the international Law makes use of the same resource. Even being distinct systems, they have in common the objective of satisfaction of the human needs.

One of the channels where this mutual interpenetration takes place is, precisely, the custom. In the contractual scope, the internationalization becomes

[1388] KOSTRITSKY, Juliet P. Op. cit., p. 526.

[1389] "I don't believe that language, equations and curves of the economic analysis of Law are a panacea to the problems that the arbitration and the lex mercatoria rise, due to the several explicit and implicit, ideological and reactive themes which the economic analysis moves". (MARRELLA, Fabrizio. La nuova lex mercatoria tra controversie dogmatiche e mercato dele regole. Note di analisi econômica del Diritto dei contratti internazionali. In: Sociologia del diritto, n. 2/3, 2005, p. 284)."

[1390] FERNÁNDEZ ROZAS, José Carlos. Ius mercatorum..., p. 95.

[1391] OSMAN, Filali. Op. cit., p. 431.

evident if we analyze the distinct models of business that start to appear in the entrails of the national ordinations. Thus, for instance, efficacy and validity are not denied to leasing, factoring, engineering, etc. Some, in the Brazilian instance, if not being made positive as typical contracts, started to deserve some attention by the legislator or the Executive Power. This phenomenon, on the other hand, does not only refer to the negotiating schemes and practices, but equally to some customs (having them being compiled or codified).

If we could recognize or observe this way of entry, we should, for sure, find the limits of the thresholds cross into the domestic Law. This will be the third part, conclusive, of this book.

PART III – LIMITS AND PERSPECTIVES OF THE CUSTOM AS A SOURCE OF CONTRACTUAL OBLIGATIONS

VI. LIMITS TO THE CUSTOM AS A SOURCE OF CONTRACTUAL OBLIGATIONS

> Custom provides a realistic, although certainly not frictionless or costless, mechanism for matching commercial expectations with commercial realities.[1392]

Every theoretical construction on the normative sources of contractual Law reveals the modern concern with the limits that should be imposed to those sources not previously endorsed by the State power. With regards to the customs, this limitation reached such a degree that, in several contexts, there was preconization of its submission to the legislative source or its full elimination of the normative fabric.

In the basis of this preoccupations, maybe there were the old examples of violations and arbitrations assigned to the despots (informed or not) absolute in power and discretionary in reason. However, at a certain moment, the own understanding of Ordination is made in such a way as to create the necessary brakes to any of these sources, even the legislative one, making the submission of the custom to the State political authority seem anachronistic at certain moments.

After all the way of the research carried out, thus, it is time we analyzed the way the contemporaneous Brazilian legal system will impose, when necessary, limits to the customs as sources of contractual obligations, being them national or international: either in the individual sense of the restriction imposed by the private autonomy, by the control of open clauses as the "public policy" one, or, finally, by the notion of such essential rights to the human genre which impose them respect. The two first ways of conditioning reflect, in a last analysis, the performance of the State, most of the times, the last one, control of content which would not depend on the State approval. After these last

[1392] BEDERMAN, David. Custom..., p. 90.

reflections, at last it will be possible to present the conclusion asserting the customs as sources of contractual obligations.

6.1. THE LIMITS SUBSCRIBED TO THE CONTRACTING PARTIES: THE EXAMPLE OF PRIVATE AUTONOMY

When talking about private autonomy, it is thought about the definition of room of negotiating freedom assigned to each subject of right capable to bind themselves. Its analysis, however, also has a negative bias, that is, to understand the limits that can be recognized to the individual competence to create, at their own will, contractual obligations[1393]. This is the traditional doctrinal approach of the theme for this work. Nonetheless, this analysis will be expanded to understand how the freedom of contract is conditioned, even on an occasional choice of applicable Law to a certain international negotiating relationship.

Thus, in a constitutionalized and systematic conception[1394] of the legal system, the loss of freedom to contract could not be admitted, if the production of obligation effects could be accepted by means of the contractual custom. In other words, this is the same as stating that the same conditioning on the individual decision to bind themselves, is the one on the recognition of legality to those qualified practices (being them binding because they have been agreed or because they are socially relevant).

Following this thought, thus, the recognition of "autonomy" to the contracting party is indispensable to the recognition of the obligational and, especially, contractual effects of the custom[1395]. This autonomy, nevertheless, does not confuse with the freedom to contract the one that gave it origin. Thus, once the contractual usage acquires consuetudinary normative content, that

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[1393] It is important to point out that for the purpose of this work the distinction by some authors will not be adopted. GOMES, Orlando. Contratos.., 6. ed., p. 29-31; WALD, Arnoldo. Curso de Direito Civil..., p. 188; TARTUCE, Flávio. Direito civil: teoria geral dos contratos e contratos em espécie. 5. ed. São Paulo: Método, 2010, v. 3, p. 87. This distinction is between the freedom to contract and the contractual freedom, since this one (associated to the Idea of selection of contractual partner) is inserted in that one.

[1394] TEPEDINO, Gustavo. Temas de Direito Civil. Renovar, 1998, p. 199-215; LÔBO, Paulo Luiz Netto. Constitucionalização do direito civil. In: Revista de Informação legislativa, Brasília, n. 141, jan. /mar. 1999, p.99-109.

[1395] Perhaps this idea may be partly corroborated by KRONKE: "What is often overlooked is that Schmitthoff clearly stated that parties to international contracts were largely free to make their own law under the authority given by States. No contract can speak to its own validity. Likewise, usages require the sovereign's sanction for them to become a source of law". (KRONKE, Herbert. Op. cit., p. 462)

practice previously strictly negotiating starts to have another ground of obligatoriness and no longer supports itself on the individual statement of will.

Thus, the autonomy referred to here is wider than that one individually performed and in a localized way in a specific transaction. Although the contractual custom has its origin in individual statements that become generalized, it stops being identified with them. This way, in other words, the contractual custom does not bind because there is consent or agreement on its content, but was defined in eligible exercise of an autonomy recognized by the legal system.

This way it is essential the recognition of room of autonomy that the private finds at their disposal (given by the Ordination) to govern its own relations. It should be noticed, however, that this statement cannot be confused with a purely economic liberal perspective which brings challenges that must be understood and avoided. Thus, for instance, it is common to associate the idea that in relation to contracts, the normative decentralization is more "efficient than the centralization, since it allows more adhesion by the internalization of the rule by the own members of the community it is addressed to, realizing community property for the individual satisfaction[1396].

The starting point is that to go beyond the individual interest and the community property (under such perspective) it is essential the recognition that this room is limited, either for imperatives of public policy (internal), or, as it will be supported, for reasons of social interest and the person's protection. It is also important to remember that maybe a certain community does not understand as a violation to their "community property", or that it is offensive to their "morality" the imposition, to immigrants (internal or external ones), members of another ethic group, class, religion or political orientation, degrading contractual conditions to live, work, feed themselves and exist in decent conditions.

Thus, once it is recognized that autonomy is not wide so that the contracting parties, individually, establish the outlines of the obligational relationship, being it through behavioral statement (declared will, creation of

[1396] "According to my theory, norms arise when each individual benefits from representing himself as conforming to a practice that benefits other people. In other words, norms arise when everyone's self-interest is served by signaling that he will supply a local public good". COOTER, Robert D. The theory of market modernization of law. In: International Review of Law and Economics, v. 16, 1996, p. 1164-165.

expectations and establishment of practices), the contracting parties, either, collectively or in a generalized way, would not have freedom to create own normative rooms, aloof of those same imperative directives.

It is also important to have in mind the fact that the contract only acquires legal effects insofar as it is recognized by the Ordination in which it is inserted: this is because the contract is a legal fact[1397], besides being socially relevant and, necessarily, conditioned to the human rights. This legal recognition starts from the assignment (or not) to the desired effects to the recognition of its nullity[1398]. At a certain point, so, such statement is intended to answer the questioning raised by BOBBIO on being about negotiating freedom of granted source or prior to the Ordination[1399].

The issue cannot always be worked out in simple terms. The distinction exercised between the negotiating freedom which supports the practice and the autonomy that supports the contractual custom is not, necessarily, explicit by the doctrine and/or compared Law. As it was noticed, several authors and varied normative instruments (e.g. CISG) still confuse individual freedom with this general autonomy, since the definition itself of what contractual custom is, is not clear.

Because of that, it is appropriate then, to establish which would be the outlines recognized to the freedom to individual contract, and whenever possible, deduce them to the conditioning of generalized practices.

This strategy seems especially useful to the common law that do not distinct, necessarily, usage from custom. In this situation, thus, the analysis comes from the outlines recognized to the freedom to contract, or else,

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[1397] "(...)They are events that produce legal effects, causing the birth, the change or the extinction of legal relations and their rights". (AMARAL, Francisco. Direito civil: introdução. 7. ed. Rio de Janeiro: Renovar, 2008, p. 379.). While Fernando Noronha points out the "relevance" assigned by the Law to the fact so as to grant it effects(NORONHA, Fernando. Direito das Obrigações. São Paulo: Saraiva, 2003, v. 1, p. 346-347), Marcos Bernardes de Mello explains that the conversion of an ordinary event and one capable of producing legal effects would depend on some requirements: (i) existence of a role which assigns it legal consequences; (ii) prescription of the fact which will be the reason for the consequence (factual support); (iii) incidence of the rule on the factual support (MELLO, Marcos Bernardes de. Op. cit., passim). Paulo Lobo still points out that the incidence of the rule in the factual support is automatic, regardless its efficacy. LÔBO, Paulo. Direito Civil: parte geral. São Paulo: Saraiva, 2009, p. 224-225.

[1398] If admitted as an example of possible consequences those apparently described by arts. 17 of the Law of Introduction to the Rules of Brazilian Law. ("The Laws, acts and sentences of another country, as well as any statements of will, will not be effective in Brazil when violating the national sovereignty, public policy or good morals") and by the sole paragraph of art.2035 of the current Civil Code: "No convention will prevail if opposes precepts of public policy, such as the ones established by this Code to assure the social function of property and contracts").

[1399] BOBBIO, Norberto. Teoria geral..., p. 192.

freedom of a party to choose to enter into a contract on whatever terms it may consider advantageous to its interests, or to choose not to"[1400].

The English Law and the Australian Law have admitted the qualified concept of contractual freedom, in a way to condition the way a certain contractual obligation should be performed[1401].

> Today the position is seen in a different light. Freedom of contracts is generally regarded as a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large.[1402]

Such line of thought would be supported by an interesting precedent of the Constitutional Court of South Africa, which, even though recognizes the obligatoriness of the contract as an essential moral principle of that society and recognizes the freedom to contract even against the contracting parties' own interests, did not recognize enforcement to the contractual disposition which was immoral or contrary to the measures of public policy (constitutionalized values and established by the Bill of Rights)[1403].

Such balance of individual and collective economic interest is really narrow. TREITEL, for example, mentions events in which there would be clear offensive exercise of freedom (for example, refuses contracting for racial reasons, sexual or disability). However, the author also claims that

> it is obvious that, the more the law interferes with the relationship of the parties, the less important the factor of agreement becomes. In some situations the degree of interference is so large that it becomes improper to describe the relationship between the parties as a contract. One illustration of such a relationship is that of marriage.[1404]

[1400] BEATSON, J. Anson's Law of contract. 28. ed. New York: Oxford University press, 2002, p. 04.
[1401] MCKENDRICK, Ewan. Contract law: text, cases and materials. 3. ed. Oxford: Oxford University press, 2008, p. 04; CARTER, J. W.; HARLAND, D. J. Contract Law in Australia. 4. ed, Chatswood: LexisNexis, 2002, p. 13.
[1402] BEATSON, J. Op. cit., p. 04.
[1403] HUTCHISON, Dale. Nature and basis of Contract. In: HUTCHISON, Dale; PRETORIUS, Chris James. (Eds.). The Law of Contract in South Africa. Cape Town: Oxford University Press, 2009, p. 27.
[1404] TREITEL, G. H. An outline of The Law of Contract. 6. ed. Oxford: Oxford University Press, 2004, p. 04.

Generally speaking, nonetheless, the Anglo-Saxon Law is reticent about recognizing the non-performance of the contract and intervention of the contractual content[1405], preferring to perform it.

Concerning the Civil Law, the doctrinal positioning is as polemic, even though the conditioning of the general practices is not approached. The classic French Law established the individual autonomy as an essential obligational principle, corroborated by responsibility and equality. Its justification, according to DEMOGUE was due to the own protection of human personality[1406]. As for the Argentinean Civil Code, MOSSET ITURRASPE explains that it was even stricter than the French one, establishing wide individual freedom, limited by public policy and good morals[1407]. On the other hand, it should be remembered that the German Law seems to establish wide judicial control intervention of the standard clauses[1408].

In the Brazilian Law, in turn, historically speaking, the classical and interventional theoretical chains still debate in a smaller or larger degree. If, for example, on the one side, the wide negotiating freedom was traditionally affirmed, limited only by neighboring conditions of legality[1409], on the other hand, it is recognized that beyond those limits there are *reasons* which would condition the contractual object.

The nuances of this discussion may seem narrow, at first, but the consequences of one or another positioning may be exemplified in hypotheses which are driven away from the daily observation of the court precedents.

If we take as an example the typical and generalized contract of sales, it will be noticed that one of its essential requirements would be the agent's capacity (art. 104, I of the Brazilian Civil Code[1410], for example). What is there to say, however, of a transaction engaged between a minor, totally incapable, with a trader for the acquisition of stickers, so popular in episodes of soccer world

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[1405] BEATSON, J. Op. cit., p. 07-08.
[1406] DEMOGUE, René. Op. cit., p. 147-150.
[1407] The author refers to art. 1.197 ("Las convenciones hechas en los contratos forman para las partes una regla a la cual deben someterse como a la ley misma".). MOSSET ITURRASPE, Jorge. Teoria general del contrato. Cordoba: Orbir Ediciones Juridicas, 1970, p. 339-340.
[1408] MARKESINIS, Basil S.; UNBERATH, Hannes; JOHNSTON, Angus. Op. cit., p. 46-47.
[1409] GARCEZ NETO, Martinho. Autonomia da vontade. In: Temas de Direito civil. Rio de Janeiro: Renovar, 2000, p. 40-41.
[1410] "Art. 104. "The validity of a legal transaction requires: I – a capable agent"

championships?[1411] Well, in this situation, it could be said that the contract is null. However, it produced, in practice, all its effects, satisfying both the contracting parties. It would also be possible to argue that such transactions would be irrelevant to the Law, as they represent small business. This is the answer traditionally heard in the classroom, but it is rarely reduced to writing. If, however, they are recognized as legal facts, how could they be irrelevant? Only if among the requirements of validity of the business, another one can be found: the economic value. So, it seems right to affirm that the freedom to contract, in this situation, is recognized, despite the initial invalidity of the business (absence of capacity). Still within this argumentative line, several instances of invalidity of the contract may be remembered, due to absence of form, and that end up being recognized by the ordination so as to produce effects in clear application of the principle of the *conservation* of the contract[1412].

So, it is demonstrated that the subjacent concern with the system is other than the mere "hygiene" of the will. This discussion is given new outlines with the recognition of a social function to the contract and that seems to be especially interesting if remembered that the basis of the contractual custom no longer confuses with the negotiating freedom that gave it origin.

The new Brazilian Civil Codification, for example, refers to the exercise of freedom to contract[1413], indicating that it will occur "in terms and in the limits" of the social function of the contract (art. 421). The way this disposition was expressed generated several different understandings on the theme. This is because its adoption takes places without any reference of values, even though it is recognized that it should be "read and applied according to the logic of constitutional solidarity and the contemporaneous interpretative technique"[1414].

[1411] G1. Procura por novas figurinhas da Copa esgota encartes em bancas de SP. Available on: <http://g1.globo.com/especiais/africa-do-sul-2010/noticia/2010/06/procura-por-novasfigurinhas- da-copa-esgota-encartes-em-bancas-de-sp.html>. or also <http://video.globo.com/Videos/Player/Noticias/0,,GIM1254806-7823 FIGURINHAS+DA+COPA+SE+TRANSFORMAM+EM+FEBRE+NACIONAL,00.html>.

[1412] GLITZ, Frederico Eduardo Zenedin. Favor contractus..., p. 250-263.

[1413] In this sense BERALDO, Leonardo de Faria. Função social do contrato: contributo para a construção de uma nova teoria. Belo Horizonte: Del Rey, 2011, p. 266. It is also important to point out that it is considered that the contractual freedom is inserted in the concept of contracting (cs. Previous note).

[1414] TEPEDINO, Gustavo. Crise de fontes normativas e técnicas legislativa na Parte Geral do Código Civil de 2002. In: _____. (Org.). A parte geral do Novo Código Civil: estudos na perspectiva civil-constitucional. Rio de Janeiro: Renovar, 2002, p. XX.

For the purpose of exposition, it can be identified the prevalent understanding which defends the need of legal reformulation from the terms constitutionally established. This would be the same as to state that the constitutional precepts, essential and human Rights, would condition the application of the rule (understood not only as a "statutory law"). Nowadays, this positioning appears to be adopted in a smaller or larger degree by most part of the doctrine[1415]. The complexity of its understanding, however, reveals more than one possibility of such understanding: (a) those who do not approach this reasoning, mentioning only the discussion on the contractual principles: (b) those who understand the constitution of Republic as a basis of illegibility of all the other rules part of the legal system, just like the one by Kelsen, in more or less positivist terms[1416] and, at last, (c) those who see certain values established by the constitution, alongside with others, which may be identified as *essential*. While for the second chain the constitution would be applied as a Code, for the last one, a "reading" would take into account the need of pondering the concrete case.

At this point of the work, it seems clear that this last approach will be chosen. Even though this choice may be justified by several arguments, some will be enough: (i) normatively, it is the only one that explains the interaction between the constitutional and international grounds without requiring that any and every international act is nationalized so that they can produce effects in national territory. This requirement, essential to the monist chain, takes as a starting point the premise that there would exist a sole relevant normative system, which is the national one; (ii) the admission of a legal system open to internationalization, but "watched" in the protection of the person[1417]; (iii) the barbarism against civil populations due to armed conflicts led by racial, religious, economic and territorial issues, and the flexibilization of certain social conditions promoted by the private economic activity has demonstrated that the national legislations are not always enough, or completely uninterested, to promote the defense and implantation of Rights taken as essential; (iv) it can be observed

[1415] RIZZARDO, Arnaldo. Contratos. 8. ed. Rio de Janeiro: Forense, 2008, p. 21.
[1416] WALD, Arnoldo. Curso de Direito Civil..., p. 204-205.
[1417] PERLINGIERI, Pietro. A Doutrina do Direito civil na Legalidade Constitucional. In: TEPEDINO, Gustavo. (Org.). Direito Civil Contemporâneo: novos problemas à luz da legalidade constitucional. São Paulo: Atlas, 2008, p. 05.

certain insufficiency of the legislative technique to adequately protect the human rights[1418]; (v) also the private owns submission to the human and essential rights, a reason for which the Market and the State must respect them and implement them[1419]. Nonetheless, this last conclusion does not occur without amazement by the traditional and economics tradition, and the recognition of the need to rethink its constructions[1420].

Thus, having understood the theoretical background, it is possible to understand the limits and possibilities of each argument. The current Brazilian doctrine takes over some interesting arguments in this debate.

This way, for example, WALD relates the need of good functioning of the Market with obedience to ethic principles, legal certainty and equilibrium between the contracting parties[1421], and also respect to individual function, the acquired right and the appropriate substantive legal process[1422]. As for FORGIONI, he understands that contracts are conditioned by the limits imposed by the ordination[1423]; such limitation, however, seems to be associated to the notion of the limitation imposed by lawfulness[1424]. The association between the idea of legislative limits, autonomy and social function finds a strong echo in the national doctrine[1425], even when the need of constitutional reading is

[1418] TEPEDINO, Gustavo. Direitos humanos e relações jurídicas privadas. In: _____. Temas de Direito Civil. Rio de Janeiro: Renovar, 1999, p. 58-67.
[1419] PERLINGIERI, Pietro. Normas constitucionais..., p. 67.
[1420] JAMIN, Christophe. Le droit des contrats saisi par les droits fondamentaux. In: LEWKOWICZ, Gregory; XIFARAS, Mikhaïl. (Dir.). Repenser le contrat. Paris: Dalloz, 2009, p. 175- 220; HENNEBEL, Ludovic; LEWKOWICZ, Gregory. La contractualisation des droits de l´homme. In: LEWKOWICZ, Gregory; XIFARAS, Mikhaïl. (Dir.). Op. cit., p. 221-244.
[1421] WALD, Arnoldo. O interesse social no Direito privado. In: Revista Jurídica, n. 338. dez. 2005, p. 14.
[1422] WALD, Arnoldo. Um novo direito..., p. 89.
[1423] FORGIONI, Paula A. Teoria geral..., p. 81.
[1424] Ibidem, p. 82; ALVIM, Arruda. A função social dos contratos no novo Código Civil. In: Revista Forense, n. 371, mar./abr. 2004, p. 70-72.
[1425] MARTINS, Ives Gandra. A função social do contrato. In: ALVIM, Arruda; CÉSAR, Joaquim Portes de Cerqueira; ROSAS, Roberto. (Coords.). Aspectos controvertidos do novo Código Civil: escritos em homenagem ao Ministro José Carlos Moreira Alves. São Paulo: RT, 2003, p. 339; WALD, Arnoldo. Curso de Direito Civil..., p. 189; 205; PEREIRA, Caio Mário da Silva. Instituições de Direito Civil: contratos. 11. ed. Rio de Janeiro: Forense, 2005, v. 3, p. 25-30; GONÇALVES, Carlos Roberto. Op. cit., p. 08-09; MONTEIRO, Washington de Barros. Curso de Direito Civil: direito das obrigações – 2ª parte. São Paulo: Saraiva, 2003. V. 5, p. 09-10; COELHO, Fábio Ulhoa. Curso de Direito civil. São Paulo: Saraiva. 2005, v. 3, p. 24-25; RIBEIRO, Márcia Carla Pereira; GALESKI JUNIOR, Irineu. Teoria geral dos contratos: contratos empresariais e análise econômica. Rio de Janeiro: ElSevier, 2009, p. 46; BRANCO, Gerson Luiz Carlos. Função social dos contratos: interpretação à luz do Código Civil. São Paulo: Saraiva, 2009, p. 268; FONSECA, Rodrigo Garcia da. A função social do contrato e o alcance do art. 421 do Código Civil. Rio de Janeiro: Renovar, 2007, p. 255. Sometimes its prevalente over the property: HIRONAKA, Giselda Maria Fernandes Novaes; TARTUCE, Flávio. O princípio da autonomia privada e o Direito contratual brasileiro. In: _____; _____. (Coords.). Direito contratual: temas atuais. São Paulo: Método, 2007, p. 76-77; LOPEZ, Teresa Ancona. Princípios contratuais. In: FERNANDES, Wanderley. (Coord.). Fundamentos e princípios dos contratos empresariais. São Paulo: Saraiva, 2007, p. 65.

mentioned[1426]. However, only a few deny the collective interest to the social function[1427]. Another concern demonstrated is the requirement of functionalization of the contract as an obstacle to regional integrity[1428] and harmonization of contractual Law.

On the other hand, some mention the subjection of individual freedom to the social function of the contracts, without, however, leaving it clear how the social function does this limitation, even if mentioned the social interest (art. 5 of LINDB)[1429], community property[1430], public interest[1431] and distributive justice[1432]. There are others who relate the social function with the idea of equilibrium and justice, just like public policy[1433].

At last, others understand the freedom conditioned to the essential rights and constitutional principles, not only in terms of negative limitation, but also legislative conditioning, interpretation and application[1434]; in other words, a mechanism of promotion of the aims of the constitutional legal order[1435]. It is in

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[1426] LISBOA, Roberto Senise. Manual de Direito Civil: contratos. 4. ed. São Paulo: Saraiva, 2009. v. 3, p. 66; TARTUCE, Flávio. Direito Civil..., p. 88.

[1427] As, for example: COELHO, Fábio Ulhoa. Op. cit., p. 38; LOPEZ, Teresa Ancona. Op. cit., p. 65.

[1428] FRADERA, Véra Maria Jacob de. O Direito dos contratos no Século XXI: a construção de uma noção metanacional de contrato decorrente da globalização, da integração regional e sob influência da doutrina comparatista. In: DINIZ, Maria Helena; LISBOA, Roberto Senise. (Coords.). O Direito civil no Século XXI. São Paulo: Saraiva, 2003, p. 570.

[1429] AZEVEDO, Alvaro Villaça. O novo Código Civil Brasileiro tramitação; função social do contrato; boa-fé objetiva; teoria da imprevisão e, em especial, onerosidade excessiva (laesio enormis). In: ALVIM, Arruda; CÉSAR, Joaquim Portes de Cerqueira; ROSAS, Roberto. (Coords.). Op. cit., p. 34; LÔBO, Paulo Luiz Netto. Princípios dos contratos e mudanças sociais. In: Revista Jurídica, n. 329, mar. 2005, p. 14.

[1430] MARTINS-COSTA, Judith. Reflexões sobre o princípio da função social dos contratos. In: Revista Direito GV, n. 1, maio 2005, p. 57-58.

[1431] VENOSA, Sílvio de Salvo. Direito Civil: teoria geral das obrigações e teoria geral dos contratos. 5. ed. São Paulo: Atlas, 2005, v. 2, p. 406; MOURA, Mário Aguiar. Função social do contrato. In: Revista dos Tribunais, v. 630. abr. 1988, p. 249; AZEVEDO, Antonio Junqueira de. Princípios do novo Direito contratual e desregulamentação do mercado. Direito de exclusividade nas relações contratuais de fornecimento. Função social do contrato e responsabilidade aquiliana do terceiro que contribui para inadimplemento do contrato. In: Revista dos Tribunais, v. 750, abr. 1998, p. 116.

[1432] RIZZARDO, Arnaldo. Op. cit., p. 21; NADER, Paulo. Curso de Direito Civil: contratos. 5. ed. Rio de Janeiro: Forense, 2010, v. 3, p. 26.

[1433] TOMASEVICIUS FILHO, Eduardo. A função social do contrato: conceito e critérios de aplicação. In: Revista de Informação Legislativa, n. 168. out./dez. 2005, p. 211-212.

[1434] GAGLIANO, Pablo Stolze; PAMPLONA FILHO, Rodolfo. Novo curso de Direito Civil: contratos. 4. ed. São Paulo: Saraiva, 2008, v. 4, t. 1, p. 53; GOMES, Rogério Zuel. Teoria contratual contemporânea: função social do contrato e boa-fé. Rio de Janeiro: Forense, 2004, p. 91-95; MIRAGEM, Bruno. Diretrizes interpretativas da função social do contrato. In: Revista de Direito do Consumido, n. 56. out./dez. 2005, p. 32-45.

[1435] MATTIETTO, Leonardo. Função social e relatividade do contrato: um contraste entre princípios. In: Revista Jurídica, n. 342, abr. 2006, p. 38; NALIN, Paulo. Do contrato: conceito Pós-moderno (em busca de sua formulação na perspectiva civil constitucional). Curitiba: Juruá, 2001, p. 225-233; NEGREIROS, Teresa. Teoria do Contrato: novos paradigmas. Rio de Janeiro: Renovar, 2002, p. 208-210; RUZYK, Carlos Eduardo Pianovski. Os princípios contratuais: da formação liberal à noção contemporânea. In: RAMOS, Carmem Lucia Silveira. (Coord.). Direito Civil Constitucional: situações patrimoniais. Curitiba: Juruá, 2003, p. 32-33, 37; GLITZ, Frederico Eduardo Zenedin. Contrato e sua conservação..., p. 41-45; NEGREIROS, Teresa. Op. cit., p. 76-84.

this last perspective that the conclusions of the present work are inserted and which are extended to the normative power of the contractual custom.

As for the research carried out in the court precedents of the Superior Court of Justice[1436], it reveals the freedom to contract, sometimes reasoning on the obligatoriness of the contract[1437], sometimes it is presented limited by the law[1438].

[1436] The research took into account the phrase "freedom to contract" and was carried out in the appellate decisions taken in the period between 1 January 1990 and 1 January 2010. From the 25 (twenty-five) appellate decisions located, only 6 (six) effectively referred to the issue in the items previously discussed. The research, with the same criteria, found two adjudicated of the Federal Supreme Court, but both referred to criminal issues.

[1437] BRAZIL. Superior Tribunal de Justiça. Recurso Especial. CONSUMER RIGHT. APPLICATION OF CONSUMER CODE LAW. PRECEDENTS. UNCONSCIONABLE CLAUSE. ART. 51, IV, CDC. NON-CHARACTERIZATION. UNACCEPTED APPEAL. I – according to the precedents of this Court, the, dispositions of the Consumer Protection Code are applied to financial institutions; II – it is not unconscionable the clause inserted in the contract of bank loan which is about the permit for the bank to debit to the account or bail out financial investment on behalf of the contracting party or codebtor enough amount to discharge debit balance, as it does not violate the principle of autonomy of will, which guides the freedom to contract, it does not reach the contractual equilibrium or good faith, since the clause is translated into mere device to facilitate the satisfaction of credit, or yet, it does not reveal the consumer burden. III – According to teaching of Caio Mário, "they are called [...] potestative, when eventuality derives from human will, who has the faculty to orientate themselves in one or another sense; the higher or lower participation of will makes them distinguish the simply potestative condition of that other one that calls itself pure potestative, which fully leaves the legal transaction itself"; at the discretion of one of the parties" [....] It is important not to confuse: the "pure potestative" nulls the act, as it leaves exclusive discretion to one of the parties. The same does not happen with the "simply potestative" condition. Carlos Alberto de Almeida versus Banco Boavista S/A. Quarta Turma. Relator Min. Sálvio de Figueiredo Teixeira. Adjudicated on 20 March 2003.

BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 155242/RJ. CIVIL LAW. FIDUCIARY TRANSACTION. SIMULATION. ACTUAL ESTATE SALE, WITH PROMISE OF RETURN. PARTIAL PAYMENT OF THE LOAN BY THE SELLER. UNJUST ENRICHMENT. REAL AND NO-APPARENT TRANSACTION ARTS. 102, 103 AND 104, CC. LEGAL VALUES. HERMENEUTIC. APPEAL GRANTED . I – the fiduciary transaction, even with no regulation determined in positive Law, is inserted in the freedom to contract proper of the private Law and its is characterized by the delivery of an asset, usually as guaranty, with the condition, verbigratia, to be later returned. II – In the lesson of Francesco Ferrara, "the fiduciary transaction, as really wanted, produces all the ordinary effects, even if between themselves the contracting parties take over personal obligation to employ the effects obtained only for the purpose established between them". (A simulação dos negócios jurídicos, São Paulo: Saraiva, 1939, p. 76). III – In the simulated transaction, there is some distance between actual will and declared will, contrary to the fiduciary transaction, in which the declared will corresponds to reality. IV – In the comparison of two values protected by Law, it is the judge's responsibility to decide on the one of higher importance and that in the instance it is clearer shown. Marítima Seguros S/A versus Valter Apolinário Filho. Quarta Turma. Relator Min. Sálvio de Figueiredo Teixeira, Adjudicated on 15 February 1999.

BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 49872/RS. COMMERCIAL. RURAL PAPER. ACTION TO REVIEW CONTRACT AND DEBTOR EMBARGO. DEBT ADJUSTEMENT BOUND TO CPI. IMPOSSIBILITY OF ADJUSTMENT IN MARCH/96 BY THE "BTN". PRINCIPLE OF FREEDOM TO CONTRACT. APPLICATION OF LAW 8.088/90 IN RELATION TO SUMS OF APRIL AND MAY/90. APPEAL PARTIALLY PROVIDED. I – HAVING BEEN DECIDED THE INFLATION ADJUSTMENT BY CPI AND NOT BEING LOAN WITH RESOURCES FROM RURAL OR SIMPLE SAVING, IT IS IMPOSED TO BE RESPECTED THE AGREED INDEX, NOT BEING SUCCESSFUL THE ATTEMPT OF ADJUSTMENT, IN MARCH/90, BY "BTN". II – UNJUSTIFIABLE TO ATTEMPT CONTRACT REVIEW FOR THE SUPPOSED DISPROPORTION AMONG THE SEVERAL INDEX RATES IN ONLY ONE MOTH, AS IT IS EVIDENT THE UNSTABLE AND INFLATIONARY CHARACTER OF OUR ECONOMY, MAINLY WITH REGARDS TO RURAL LOAN NOT BOUND TO SAVING. III – POSSIBLE AND THE OPTION OF BORROWER IN RELATION TO APRIL AND MAY/90 BY THE INDEX OF "BTN", IN ACCORDANCE WITH ART. 5 OF LAW 8.088/90. Banco Itaú S/A versus Fernando Campos Domingues. Quarta Turma. Relator Min. Sálvio de Figueiredo Teixeira, Adjudicated on 08 April 1999.

[1438] BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 1.058.165/RS. Business Law and Civil Procedural. Special appeal. Violation of art. 535 do CPC. Deficient grounds. Violation to art. 5 of LICC. Absence of pre-

The understanding of the Court of Justice of Paraná (and the extinct Court of Appeals) seems to be similar: the freedom to contract, sometimes reasoning on the obligationess[1439] of the contract, sometimes its lawfulness[1440].

questioning. Violation of arts. 421 and 977 CC/02. Impossibility of the contract of partnership between spouse in matrimonial regime of separation of property or compulsory separation. Legal prohibition applied to both business and simple partnerships. There is no knowledge of a special appeal in the part whose grounds are deficient. Precedent 284/STF. Appreciation of special appeal not viable when pre-questioning of legal device taken as violated is absent. Precedent 211/STJ. The freedom to contract which art. 421 of CC/02 refers to can only be legally performed if it does not violate the conditions imposed by the legal text itself. Art. 977 of CC/02 innovated the Brazilian legal system when explicitly allowed partnership between spouses, making an exception only when they are married in matrimonial regime of separation of property or compulsory separation. The restrictions prescribed in art. 977 do CC/02 make it impossible that spouses married under matrimonial regimes as prescribed contract each other both in business and simple partnerships. Prescription denied to special appeal. Ancart Participações Ltda versus Registro de Imóveis da 2ª Zona de Porto Alegre. Terceira Turma. Relator Min. Nancy Andrighi. Adjudicated on 14 de abril 2009.

BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 13560/SP. COMMERCIAL LEASE. RENEWABLE. AVOIDANCE CLAUSE OF THE RIGHT TO RENEW. NULLITY. AND NULE CONTRACT CLAUSE WHICH AVOID THE RIGHT TO RENEW CONTRACT OF COMMERCIAL LEASE GOVERNEED BY DECREE N. 24.150/34. LEGAL HYPIOTHESIS LIMITING THE FREEDOM TO CONTRACT. (ART. 30 OF "LEI DE LUVAS"). Lanchonete Feijão Amigo Ltda versus Maria de Almeida Henriques. Terceira Turma. Relator Min. Claudio Santos. Julgado em 18/12/1991.

BRAZIL. Superior Tribunal de Justiça. Recurso especial n. 4930/SP. RENEWABLE LEASE - DECREE 24 150. CONTRACTUAL CLAUSES WHOSE AIM IS TO DRIVE AWAY THE INCIDENCE OF LEGAL RULES THAT ASSURE THE RIGHT TO RENEW LEASE ARE CONSIDERED INVALID. RESTRICTIONS TO WILL AUTONOMY AND FREEDOM TO CONTRACT DERIVED FROM THE LAW. Cinemas São Paulo Ltda versus SAMU – Sociedade de Administração, Melhoramentos Urbanos e Com. Ltda. Terceira Turma. Relator Min. Eduardo Ribeiro. Adjudicated on 18 December 1991.

[1439] PARANÁ. Tribunal de Justiça. Apelação Cível n. 108529-4. CIVIL APPEAL – CONTRACT OF CREDIT OPENING IN BANK ACCOUNT – OVERDRAFT – ADHWESION CONTRACT – FORENSIC ACCOUNTING EVIDENCE – VERIFICATION OF THE PRACTICE OF ANATOCISM BY THE BANK INSTITUTIONS – CONTRACT CHARGES – INTERESTRATES – OMISSION TO THE CLIENT INTEREFING IN THE FREEDOM TO CONTRACT –APPEAL DENIED. Banco do Estado do Paraná S/A versus Clayton Petterle Júnior e outro. Quinta Câmara Cível. Des. Bonejos Demchuk. Adjudicated on 09 outubro de 2001. PARANÁ. Tribunal de Justiça. Apelação Cível n. 104931-8. CÍVEL APPEAL – CONTRACT OF CREDIT OPENING IN BANK ACCOUNT – OVERDRAFT – ADHWESION CONTRACT – FORENSIC ACCOUNTING EVIDENCE – VERIFICATION OF THE PRACTICE OF ANATOCISM BY THE BANK INSTITUTION – CONTRACT CHARGES – OMISSION TO THE CLIENT INTEREFING IN THE FREEDOM TO CONTRACT – RE-CALCULATION OF DEBT – BAD FAITH NON – CONFIGURATION APPEAL PARTIALLY ADJUDICATED WITH INVERSION OF COSTS OF LOSS OF SUIT. Jorge da Silva Filho & CIA. LTDA. e outro versus Banco do Estado do Paraná S.A. Quinta Câmara Cível. Des. Bonejos Demchuk. Adjudicated on 12 June 2001.

[1440] PARANA. Tribunal de Alçada. Apelação Cível n. 218396-0. CIVIL APPEAL – ACTION OF TAX REFUND – LEASE CONTRACT – BONUS OR PUNCTUALITY CLAUSE - LATE CHARGE - IMPOSSIBILITY OF JOINDER – ATTORNEY FEES – RENDERING OF SERVICES – CONTRACT WHICH PRODUCES EFFECTS BETWEEN THE PARTIES – CORRECT DECISION – APPEAL DENIED. In spite of lawful, for being in accordance with the principle of freedom to contract, the clause establishing discount on the value of the lease as a punctuality benefit is unclaimable and so is the late charge, as both find footstool in the delay of payment, forming the joinder bis in idem. S.W.A. Administradora de Bens Próprios LTDA. versus Auto-Mecânica Monte Castelo Ltda. Sétima Câmara Cível. Relator Juiz Prestes Mattar. Adjudicated on 16 December 2000.

PARANÁ. Tribunal de Alçada. Apelação Cível n. 166924-9. LEASE - EVICTION – LACK OF LEASE RENT – CONSENSUAL ADJUSTMENT - VALIDITY AND EFFICACY – DEFECT OF CONSENT (CC, ART. 147, II) NOT DEMONSTRADED – ENFORCEABILITY OF THE AMOUNT AGREED - INEXISTENCE, FURTHERMORE, OF DEPOSIT BY THE UNDISPUTED PART – LAW 8.245/91, ARTS. 62 AND 67 - INTELLIGENCE – DELIVERY OF KEYS AFTER TRIAL COURT – NEW FACT - ARTICLE 462, CIVIL PROCESS CODE – APLICATION TO COURTS - DOCTRINE - JURISPRUDENCE - APEALL ADJUDICATED. The adjustment of the value of lease higher than to legal indexes is lawful, upon mutual agreement, insofar as there is legal basis in article 18 of Law 8.245/91; the lease admitted agreeing with the proposed increase, the single allegation of defect of consent is not suitable, without at least appointing which defect would be able to nullify the legal act (CC, art. 147). By mutual agreement, with full freedom, the original value of the lease can be contracted, in force in the first rent, as well as new rent on the course of this lease,... Anyway, there are no obstacles, upon mutual agreement, that the

Nonetheless, it is recognized that it goes under legal limitations[1441], especially with regards to the contract in which full freedom is not assured to the adherent[1442] and derived from the social function of the contract[1443].

parties agree on value of the lease, before or after its compulsory prorogation. It is a natural consequence, and bluntly, in the terms of the law, the contractual freedom (Silva Pacheco). Nair Copinski e outras versus Eloi Volpe Sexta Câmara Cível. Relator Juiz Mendes Silva. Adjudicated on 19 November 2001.

PARANÁ. Tribunal de Alçada. Apelação Cível n. 165483-9. CIVIL AND CIVIL PROCEDURAL - LEASE – DISCOUNT – BONUS AND LATE CHARGE - DOCTRINE - JOINDER - INADMISSIBILITY – MAINTANCE OF THE ONE WHICH IS LESS EXPENSIVE TO THE LESSEE - CODECON - INEXISTENCE OF CONSUMPTION - INAPLICABILITY - POSITION OF SUPERIOR COURT OF JUSTICE – REFORM BUDGET - USELESSNESS – VALUE PREVIOUSLY DEPOSITED IS GUARANTEE - COMPENSATION – APPEAL ADJUDICATED. In spite of lawful, for being in accordance with the principle of freedom to contract, the clause establishing discount on the value of the lease as a punctuality benefit is unclaimable and so is the late charge, as both find footstool in the delay of payment, forming the joinder bis in idem. A single budget is not convincing enough to give opportunity to charge for repair in the property located, as the statements in the private document are true in relation to the signatory, however, being the interested party responsible to prove the veracity of the fact (CPC, art. 368 and § solely). Cristovão Alves Pinto e outros versus Francisco Ávila. Sexta Câmara Cível. Relator Juiz Carvilio da Silveira Filho. Adjudicated on 18 June 2001.

PARANÁ. Tribunal de Alçada. Apelação Cível n. 171932-4. LEASE - FEES – PUNCTUALITY BONUS AND LATE CHARGE – JOIND CHARGE - BIS IN IDEM - INADMISSIBILITY – MAINTANENCE OF THE ONE WHICH IS LESS EXPENSIVE TO THE LESSEE – PENAL CLAUSE – SUBSCRIPTION IN CONTRACT – STANDING AND ENFORCEABILITY - DOCTRINE – MAIN APPEAL PARTIALLY ADJUDICATED AND ADJUDICATED SEAL. The principle of freedom to contract allows to stipulate, in leasings, late charge and penal clause, due to that one related to late payment of the rent, and because of this contract violation, however, being unclaimable, cumulatively, the first one added to the corresponding so-called "punctuality bonus", as they find justification in the same rubric (default). The Law does not prohibit the free convention, since it is based on the principle of contractual freedom... It explicitly admits to charge fine or penalty.(Silva Pacheco). Renato Volpi versus Lauro Pasternak e Inajá Sloboda. Sexta Câmara Cível. Relator Juiz Mendes Silva. AdJudicated on 30 April 2001.

[1441] PARANÁ. Tribunal de Alçada. Apelação Cível n. 190965-5. CIVIL APPEAL – SUSPENSION OF "ACTUAL INTEREST" RATE OF 0,5% A MONTH - APLICABILITY OF OFFICIAL LETTER OF CONSTITUTIONAL LIMIT OF 12% - THERE IS NO LEGAL ARGUMENT TO JUSTIFY EXACTLY WHAT THE CONVENTIONEER EXPLICITLY PROHIBITED – THE PROVIDER OF BANKING SERVICES AND CREDIT IS EXPLICITLY IN ACCORDANCE WITH THE DEVICES OF CODECON – THE FREEDOM TO CONTRACT, JUST LIKE ANY OTHER FREEDOM, HAS LIMITATIONS IN THE MODERN STATE OF LAW – COMPOUND INTERESTS WHICH ARE NOT IN ACCORDANCE IN THE EXCEPTION HYPOTHESES – COMISSION TO KEEP THE MARKET RATES – ABUSIVE PRICING - JUDGMENT TO APPEAL DENIED. BB Financeira S/A Crédito, Financiamento e Investimento versus Alberto Bosak Filho e Outros. Oitava Câmara Cível. Relator Juiz Antenor Demeterco Juniora Adjudicated on 10 June 2002.

PARANÁ. Tribunal de Alçada. Apelação Cível n. 152753-1. ACTION TO REVIEW. LEASE-PURCHASE. FINANCING BOUND TO EXCHANGE RATE VARIATION. NORTH–AMERICAN DOLAR. REGIME HAS TO BE ALTERED DUE TO CHANGE OF ECONOMIC POLICY IN JANUARY/99 – RELEASE OF FOREIGN EXCHANGE BY CENTRAL BANK OF BRAZIL. ABSENCE OF PROOF THAT THE RESOURCES CAME FROM ABROAD (ART. 6º, DA LEI 8.880/94). NECESSARY REVIEW, ALSO DUETO BEING TOO EXPENSIVE FOR THE DEPTOR, TO REESTABLISH THE EQUILIBRIUM OF THE CONTRACT. APPLICATION OF ART. 6, ITEM V, OF THE CONSUMER PROTECTION CODE. DOLLAR UPDATING REPLACED BY INPC/IGPM. SENTENCE CONFIRMED. APPEAL DENIED. The freedom to contract is not absolute, that is, it is limited to the supremacy of public policy, from the time the democratic social state of Law came up. The contractual relationship is onerous, generating subjective impossibility to perform the contracts, legal review is perfectly plausible, without confronting the principle "pacta sent servanda", since the nuances of such rule are outlined in the present time, even more in bank contracts. Because the exchange policy changed, the debtor had excessive onerousness to the creditor, it is appropriate to apply the theory of unpredictability, adopted in an objective way by art. 6, of CDC, being the contract reviewed so that, from 9 January 1999, the payments are updated according to INPC/IGMPM. Bankboston Leasing S/A - Arrendamento Mercantil versus Sandra Baker Hessel. Relator Juiz Sérgio Arenhart. Adjudicated on 24 October 2000.

[1442] PARANÁ. Tribunal de Alçada. Apelação Cível n. 183255-3. Action for an innominate provisional remedy in prohibitory and preparatory character and share of common stock(review). Housing Financial System. Non-applicable Consumer Protection Code. Contract before the Law. Non-acceptance in view of recognized interest of public policy. TR. Replacement by INPC. Maintenance. Debt. Amortization. Precedent to the updating of debit balance. Maintenance. Insurance contract. Obligation of value of Prize to correspond to the

For several and varied reasons, it has been affirmed the disappearance of civil Law[1444] and the death of the contract[1445], but apparently and contradictorily, both seem to be in perfect state of health[1446]. Such health is not conditioned, however, to the mere exercise of "equalitarian" freedom, as before, but to its

loan review. Possibility. Respect to contract in more advantageous conditions. Maintenance. Debit balance. Adjustment bound to the variation of minimum wage. Borrower with no employment relationship. Legal permissibility. Art. 9., § 4., DL 2.164/84. Anatocism. Price Table. Characterization. Installments. Amortizations. Maintenance. Register of Credit protection. Inclusion of borrowers' names. Impossibility. Attorney fees. Percentage previously agreed in the contract. Inappropriateness. Judge responsibility. Adhesive. Breach of contract. Clause of acceleration of payment. Positivity. Non-acceptance. DL 70/66. Unconstitutionality. Non-occurrence. Possibility of cession with no previous borrower agreement. Absence of interest. Maintenance. Housing Assistance Fund (FUNDHAB). Return of value paid. Giving up the appeal part made up in Trial.[Possibility. Non knowledge Interests. Clause of increase. maintenance. INPC. Adequacy to the other clauses of the contract. Acceptance Contractual penalty. CDC. Decrease. Acceptance Clause of responsibility for remaining debt. Positivity. Nullity recognized. Appeal. Denied. Adhesive Appeal. Partly recognized and partly adjudicated. Quinta Câmara Cível. Relator Juiz Edson Vidal Pinto. Adjudicated on 11 December 2002.
PARANÁ. Tribunal de Justiça. Agravo de Instrumento n. 97233-4. INTERLOCUTORY APPEAL – EXCEPTION OF INCOMPETENCE – JURISDICTION CHOSEN BY THE CONTRACTING PARTIES –ADHESION CONTRACT - MITIGATION OF THE PRINCIPLE OF FREEDOM TO CONTRACT – APPLICABILITY OF ART. 100, IV, "b" DO C, p.CIVIL – APPEAL DENIED. When dealing with adhesion contracts, where the principle of freedom to contract is mitigated, ineffective and the clause of the jurisdiction chosen by the the contracting parties in detriment to the person that adheres to the contract, it is possible, so, to apply the device according to art. 100, IV, "b" of C.P.Civil. Volkswagen do Brasil Ltda. versus Comercial Princesa de Automóveis Ltda. Quinta Câmara Cível. Relator Des. Antônio Gomes da Silva. Adjudicated on 17 October 2000.

[1443] PARANÁ. Tribunal de Justiça. Agravo de instrumento n. 306664-4. PROVISIONAL REMEDY. DECLARATORY JUDGMENT ACTION. BANK LOANS. PUBLIC SERVANT. FREEZE OF WAGE DEPOSITED IN BANK ACCOUNT TO SATISFY CREDIT OF THE FINANCE INSTITUTION. SOCIAL FUNCTION OF THE CONTRACT OF THE CONTRACT. REQUIREMENTS OF PROVISIONAL ACTION FULFILLED. POST SECURITY. ENFORCEABILITY. From the preliminary 1. The period of limitation of the right to action is the one of personal actions, in accordance with article 205 of the Civil Code 2002, in verbis: "The prescription lasts ten years, when the law has not fixed a lower period of limitation". (TAPR; 6ª CC; Acórdão n. 18091; Apel. Civ. n. 0260254-0; Rel. Paulo Habith; j. 31.08.2004; un.; DJ 6707.) 2. In case of interlocutory appeal it is unreasonable the dismissal of the case – provisional action – with no Trial on the merit, when the theme has not been subjected to Trial court. 3 "So as to assure effective remedy of the losses that the defendant may have, in the cases listed in CPC 811, the judge may determine post security as a condition to issue injunction". (Nery Júnior, Nelson; Nery, Rosa Maria de Andrade, Código de Processo Civil comentado e legislação extravagante, São Paulo: Ed. RT; 8ª ed. 2004, p. 1189). On the merit 1.Once checked the existence of the legal requisites for authorization - - fumus boni iuris and periculum in mora – there is nothing to argue about repeal of granted injunction. 2. "Our courts have understood on the impossibility to freeze employees' wage, since, even if maturity dates are to be credited from the checking account, this one does deny its characteristic of alimentation character. As a loan by the appellee, the appellant can only charge him/her judicially, but not discount as it had been doing, even with a written permit, if later the debtor does not agree with it anymore" (RT 803/262)1 3. The application of the principles pacta sunt servanda is currently mitigated, as the application of the theory of the social function of the contract which is a logical consequence of the constitutional principle of the values of solidarity and the construction of a fairer society (CF 3, I)2, in the terms art.421 of the Civil Code of 2002, in verbis: "The freedom to contract will be performed due to and in the limits of the social function of the contract". APPEAL KNOWN AND PARTIALLY ADJUDICATED. Banco Rural S/A versus Antônio José Cruz Malassise. Décima sexta Câmara Cível. Relator Des. Shiroshi Yendo. Adjudicated on 09 November 2005.

[1444] AZEVEDO, Antônio Junqueira de. O Direito civil tende a desaparecer? In: Revista dos Tribunais, v. 472. Fevereiro de 1975, p. 15-21.

[1445] For example: GRANT, Gilmore. The Death of Contract. Columbus: Ohio University Press,1992;

[1446] According to CARBONNIER, the difficulty to explain the changes in the general concepts would give rise to the affirmation of decay of an Institute (CARBONNIER, Jean. Op. cit., 7. ed., p. 286-287). In the same sense ROPPO: "the contract is not dead, but simply 'different from what it was like in the past". (ROPPO, Enzo. Op. cit., p. 347).

humanization and sense of usefulness[1447]. This sense inspires, thus, the founding autonomy of the individual contractual practices, addition to the normative power of the contractual custom, generalized and compulsory.

On the other hand, if the scenery on the outlines of individual freedom is already intricate taking into account only a unitary understanding of normative production, it becomes much more complex if the international phenomenon and the pluralist perspective of contractual sources are aggregated to it. That is because, according to ARAUJO, in private international Law the individual autonomy is demonstrated by the choice of applicable law to the contractual relations[1448].

In Brazil, it is traditionally understood that, due to the provision of art. 9 § 2 of LINDB[1449], the choice of applicable law to the contract would not be admitted[1450], even though every contemporaneous doctrine recognizes the need of legislation reform[1451]. SOUZA JUNIOR defends the need of constitutionalized reading of the provision, informed by the essential Law to freedom, to mitigate the urgency in the legislative reform[1452].

[1447] "Stung in its invulnerability, the selfish taboo tends to be overshadowed in the bourgeois Codes. They refuse the principles that establish human solidarity and social usefulness". GOMES, Orlando. Humanização do Direito Privado. In: A crise do Direito. São Paulo: Max Limonad, 1955, p.27.

[1448] ARAUJO, Nadia de. O direito subjetivo e a teoria da autonomia da vontade no direito internacional privado. In: CASELLA, Paulo Borba. (Coord.). Contratos Internacionais e Direito Econômico no MERCOSUL. São Paulo: LTr, 1996, p. 39.

[1449] "Art. 9º. To qualify and govern the obligation, the law to be applied is the one of the country in which they have been made.§ 2. The resulting obligation of the contract is considered as the place where the offeror lives".

[1450] MIRANDA, Pontes de. Op. cit., p. 113; FRANCESCHINI, José Inácio Gonzaga. A lei e o foro de eleição em tema de contratos internacionais. In: RODAS, João Grandino. (Coord.). Op. cit., p. 114; BASSO, Maristela. Autonomia da vontade nos contratos Internacionais do Comércio. In: BAPTISTA, Luiz Olavo; HUCK, Hermes Marcelo; CASELLA, Paulo Borba. (Coords.). Op. cit., p. 48; ARAUJO, Nadia. Contratos internacionais: autonomia da vontade, MERCOSUL e Convenções Internacionais. 3. ed. Rio de Janeiro, 2004, p. 201-205; ARAUJO, Nadia de. Contratos internacionais no Brasil: posição atual da jurisprudência no Brasil. In: Revista Trimestral de Direito Civil, n. 34. abr./jun. 2008, p. 267; ENGELBERG, Esther. Op. cit., p. 23; MADRUGA FILHO, Antenor Pereira. Op. cit., p. 79; BASSO, Maristela. Introdução..., p. 68. They point out that indirectly autonomy can be admitted provided that the Law of the venue where the contract established do it: RODAS, João Grandino. Direito Internacional Privado Brasileiro. São Paulo: RT, 1993, p. 44; STRENGER, Irineu. Direito Internacional..., p. 658; PEREIRA, Luis Cezar Ramos. Aspectos gerais sobre as regras nacionais de Direito Internacional privado, relativas às obrigações (análise do art. 9º, da LICC). In: Cadernos de Direito Constitucional e Ciência Política, n. 18. jan. /mar. 1997, p. 211; ROVIRA, Suzan Lee Zaragoza de. Estudo comparativo sobre os contratos internacionais: aspectos doutrinários e práticos. In: RODAS, João Grandino. (Coord.). Op. cit., p. 60-61. BASTOS and KISS and HUCK remember the possibility, denied by many for being a fraud, to indirectly choose the applicable Law via the election of the venue of the establishment of the obligation (BASTOS, Celso Ribeiro; KISS, Eduardo Amaral Gurgel. Op. cit., p. 07; HUCK, Hermes Marcelo. Contratos internacionais de financiamento: a lei aplicável. In: Revista de Direito Mercantil, n. 53. São Paulo: RT, jan./mar. 1984, p. 86-87.

[1451] ARAUJO, Nadia. Contratos internacionais..., p. 205; RECHSTEINER, Beat Walter. Op. cit., p. 140.

[1452] SOUZA JÚNIOR Lauro da Gama. Autonomia da vontade nos contratos internacionais no Direito Internacional Privado brasileiro: Uma leitura constitucional do artigo 9º da Lei de Introdução ao Código Civil em favor da liberdade de escolha do direito aplicável. In: TIBURCIO, Carmen; BARROSO, Luis Roberto (Coord.). O

The few exceptions contrary to it should be previously mentioned. DOLINGER understands that, due to the positioning of court precedents, it would be possible to state that the clause of election of the applicable legislation is respected in Brazil, even if there is no evidence that such clause had been executed here, and that it had been appreciated by the Brazilian Courts[1453]. As for SOARES, he claims that the possibility of the fragmentation of the contract (different obligations being governed by different laws) would be a good reason to allow the election[1454].

Nonetheless, some see the permission in law n. 9307/1996 which established the private autonomy for the election of the legislation when the instance was appreciated by arbitrators (art. 2, § 1 and § 2)[1455]. Two possible discussions come out from these devices. The first one concerns the limitation of autonomy on the choice of procedural rules if the choice would be possible, also, of the substantial Law applicable to the conflict[1456]. The second one, more interesting one to the aims of this book, is the questioning on the need for the contract to be subjected to arbitration to be international[1457], or if the efficacy of the clause of election of applicable Law would also be applied to non-international instances[1458]. The answer to this questioning would have to go

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Direito Internacional Contemporâneo: estudos em homenagem ao Professor Jacob Dolinger. Rio de Janeiro: Renovar, 2006, p. 599-626.

[1453] DOLINGER, Jacob. Direito Internacional Privado (parte especial): direito civil internacional. Contratos e obrigações no Direito Internacional Privado. Rio de Janeiro: Renovar, 2007. V. 2, p. 464.

[1454] SOARES, Guido Fernando Silva Soares. Contratos internacionais..., p. 170-171.

[1455] GIFFONI, Adriana de Oliveira. A Convenção de Viena sobre compra e venda internacional de mercadorias e sua utilidade no Brasil. In: Revista de Direito Mercantil, n. 116. São Paulo: Malheiros, out./dez. 1999, p. 167-170; RECHSTEINER, Beat Walter. Op. cit., p. 140; GREBLER, Eduardo. A Convenção das Nações..., p. 63; JACQUES, Daniela Corrêa. A adoção do Princípio da Autonomia da Vontade na Contratação Internacional pelos Países do MERCOSUL. In: MARQUES, Claudia Lima; ARAUJO, Nadia de. (Orgs). Op. cit., p. 303; PIMENTEL, Luiz Otávio; AREAS, Patrícia de Oliveira; COPETTI, Michele. Brasil. In: ESPLUGUES MOTA, Carlos; HARGAIN, Daniel; PALAO MORENO, Guillermo. (Dir.). Op. cit., p. 143.

[1456] BAPTISTA, Luiz Olavo. Arbitragem comercial e internacional. São Paulo: Lex Magister, 2011, p. 132.

[1457] LEE, João Bosco. A Lei 9.307/96 e o Direito Aplicável ao mérito do litígio na arbitragem comercial internacional. In: PIMENTEL, Luiz Otávio; REIS, Murilo Gouvêa dos. (Org.). Direito comercial internacional: arbitragem. Florianópolis: OAB/SC, 2002, p. 55; VERÇOSA, Fabiane. Arbitragem interna v. arbitragem internacional: breves contornos da distinção e sua repercussão no ordenamento jurídico brasileiro face ao princípio da autonomia da vontade. In: TIBURCIO, Carmen; BARROSO, Luis Roberto. (Coords.). Op. cit., p. 449; CASELLA, Paulo Borba. Autonomia da vontade, arbitragem Comercial Internacional e Direito Brasileiro. In: TIBURCIO, Carmen; BARROSO, Luis Roberto. (Coords.). Op. cit., p. 747-748; RECHSTEINER, Beat Walter. Arbitragem privada internacional no Brasil, 2. Ed, São Paulo: RT, 2001, p. 58-59; BARRAL, Welber. A arbitragem e seus mitos. Florianópolis: OAB/SC, 2000, p. 18-21.

[1458] ARAUJO, Nadia. Contratos internacionais..., p. 204-205; ARAUJO, Nadia de. A nova lei de arbitragem brasileira e os "Princípios Uniformes dos Contratos comerciais internacionais", elaborados pelo UNIDROIT. In: CASELLA, Paulo Borba (Coord.). Arbitragem: lei brasileira e praxe internacional, 2. Ed., São Paulo: LTr, 1999, p. 133; GAMA JÚNIOR, Lauro. Contratos Internacionais à luz dos Princípios do UNIDROIT 2004: soft Law, arbitragem e jurisdição. Rio de Janeiro: Renovar, 2006, p. 441-442; CRETELA NETO, José. Curso de

through the analysis of arbitral duality[1459], in other words, if the arbitration is domestic or international[1460]. It is also interesting to mention that there is precedent of the 7th Chamber of Civil Law of the extinct 1st Court of Appeal of São Paulo, in 2002, admitting the thesis of choice of applicable law to govern the arbitration in agency agreements to be performed in Brazil[1461];

Moreover, it is convenient to point out that the referred provision explicitly mentions the possibility of election of the international commercial customs for the solution of occasional controversy[1462]. Along with the discussion on the coincidence with the concept of *Lex mercatoria*, it is difficult to admit that international customs may be invoked to govern a certain contract. Join to that the interpretation that would allow the choice of law for internal contracts. In this situation, we would be talking about the real voluntary internationalization of the contractual custom, regardless its acceptance (as an arbitral clause) by the contracting parties.

If the freedom for an arbitrator to proceed this way is already internationally questioned, as demonstrated when analyzing the PICC, there would be a greater controversy in instances of dispute involving national controversies and arbitrators. This is because, for the internal contracts, the traditional tools of analysis (internal public policy and private autonomy) are inadequate for international transactions (public policy). Hence, it seems inappropriate to expand the application of art. 2 § 1 and § 2 of the Brazilian law of

Arbitragem. 2. ed. Campinas: Millennium, 2009, p. 59; BAPTISTA, Luiz Olavo. Arbitragem comercial..., p. 250-254.

[1459] FERNÁNDEZ ROZAS, José Carlos. El arbitraje internacional y sus dualidades. In: Anuario Argentino de Derecho Internacional. Rosario: Asociación argentina de Derecho Internacional, 2007, p. 01-24.

[1460] The same controversy is reported by MORENO RODRÍGUEZ in relation to the Paraguayan legislation. The author, for example, joins the more liberal chain that admits autonomy in the choice of applicable law. MORENO RODRÍGUEZ, José Antonio. Arbitraje en el Paraguay. Asunción: CEDEP, 2011, p. 39-44.

[1461] SÃO PAULO. Primeiro Tribunal de Alçada Civil. Agravo de Instrumento n. 1.111.650-0. 1) Arbitration. Constitutionality. Agency contract containing a clause that imposes the resolution of conflicts in arbitral judgment, according to the French Law. art. 2 of law n. 9.307/96. Incidence of the principle of autonomy of will. 2) Defective complaint. Passive lack of standing. Non-occurrence. Complaint that fulfills the legal requirements. Claim of the existence of a verbal contract agency. Admissibility. Appeal partially adjudicated. SNC e outra versus Thorey Invest Negócios Ltda. Sétima Câmara Cível. Relator Juiz Waldir de Souza José. Adjudicated on 24 September 2002.

[1462] LÓPEZ RORIGUEZ believes that the lex mercatoria could be adopted as agreed by the parties, since there would be an international tendency to accept that private autonomy would be performed beyond the State legislation. However, he recognizes that the theme is controversial when the express selection by the parties is absent. LÓPEZ RODRÍGUEZ, Ana M. Op. cit., p. 113-121.

arbitration to domestic instances. However, such conclusion is not corroborated by the Brazilian practice[1463].

From the point of view of the attempts of uniformization of contractual Law, the tendency is to the recognition of wide freedom of choice of the applicable Law[1464]. The UNIDROIT Principles explicitly determine that "the parties are free to execute a contract and determine its content" (art. 1.1)[1465].

Thus, for example, the Court of Arbitration of the ICC in Paris, in 1996, adjudicated dispute involving the obligatoriness to negotiate in good faith in a contract executed between an American company and a Saudi one. The report impose to the case the application of the legislation of the State of New York, referring to the content of the PICC, meaning that the parties had full freedom to determine the contractual custom, and in special, this obligation to corroborate its decision[1466]. It is, by all means, an instance that may be mentioned as an example of the establishment of contractual freedom by the UNIDROIT Principles. GAMA JUNIOR shares the same opinion[1467].

The UNIDROIT principles, nonetheless, also recognize the existence of State "imperative rules" which prevail over the autonomy of the contracting parties[1468]. BONELL explains that imperative rules that may drive away individual freedom come from different sources (citing, for example, the Declaration of Human Rights) and the even the PICC would have rules of mandatory application, once they have been chosen as so[1469]. It is from the recognition that individual freedom is not absolute and that the PICC themselves recognize it (art.1.4):

> None of the provision of the present principles will restrict the application of imperative rules, being them national, international or supranational, which will be applied in accordance with the rules of the pertinent private international Law.

[1463] BAPTISTA, Luiz Olavo. Arbitragem comercial..., p. 250-254.

[1464] This issue seems to be so relevant in an international perspective that a study carried out in 2007, by the Hague Conference recommended in future work, regardless the instruments adopted, that autonomy was established, even with restrictions defined by public policy and imperative rules. (KRUGER, Thalia. Étude de faisabilité sur le choix de la loi applicable dans les contrats internationaux - aperçu et analyse des instruments existants, p. 20. Available on: <http://www.hcch.net/index_fr.php//management/upload/upload/wop/genaff_pd22a2007f.pdf>. In February 2011 significant progress of the drafting work of the draft of international instrument was announced. <http://www.hcch.net/upload/wop/genaff2011pd06f.pdf>.

[1465] VILLELA, João Baptista; et al. (Eds.). Op. cit., p. 08.

[1466] BONELL, Michael Joachim. (Ed.). Op. cit., p. 636-641.

[1467] GAMA JÚNIOR, Lauro. Op. cit., p. 285.

[1468] VILLELA, João Baptista; et al. (Eds.). Op. cit., p. 09.

[1469] BONELL, Michel Joachim. An International Restatement of Contract Law. 3. ed. Ardsley: Transnational Publishers, 2005, p. 91-94.

It is interesting to notice, however, that in an instance involving an American corporation of petroliferous exploitation and the old Soviet Republic, the arbitral court *ad hoc*, named to adjudicate a controversy on the incidence or not of a new legislation which amended the condition of exploitation of the service, preferred to complement the State legislation (applicable by force of clause) with the dispositions of the PICC. The basis of this decision was that the legislation of that country was not yet adapted to the system of the market, existing numerous gaps and ambiguities[1470].

The European Law also reproduced the "hindered" freedom subscribed by the PICC. Thus, for example, the Preliminary Project of the European Code of Contracts subscribes that

> The parties may freely determine the content of the contract within the limits imposed by the imperative rules, the Community property, public policy, as defined in the present Code, in Member-States of the European Unions, provided that the parties do not aim at only harm a third party. (art. 2.1)[1471]

Still in the European Law, the Rome Convention of 1980 on the applicable law over contractual obligation established the freedom for the parties to select, in international contracts, the applicable legislator to govern their transaction (art. 3, I)[1472]. POSENATO comments that the Convention represented an attempt to unify the conflictual rules of the different European States, applicable to most part of the contracts, which established private autonomy, even if the imperative rules were exceptions[1473]. Such understanding

[1470] BONELL, Michael Joachim. (Ed.). Op. cit., p. 544.

[1471] POSENATO, Naiara. (Org.). Código europeu dos contratos: projeto preliminar – Livro primeiro. Curitiba: Juruá, 2008, p. 03.

[1472] "A contract shall be governed by the Law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract". (BORTOLOTTI, Fabio. Drafting and Negotiating International Commercial Contracts: a practical guide. Paris: ICC, 2008, p. 360.).

[1473] POSENATO, Naiara. A prestação característica na Convenção sobre a lei aplicável às obrigações contratuais de Roma de 19 de junho de 1980. In: CASTRO JÚNIOR Osvaldo Agripino de. (Org.). Temais atuais de Direito do Comércio Internacional. Florianópolis: OAB/SC, 2005, v. 2, p. 472-473.

is confirmed by LESGUILLONS, who points out the establishment of court precedents and customary practice by the Convention[1474].

The recent adoption by the Parliament and Regulation Council n.593 / 2008 (Rome I) reassured the intention to keep private autonomy on the choice of applicable law to the contractual obligations as a paradigm of the European legal system. HEISS claims that it is still the major principle of the European private international Law in relation to contracts[1475], even though there had been some amendments in the text of the article with the aim of making the translation clearer[1476].

Before the reform, BONAMI brought the hypothesis of choosing "non-State Law" to govern the contract under the aegis of the Rome Convention. The difficulty found by the author was precisely the old drafting which did not subscribe the possibility explicitly, as other texts did[1477]. The new text did not include subscription.

According to KASSIS, this peculiarity of the text would impede (art. 4[1478]), the use of any other normative source which was not the State legislation, when absent the express selection by the parties[1479]. In this sense, in his opinion, it would be the end of the *lex mercatoria*, but not the commercial usages and customs, as these ones could take out their binding to the national ordinations[1480].

[1474] LESGUILLONS, Henry. A Convenção de Roma de 19 de Junho de 1980 sobre a Lei Aplicável às Obrigações Contratuais. In: BAPTISTA, Luiz Olavo; HUCK, Hermes Marcelo; CASELLA, Paulo Borba. (Coords.). Op. cit., p. 177.

[1475] HEISS, Helmut. Party Autonomy. In: FERRARI, Franco; LEIBLE, Stefan. (Eds.). Rome I Regulation: The law Applicable to Contractual Obligations in Europe. Munich: Sellier, 2009, p. 01.

[1476] "A contract shall be governed by the Law chosen by the parties. The choice shall be made explicitly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract".

[1477] BONOMI, Andrea. The principle of party autonomy and closest connection in the future EC Regulation "Rome I" on the Law Applicable to Contractual Obligations. In: DREYZIN DE KLOR, Adriana; FÉRNANDEZ ARROYO, Diego P.; PIMENTEL, Luiz Otávio. (Dir.). Op. cit., p. 333-334.

[1478] "1. To the extent that the law applicable to the contract has not been chosen in accordance with article 3, the contract shall be governed by the law of the country with which it is most closely connected..." (EUROPE. Rome Convention on applicable Law to contractual obligations). Available on: <http://www.jus.uio.no/lm/ec.applicable.law.contracts.1980/landscape.a4.pdf>.

[1479] KASSIS, Antoine. Le nouveau droit..., p. 373-374.

[1480] "The Rome Convention offers, this way, unreservedly, to the international trade customs, not being made necessary a clause of reference or submission to the customs as they incorporate to thecontract in a tacit way. If the clause of reference or submission refers to the lex mercatoria as anational Law, it will be considered null and with no effects, as a Law that does not exist cannot be incorporated to the contract, if reversing to the customs would be redundant, since its incorporation to the contract is tacit". (KASSIS, Antoine. Le nouveau droit..., p. 393).

The impact of this Treaty is better understood if we remember that the policy of the French doctrine and court precedents were always shaky, sometimes defending full freedom (*American Trading Co.* instance), sometimes its conditioning (Messageris Maritimes instances) and sometimes the freedom of judicial appreciation (*Mercator Press* instance)[1481].

The CISG, for example, widely establishes the autonomy of will to a point as to make it possible that the parties exclude its total or partial incidence on the contracts (art. 6)[1482]. The same logic was followed by CIDIP-V, which established the possibility of choice of applicable law to the international contracts (art. 7)[1483]. According to MAEKELT it was the recent overcoming of an old American tradition to deny autonomy on the selection of applicable law[1484].

It can still be mentioned the issue related to the consequences of the international treaties to the different internal legal systems[1485], or yet, the treaties of Human Rights.

Thus, for example, the Nigerian Law, at the same time it constitutionally prohibits discrimination by the circumstances of birth, it recognizes the possibility that a foreigner may opt to be subjected to a customary regime or that a native may adopt common law or even another custom (culturalization)[1486]. In other words, in the systems which establish the consuetudinary law it is common to recognize that it is a *personal statute*, or else, its application is to those belonging to a certain traditional community, or even, those who decide to be subjected to its regime. So, how to make it compatible this degree of freedom and the protection of equality as a Human or essential rights? This issue deserves to be looked into more deeply in due course.

The theme, however, is not unique to international treaties. The Chinese legislation, for example, explicitly admits the selection of applicable Law to the

[1481] ARAUJO, Nadia de. O direito subjetivo..., p. 39-41.
[1482] "Artículo 6º. Las partes podrán excluir la aplicación de la presente Convención o, sin perjuicio de lo dispuesto en el artículo 12, establecer excepciones a cualquiera de sus disposiciones o modificar sus efectos". Available on: <http://turan. uc3m.es/uc3m/dpto/PR/dppro3/cisg/textoc.htm.
[1483] ORGANIZATION OF THE AMERICAN STATES. Inter-American Convention...
[1484] MAEKELT, Tatiana B. de. La flexibilización del..., p. 269-276.
[1485] ROSA, Luis Fernando Franceschini da. As relações entre o Ordenamento do Mercosul e os Ordenamentos dos Estados. In: Mercosul e Função Judicial. São Paulo: LTr, 1997, p.121-128.
[1486] YAKUBU, John Ademola. Op. cit., p. 212-214.

civil relations with international repercussion[1487]. In the meantime, the UCC limits the autonomy of will by the parties to select the law of jurisdiction reasonably involved in the contract, in accordance with art. 1§ 1 – 105 (1)[1488].

It can also be mentioned an interesting Argentinean court precedent on the applicable Law is an instance of intermediation of sales of guns in which it was admitted the choice of applicable Law to the instance, but it was assured the incidence of the Argentinean Law in a subsidiary way whenever the convention of the parties was silent[1489].

The argument over the limits of individual freedom of definition of the normativity of the contractual content is also relevant from the point of view of the international contractual customs. That is because if there is no room to the previously mentioned freedom, these can equally exist conditioning for the assertion of this obligational source. Traditionally, thus, the answer is simplistic: the contractual customs are subsidiary sources and so do not prevail over the law. There would be very few exceptions, being art. 9 of the CISG the most notable one.

Hence, it seems appropriate to state that the contractual freedom is conditioned by principles other that the mere convince of the contracting parties. If on the one hand they give opportunity to the legal analysis of a social fact, called, contract, this one will only be able to produce legal consequences that are worthy of the name and, so, of remedy, from the moment its behavioral manifestations are in conformity with the rules of the legal system.

At last, freedom, a basic right, which is the basis for individual autonomy is not assured, on its own, but as "a basis in other profiles of the freedom that make the functional sense of Civil Law and in other legal values that are not restricted to individual freedom (even if they can relate to it), but that also have

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[1487] "Article 3. The parties may explicitly choose the laws applicable to foreign-related civil relations in accordance with the provisions of law". CHINA, Adopted on 28 October 2010. Available on: <http://asadip.files.wordpress.com/2010/11/law-of-the-application-of-law-for-foreign-of-china-2010.pdf.>.

[1488] "Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state". Available on: <http://www.law.cornell.edu/ucc/1/1-105.html>.

[1489] ARGENTINA. Corte Suprema de Justicia de la Nación. AR/JUR/1660/1994.
AUTONOMIA DE LA VOLUNTAD. CORRETAJE. DERECHO INTERNACIONAL PRIVADO. HECHOS CONTROVERTIDOS. INTERMEDIACION. LEY APLICABLE. PRUEBA. Tactician Int. Corp. y otros versus Dirección Gral. de Fabricaciones Militares. Adjudicated on 15 March 1994.

constitutional status being able to refer to a sphere which surpasses the contracting parties"[1490].

On the grounds of this thought it can be stated, for example, the control of the consuetudinary rule as a source of contractual obligations. The custom, in this instance, is not based on the individual freedom that gave it its origin, itself or on the durability of its observance, but on its adequacy to fundamental legal values of a certain entity (being constitutionally established or not).

One example of this operation may be felt in a certain precedent on Succession Law, in which the Constitutional Court of South-Africa declared unconstitutional the customary principle according to which only the oldest heir would inherit the assets left by the dead. The consequence of the precedent was the reformulation of the legislation (editing of the Interstate Succession Act of 1987) to extend the order of succession to the surviving wife and all the children[1491]. What is interesting about this precedent is the "State" control of the customary rule. In this specific situation, which is of greater interest to us, the tool employed was the opposition to the constitutional system itself. Thus, even if it is not a contractual example, the paradigm established is applicable, even if by analogy.

Therefore, along with the limitation of the national consuetudinary rule by means of the understanding of the limitation of its content, such control can also be admitted when analyzing the international customary rules. Nonetheless, another tool may be employed.

6.2. THE LIMITS AT THE DISPOSAL OF THE STATES: THE EXAMPLE OF THE INTERNATIONAL PUBLIC POLICY[1492]

The jurisdiction is one of the features typically associated to the notion of sovereignty, using it to explain the same authority each State has to impose

[1490] RUZYK, Carlos Eduardo Pianovski. Institutos fundamentais do Direito Civil e liberdade(s): repensando a dimensão funcional do Contrato, da propriedade e da família. Rio de Janeiro: GZ, 2011, p. 313.
[1491] SIBANDA, Sanele. Op. cit., p. 33.
[1492] Accepted by the Anglo-Saxon Law under the name of public policy or public policy. According to WOLFF its importance in the English Law was much less relevant than the one assigned by the European Law. WOLFF, Martin. Private international Law. 2. ed. Oxford: Claredon Press, 1950, p. 176.

its Law, inside their territory, agreeing with, in certain instances and under certain conditions, the possibility of application of foreign Law.

On the other hand, from the international point of view, each State does not have the same exclusive authority, a reason for which it can, at most, define itself concurrently competent to a certain instance. It is due to this fact, for example, that in Brazil one is allowed to declare itself exclusively to adjudicate instances involving real estates here located (art. 89, I of the Code of Civil Process), at the same time it defines itself as competent, without excluding others, when the defendant lives in national territory (art. 88, I, of the Code of Civil Process).

The already mentioned Charter of Economic Rights and Duties of States of UN (1974) corroborates this international "consensus" when it mentions, for example, the rights of each State to freely and permanently exercise its sovereignty (art.2). With that, a sovereign State cannot, theoretically, impose its judicial, legislative or executive decision over the other sovereign states[1493].

Thus, this double conditioning becomes, for the purpose of the definition of how the foreign Law will be accepted, or, in our analysis, the consuetudinary Law of international origin. DALHUISEN cites as an example the impossibility of the *Lex mercatoria* to eliminate the impact of the limitations of competitive and environmental public policy[1494].

Moreover, in DIPRI, the international doctrine[1495] built the distinction between internal public policy (limit to private autonomy) and international public policy (limit to the efficacy of foreign acts and judgments)[1496].

Such distinction, for example, was widely established by the Convention of Private International Law of Havana (The Bustamante Code – art. 3 and 8)[1497].

[1493] It should be mentioned that in some instances the internationalist doctrine, not without argument, admits the extension of the territorial effects of the rules. These events are summed up by José Carlos de Magalhães: (i) principle of nationality (the State has jurisdiction over any crime committed by its national, outside its territory); (ii) the principle of legal safety (the State can act before any people, national or foreigner that threatens its safety, even if the act has been performed abroad); (iii) principle of universality(the State has to co-operate to restrain acts against mankind); (iv) principle of passive personality (the State can act before violation to its nationals) and (v) principle of objective and subjective territorially (an event occurred outside national territory is admitted as occurred inside it). MAGALHÃES, José Carlos de. Aplicação extraterritorial de leis nacionais. In: Revista de Direito Público, n. 66. São Paulo: RT, abr./jun. 1983, p. 68-72.

[1494] DALHUISEN, J. H. Op. cit., p. 161.

[1495] SOARES, Guido Fernando Silva Soares. A ordem pública..., p. 124.

[1496] WOLFF, Martin. Op. cit., p. 168-169.

Thus, for example, the "constitutional precepts" were considered a matter of international public policy (art. 4), just like rules of collective and individual protection (art.5). In addition, it is important to remember that Bustamante Code is still a normative source of the Brazilian Law, as it has not been abrogated[1498].

BATIFFOL and LAGARDE mention that the nomenclature "internal public policy" and "international public policy" is not the best one, as it is always about a national phenomenon, and should not be understood in its literal meaning. Actually, the distinction would reflect less of a classification and more the finding of the existence of two scopes of analysis[1499]. Even though DINIZ agrees with the inappropriateness of a "classification", it seems he has not reached the same finding[1500].

The greatest problem, nonetheless, is in understanding the coverage of what "public policy" means[1501]. In order to do so, a more detailed doctrinal and adjudicating research seems to be necessary.

However, it does not appear to be possible to conclude for the existence of a precise concept of "public policy" with basis on the Brazilian court precedents. The adjudicated ones of the Federal Supreme Court, for example, treat the theme in an individual way, with no high terminological precision[1502]. In addition, the contractual instances are very rare, a reason for which some guidance should not be reached from other themes.

From all the appellate decisions appreciated, the most outstanding one is the instance in which, after intense argument, it was decided, by the majority of votes, not to consider offensive to public policy, a clause of consensual divorce which gives exclusive custody of minor to the father. On the other hand, the restriction to the right of visitation by the mother did not deserve ratification by the Supreme Court under the justification of violation to the same public

[1497] BRAZIL. Decree n. 18.871 of the 13 August 1929. Enacts the Havana Convention of Private International Law. Available on: <http://ccji.pgr.mpf.gov. br/ccji/legislacao/legislacaodocs/ bustamante.pdf.>. Acceso on: 19 October 2011.
[1498] PEREIRA, Luis Cezar Ramos. Aspectos..., p. 205.
[1499] BATIFFOL, Henri; LAGARDE, Paul. Droit international privé. 7. ed. Paris: LGDJ, 1981, t. 1, p. 424.
[1500] DINIZ, Maria Helena. Lei de Introdução..., p. 457.
[1501] WOLFF, for example, mentions instances in which the doctrine of public policy was employed to exclude the application of measures of public policy in penal and criminal matters. WOLFF, Martin. Op. cit., p. 171-176.
[1502] Conclusion based on court precedents research taking into account the period between 01/01/1990 and 01/01/2010 the entries "international public policy" – It is still important to point out that from the 65 (sixty-five) appellate decisions found, only 4 (four) did not deal with criminal or extradition matters.

policy[1503]. The relevance of this decision to the theme approached here is in the intense participation of Min. Moreira Alves and his insistence on the definition of the content of what public policy is, or else, according to his understanding, something which would impede a Brazilian judge and an American judge to take the same decision on a given concrete event.

The Supreme Court understands there is no violation to public policy in the instance of the American system of judgment by a civil Jury, as long as the sentence was appropriately based (with reference to the legislation and verdict)[1504], and when granted the *exequatur* to the letter of request of process for the collection of security values[1505].

On the other hand, it understood as a violation to public policy the instance in which it was discussed the possibility of ratification by the Brazilian Judiciary of an Italian sentence that had enacted consensual separation in which there was a clause that excluded the legal regime of assets, located in Italy. The

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[1503] BRAZIL. Supremo Tribunal Federal. Sentença Estrangeira Contestada n. 5041/EU Foreign judgment of divorce with clauses referring to a minor. Request for ratification pertaining to the clauses referring to the minor's custody, it is ratified that the child custody was awarded to the father, as in Brazil there is no principle of public police which prohibits that a child custody is awarded to the father. Partial ratification of a foreign judgment. Carlos Ferreira Lima versus Lúcia Maria Pires Galvão. Tribunal Pleno. Relator Min. Néri da Silveira. Adjudicated on 28/06/1996.

[1504] BRAZIL. Supremo Tribunal Federal. Sentença Estrangeira Contestada n. 4415/EU. FOREIGN JUDGMENT. UNITED STATES OF AMERICA. LACK OF JURISDICTION OF COURT. VIOLATION TO PUBLIC POLICY. CIVIL JURY – DECISION NOT JUSTIFIED. I – the international competence prescribed in art. 88 of CPC is concurrent. The defendant whose residence is in Brazil can be sued both here or in the country where the obligation is to be performed, where the fact has occurred or the act has been performed, provided that the respective legislation prescribes the competence of the local court. II – The Supreme has a system of the civil jury, adopted by the American law, which does not violate the Brazilian principle of public policy. III – Judgment well-founded with basis of the respective North-American legislation, the jury verdict, as well as the evidence produced. Ratification action applicable. Minpeco S/A versus Naji Robert Nahas. Tribunal Pleno. Relator Min. Francisco Rezek. Adjudicated on 11/12/1996.

[1505] BRAZIL. Supremo Tribunal Federal. Agravo Regimental na Carta Rogatória n. 5815/DF. LETTER OF REQUEST, ACTION TO RECEIVE VALUES RELATED TO REINSURANCE, SUED IN ENGLAND, AGAINST INSURANCE COMPANIES, DOMICILED IN BRAZIL. ALLEGATION, BY THE COMPANIES CITED IN BRAZIL, OF IMPROPER DUPLICITY OF LETTERS OF REQUEST; EXCLUSIVE COMPETENCE OF THE BRAZILIAN FEDERAL COURT; AND OF VIOLATION TO THE NATIONAL AND INTERNATIONAL ECONOMIC PUBLIC POLICY, IN THE INSUPRANCE PLAN; EVERYTHING AS AN OBSTACLE TO "EXEQUATUR". ALLEGATIONS DENIED. INTERNAL INTERLOCUTARY APPEAL DENIED. 1. THE DUPLICITY OF THE LETTERS OF REQUEST DO NOT CONFIGURE VIOLATION TO PUBLIC POLICY, IN BRAZIL, BEING COVERED BY THE LEGAL REQUISITES. THE BRAZILIAN COURT MUST NOT EXAMINE SUCH ALLEGATION, AND THE OBJECTANTS CAN , IF THEY WANT TO BE SUBJECTED TO THE ENGLISH JURISDICTION, PROCEED OF THE ISSUE BEFORE DE COMPETENT AUTHORITY. 2. BEING THE ACTION TO WHICH THE BRAZILIAN COURT HAS CONCURRENT COMPETENCE (RELATIVE) (ART. 88 OF CPC) AND NOT ABSOLUTE (ART. 89), ITS FILING BEFORE THE ENGLISH COURT DOES NOT VIOLATE THE NATIONAL PUBLIC POLICE. PRECEDENTS. 3. NOT DEMOSTRATED BY THE OBJECTANT COMPANIES THE ALLEGATION TO VIOLATION OF NATIONAL AND INTERNATIONAL PUBLIC POLICY, IN THE INSURANCE PLAN, DOES NOT VIOLATE THE BRAZILIAN LEGAL POLICE EITHEIR, WITH THE FILING OF ACTION OF CONTRACTUAL PAYMENT BEFORE THE ENGLISH COURT, ABOVE ALL, BEING THEM ABLE TO REFUSE SUBMISSION TO THAT JURISDICTION. Iochpe Seguradora S/A versus Halvanon Insurance Company Limited. Tribunal Pleno. Relator Min. Sydney Sanches. Adjudicated on 20/10/1992.

Federal Supreme Court understood that this clause would violate the Brazilian public policy, as it would imply in an attempt of exclusion of incidence of the legal subscription (the marriage had been celebrated in Brazil and no pre-nuptial pact had been executed)[1506].

Just as a complement, RODAS mentions other examples taken from the oldest court precedents of the Federal Supreme Court: the denial of approval of a judgment that annulled a marriage for incompetence of the officer who enabled the engaged (1980); denial of concession of *exequatur* to the letter of request, as it was understood that the argument of compensation should be adjudicated in the place of the unlawful act (1980)[1507].

TIBURCIO, in turn, mentions the decision of rejection issued by the Court of Religious Affairs of Damascus, Syria, which was ratified by the Federal Supreme Court as being divorce (2002) and monocratic decision that granted exequatur to the letter of request for process for debt collection of gambling (2001)[1508].

Also, for the same reasons, it does not seem possible to extract a concept of public policy from the court precedents of the Superior Court of Justice, which relates to the theme with no great terminological concern, either[1509].

Specifically invoking the interpretation of art. 17 of the LINDB, the third Panel of the Superior Court of Justice considered valid the clause of election of

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[1506] BRAZIL. Supremo Tribunal Federal. Sentença Estrangeira Contestada n. 7209/Itália. FOREIGN JUDGMENT – PROSECUTION OF THE CASE IN BRAZIL – RATIFICATION. The fact that in Brazil, the course of the case concerning conflict of settled interests in foreign judgment res judicata is not an obstacle to the ratification of the latest one. REAL ESTATES LOCATED IN BRAZIL – PARTITION – FOREIGN JUDGMENT – RATIFICATION. The exclusivity of the jurisdiction of real estates located in Brazil – article 89, item I, of the CPC – drives away the ratification of foreign judgment to transfer the partition. Tribunal Pleno. Relator Min. Ellen Gracie. Adjudicated on 30/09/2004.

[1507] RODAS, João Grandino. Direito Internacional privado..., p. 78-79.

[1508] TIBURCIO, Carmen. Temas de Direito Internacional. Rio de Janeiro: Renovar, 2006, p. 511-512, 513-522.

[1509] Conclusion based on court precedents research carried out taking into consideration the period between 1/01/1990 and 1/01/2010, and the entries "public policy" and "international". It is important to observe that from the 135 (a hundred and thirty-five) appellate decisions found, only 10 (ten) dealt with international matters, while the others mentioned taxation, administrative, criminal, extradition or State responsibility for political persecution issues. Another instance mentions "public policy" as being a non-available compulsory applicable matter, therefore, by the parties. (BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 134246/SP. Declaratory Judgment Action. Marriage abroad. Absence of pre-nuptial agreement. Matrimonial regime. First domicile in Brazil. 1 Although the wedding was celebrated abroad, in the concrete case, the first domicile of the couple was established in Brazil; the Brazilian legislation must be applied with regards to matrimonial regime, in the terms of art. 7, § 4, of the Law of Introduction to the Civil Code, as the spouses, before the marriage, had several domiciles. 2. Special appeal known and granted, by the majority. Waldemar Haddad versus Leo James Russel, Espólio de Leuza Bernardes e outros. Terceira Turma. Relator Min. Ari Pargendler. Ajudication on 20/04/2004).

venue in a contract of distribution of vehicles[1510] or when public interests were not involved[1511].

The same way, there is precedent in which the recognition, by the foreign jurisdiction, of clause of election of applicable legislation with antagonic disposition to that one of the Code of Consumer Protection[1512], was not

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[1510] BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 1177915/RJ. SPECIAL APPEAL. EXCEPTION OF LACK OF JURISDICTION. CLAUSE OF ELECTION OF FOREIGN VENUE. INTERNATIONAL CONTRACT OF IMPORT. VIOLATION TO ART. 535 OF CPC NON-CONFIGURED. INTERPRETATION OF CONTRACTUAL CLAUSES. RE-EXAMINATION OF EVIDENCE. INCIDENCE OF PRECEDENTS 05 AND 07 OF STJ. ABSENCE OF ISSUE OF PUBLIC POLICY. 1. It is not verified violation to art. 535 of CPC, as the appellate decision analyzed, in a clearly and reasonable way, all the issues regarding the judgment of the action, even if not in the sense invoked by the parties. 2. The reform of the adjudicated would demand the interpretation of contractual clause and the re-examination of the evidentiary-factual context, measures prohibited in the special appeal scope, in accordance with precedents 5 and 7 of STJ. The conclusions of the Court a quo meaning that, in casu, the nature of the contract executed between the parties is import, and that it is the foreign country the place of performance and fulfillment of obligations, derived from the analysis of contractual clauses and the evidentiary-factual set carried in the files, as prescribed re-examination of the matter by this special via. 4. "the election of the foreign venue is valid, except when the conflict involves public interests". (REsp 242.383/SP, Rel. Ministro HUMBERTO GOMES DE BARROS, TERCEIRA TURMA, adjudicated on 03/02/2005, DJ 21/03/2005 p. 360). 5. Special appeal denied. Fórmula F3 Brazil S/A versus Ducati Motor Holding SPA. Terceira Turma. Relator Min. Vasco Della Giustina. Adjudicated on 13/04/2010.

[1511] BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 242.383/SP. ESPECIAL APPEAL – PRE-QUESTIONING – PRECEDENSTS 282/STF and 211/STJ – RE-EXAMINATION OF EVIDENCE AND CONTRACTUAL INTERPRETATION – PRECEDENTS 4 AND 7 – CONCURRENT INTERNATIONAL JURISDICTION – ELECTION OF FOREIGN VENUE – ABSENCE OF ISSUE OF PUBLIC POLICY – VALIDITY – DIVERGENCE NON-CONFIGURED - 1. In special appeal evidence is not re-examined, neither are contractual clauses interpreted (precedent 5 and 7). 2. The election of foreign venue is valid, except when the conflict involves public interests. 3. For the configuration of divergence of precedents, it is necessary to analytically demonstrate symmetry between the confronted appellate decisions. A simple transcription of the syllabus or precedents is not sufficient. Cláudio Ferranda e outro versus Amoco Chemical Holding Company. Terceira Turma. Relator Min. Humberto Gomes de Barros. Adjudicated on 03/02/2005.

[1512] BRAZIL. Superior Tribunal de Justiça. Sentença Estrangeira Contestada n. 646/EU. CIVIL PROCESS. FOREIGN JUDGMENT. RATIFICATION. CONTRACT EXECUTED BY MUTUAL CONSENT. EXCLUSION OF RESPONSIBILITY. POSSIBILITY OF LEGAL REQUIREMENTS FULFILLED. RATIFICATION DENIED. ABSENCE OF VIOLATION TO PUBLIC POLICY OR SOVEREIGNTY. INTERVENTION BY A THIRD PARTY. ASSISTANT COPARTY. POSSIBILITY. 1. The ratification of the foreign judgment is subjected to procedure liable to admit the voluntary intervention of the assistant, that, in the factual plan, will be the addressee of the legal effects of the decision, a procedural sub-rogated position. Precedent: AgRg na SEC 1035 /EX Relatora Ministra ELIANA CALMON DJ 07.08.2006. 2. The assistant coparty is not a secondary intervening party or an accessory, as the argument between the original party and the competitor belongs to the assistant, as well. The treatment is the same as that one granted to the original party that is, it performs with the same procedural intensity. In this modality, the rules that impose a subsidiary position to the assistant are not effective, such as the ones in art. 53 and 55 of the procedural law. (...) For this reason, the performance of the qualified assistant is much wider than the one of the simple assistant coparty. Concerning the beneficial acts and the harmful acts performed by the original party, the regime of unitary joinder; that is why, beforehand, it is not admitted the assistant coparty to be harmed by one of those kind of act of freedom." (Luiz Fux, in, Curso de Direito Processual Civil, Editora Forense, 3ª Edição, pág. 281/282). 3. The entry of the sub-rogated in the procedure, in a qualified way, as a true assistant coparty is not banned, whose activity is to be submitted to the one of the original party, therefore, the judgment ratified interferes in the legal relationship which involves the assistant and the original party's competition, as being the holder of the rights related to that conflict, for having been responsible for the expenses necessary to both repair the damages of the aircraft, and the relocation and accommodation of the passengers on board. 4. In casu, the ratification refers precisely to the foreign judgment, which considered the disposition on the limited responsibility feasible, as well as the choice of the government of Law on the grounds of contract executed between the litigant parties, designed in the actions assigned in the deeds of "GTA" (General Term Agreements), in which VARIG S/A got transferred from GE, among other assets, an engine of aircraft model CF6-80C2B2, series number 690165. 5. Having elected the Law applicable to the species in statement of free will (GTA) the before mentioned pactum, stand in the

considered a violation by the Brazilian public policy. In addition, there is an instance in which a Special Court, in a venue of ratification of a foreigner arbitral report, did not appreciate the allegation of violation to public policy not for the non-application, by the arbitrator, of the clause of election of the applicable legislation. In this situation, the Court understood that the issue would get confused with the merit of the cause, and that being so, it could not be appreciated at that moment[1513].

It was not either recognized as offensive to public policy the concession of exequatur to the letter of request for process[1514] for debt collection of gambling in a country where it is admitted[1515].

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insuperable "commitment" by the allegation of execution in international contract of the CPC, internal Law, under the argument that the inverse punishment would go against public policy. 6. The foreign judgment, having fulfilled the requirements raised by art. 5, items I, II, III and IV of Resolution 09/STJ, reveals itself apt to ratification before STJ, in accordance with the Law of Introduction to the Civil Code, art. 15, for example. It will be performed in Brazil the judgment entered abroad, which brings together the following requirements: it must have been entered by a competent judge; b) the parties must have been cited or have been legally entered by default; c) having applied res judicata and been covered with the necessary formalities for the performance in the venue it was entered; d) having been translated by an authorized interpreter; e) having been ratified by the Federal Supreme Court. Sole paragraph. The judgment merely declaratory does not depend on the state of the persons. 7. The Federal Supreme Court has already recorded that the "aim of the request for ratification is not to confer efficacy to the contract where the court of origin to decided was based, but the judgment file from it", in the terms of Sec 4948/ EU, de relatoria do Min. Nelson Jobim, adjudicated by Pleno, and published in DJ 26-11-1999. Precedents: SEC 894/UY, Rel. Ministra NANCY ANDRIGHI, CORTE ESPECIAL, adjudicated on 20/08/2008, DJe 09/10/2008; SEC 1.397/US, Rel. Ministro FRANCISCO PEÇANHA MARTINS, CORTE ESPECIAL, DJ 03.09.2007. 8. Indeed, the allegation that the company had accepted the condition of consumer when executed the GTA is aggrieved, attracting the incidence of Law 8.078/90 – CPC – which prohibits the termination of the duty to indemnify in the hypotheses of negligence or Gross fault as it flees from the court of resolution of a strictly formal characteristic, and the fortiori drives away violation to public policy. 9. The existence of insurance action due to the applicant of the ratification, has no interference in the present procedure according to articles 89 and 90 of the CPC, as it is about concurrent competence, dealt with obligational conflict. 10. The court of deliberation is merely formal, without the so-called revision au found, being vertain that art. 90 of the CPC makes the existence of later action in the national territory indifferent to the purpose ratification. Precedent of this court: SEC 611/US, DJ 11/12/2006. 11. Ratification of foreign judgment granted. General Electric Company versus Varig Viação Aérea Rio Grandense. Corte Especial. Relator Min. Luiz Fux. Adjudicated on 05/11/2008.

[1513] BRAZIL. Superior Tribunal de Justiça. Sentença Estrangeira Contestada n.3035/França. FOREIGN ARBITRAL JUDGMENT. ACTIVE STANDING. INTEREST. SALES CONTRACT. MERIT OF ARBITRAL JUDGMENT. ANALYSIS OF SUPERIOR COURT OF JUSTICE. IMPOSSIBILITY. ABSENCE OF VIOLATION TO PUBLIC POLICY. A. The request for ratification may be proposed by any person interested in the effects of the foreign judgment. 2. The merit of the foreign judgment cannot be appreciated by the Superior Court of Justice, as the ratification act is restricted to the analysis of its formal requirements. Precedents. 3. The request for ratification deserves to be granted, as, aware of the violation to public policy, it gathers all the essential and necessary requirement desideratum, prescribed in Resolution n. 9/2005 of the Superior Court of Justice and in articles 38 and 39 of Law 9.307/96. 4. Request for ratification granted. Atecs Mannesmann GMBH versus Rodrimar S/A Transportes Equipamentos Industriais e Armazéns Gerais. Corte Especial. Relator Min. Fernando Gonçalves. Adjudicated on 19/08/2009.

[1514] BRAZIL. Superior Tribunal de Justiça. Agravo Regimental na Carta Rogatória n. 2807/México. LETTER OF REQUEST. INTERNAL INTERLOCUTORY APPEAL. PROCEDURAL REMEDY GRANTED. PROCESS LOSS TO DEFENSE. VIOLATION TO PUBLIC POLICY AND NATIONAL SOVEREIGNTY. NON-OCCURRENCE. – The practice of the act of procedural communication is fully acceptable in letter of request. The mere mention does not represent violation to public policy or national sovereignty, aiming this way, only at providing knowledge of the action on course and allowing the defense of the interested party. – in the fulfillment of the letters of request, it is this Court responsibility to verify it the requested procedural remedy violates national

There was also a decision on the sense that the Law of arbitration had immediate application after its edition, even for contracts previously executed, driving away the dissenting opinion to deny the appreciation by the Brazilian Judiciary in that event, would imply violation to public policy[1516]. The same way, it was denied the recognition of violation to public policy for the breach of contractual obligation[1517].

On the other hand, the Special Court of the Superior Court of Justice recognized as offensive to public policy the decision pronounced without the regular process[1518].

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sovereignty and public policy, as well as to verify if there is authenticity in the documents and observance of the requirements of resolution n. 9/2005 of this Court. Internal interlocutory appeal denied. Nitriflex S/A Indústria E Comércio versus Transformadora de Petroquímicos Companhia Conservada em Estoque Comum de Capital Variável. Corte Especial. Relator Min. Barros Monteiro. Adjudicated on 13/03/2008.

[1515] BRAZIL. Superior Tribunal de Justiça. Agravo Regimental na Carta Rogatória n. 3198/EU. LETTER OF REQUEST – PROCESS – ACTION OF DEBT FOR GAMBLING INCLURRED ABROAD – EXEQUATUR – POSSIBILITY. It does not violate the Brazilian sovereignty or public policy to grant exequatur to summon someone to defend against action of debt for gambling and requested in a foreign State, where such claims are lawful. Abraham Orenstein versus Trump Tm Mahal Associates. Corte Especial. Relator Min. Humberto Gomes de Barros. Adjudicated on 30/06/2008.

[1516] BRAZIL. Superior Tribunal de Justiça. Sentença Estrangeira Contestada n. 349/SP. FOREIGN JUDGMENT – ARBITRAL JUDGMENT – INTERNATIONAL CONTRACT EXECUTED BEFORE THE ARBITRATION LAW (9.307/96). 1. Contract executed in Japan, between a Brazilian and a Japanese company, indicating the forum of Japan to settle controversies, it is an international contract. 2. Arbitral clause explicitly inserted in the international contract, overcoming the discussion on the distinction between arbitral clause and commitment of arbitral judgment. (precedent: REsp 712.566/RJ). 3. The dispositions of Law 9.307/96 have immediate incidence on the contracts already executed, if the arbitral clause is inserted in them. 4. Arbitral judgment granted. Mitsubishi Electric Corporation versus Evadin Indústrias Amazônia S/A. Corte Especial. Relatora Min. Eliana Calmon. Adjudicated on 21/03/2007.

[1517] BRAZIL. Superior Tribunal de Justiça. Sentença estrangeira contestada n. 802/EU. FOREIGN JUDGMENT. RATIFICATION. NON-EXISTENCE OF VIOLATION TO PUBLIC POLICY AND NATIONAL SOVEREIGNTY AND THE GOOD MORALS. 1 Arbitral judgment which derived from procedure without any formal defect. 2. Answer of the defendant in the sense that it is not obliged to fulfil financing charge because the applicant did not fulfil a certain clause of the contract. Discussion on the rule of exception non adimpleti contracts, in accordance with art. 1092 of the Civil Code of 1916, which was decided in arbitral judgment. Issue that does not have nature of public policy and that does not bind to the concept of national sovereignty. 3. Constitutive power of foreign arbitral judgment for being formally and materially issued in accordance with the principles of our legal system. 4. Ratification granted. Attorney fees fixed in 10% (tem per cent) on the value of the action.. Thales Geosolutions INC versus Fonseca Almeida Representações e Comércio LTDA. Corte Especial. Relator Min. José Delgado. Adjudicated on 17/08/2007.

[1518] BRAZIL Superior Tribunal de Justiça. Sentença Estrangeira contestada n. 879/EU. CIVIL PROCEDURAL. FOREIGN JUDGMENT.RATIFICATION. ABSENCE OF PROCESS. 1.Foreign judgment which convicted the Brazilian insurance company in amount of retrocession, consonant legal transaction infected of invalidity, determined as being executed by an incompetent agent, indicated in consortium of members executed by whom did not have the authority of legal personality of each one of the companies. 2. Allegation which contaminated the clause of election of venue and , the fortiori, the competence of judgment. 3. Irregular process taken to effect before a legal person who did not have the power to receive procedural communication. 4. The ratification of foreign judgment reclaims proof of process valid from the defendant, either in the territory of entry of the judgment of the decision sought to be ratified, or in Brazil, before letter of request, consonant to ratio essendi of art. 217, II, of RISTF. 5. Indeed, its registered in the Supreme Court that: "The process of the person whose domicile is in Brazil is to take place before a letter of request, not prevailing, before the principle decreted to the actual knowledge of the proposed action, notice served abroad. Non-existent the process, the ratification of the judgment is denied. (...)" (SEC 7696/HL, Relator Ministro Marco Aurélio, DJ de 12.11.2004) 6. Precedentes jurisprudenciais do STF: SEC 6684/EU, Relator Ministro Sepúlveda Pertence, DJ de 19.08.2004; SEC 7570/EU, Relatora Ministra Ellen Gracie, DJ de 30.04.2004 e SEC

In another instance, the Third Panel of the Superior Court of Justice recognized fraud to the execution, offensive to public policy, in the act by a foreign entity to transfer abroad all the assets located in Brazil, violating the "efficient development of the function of the court precedents in course"[1519].

In a local venue, the Court of Justice of Paraná made only one statement on the theme. The 15th Civil Chamber of the Court of Justice of Paraná drove away the argument the Code of Consumer Protection was a subject of public policy that would surpass the foreign applicable law to the international contract. It also drove away the possibility of invoking the application of rules of the Code

7459/PT, Relator Ministro Nelson Jobim, DJ de 30.04.2004. 7. In casu, consonant point out by the Republic Attorney General to pages 496/499, " the applicant itself in the initial piece informs that the process of the defendant was made effective through mail of the United States of America, after the C.T. "Corporation" had informed by letter "that it had not been contracted by the defendant to provide this kind of service of legal processes." (page 5). Moreover, the defendant did not even voluntary appear in the prosecuting judgment. Domiciled in Brazilian territory, the defendant should have been processed by a letter of request, and not under the conditions of Anglo-American procedural forms. Thus, there was no process of the Brazilian company, neither did it appear in the foreign court, a reason why there is no way to borrow validity to the adjudicated of default. 8. Furthermore the agreement whose breach was the basis for the conviction, was not executed by a competent signatory, being certain that the applicant did not clarify who had the power, at the time of the execution of the contract, on behalf to the group of Brazilian Insurance Companies, to assume the participation of the defendant in the previously mentioned contract, nor did it bring any proof that would authorize such management, even though it was urged to do it by determination from the quote of the Federal Parquet. 9. Indeed, the eligibility to execute the contract was not supplied by the manager of consortium, therefore, before the transaction, the legal personality and individuality of the companies were healthy, and contaminated the commitment and, fortiori, the elected competence. Precedents of STF: SEC6753 / UK - Reino Unido da Grã-Bretanha e da Irlanda do Norte, Relator Ministro Maurício Corrêa, DJ de 04.10.2002, that is why the action should have been proposed in the venue of the defendant domicile. 10. Hence, being a matter of public policy, knowing the official letter, it can be seen clear nullity, before the absence of motive of the ratified decision, as a violation to art. 216, RISTF and 17 of LICC which says: "The laws, acts and judgment of other countries, as well as any statements of will, will not be effective in Brazil, when violating national sovereignty, public policy and good morals". In this sense the doctrine and the court precedents are unison: (SEC 2521, relator Ministro Antônio Neder). 11. Ratification denied (art. 217, I e II e 216, RISTF c/c 17 da LICC). Universal Marine Insurance Company LTD versus União Novo Hamburgo Seguros S/A. Corte Especial. Relator Min. Luiz Fux. Adjudicated on 02/08/2006.

[1519] BRAZIL. Superior Tribunal de Justiça. Recurso Especial n. 1063768/SP. Civil Process. Judicial execution proposed, in Brazil, before foreign legal entity. Alienation, on the course of the process, by the defendant, of all its property located in Brazil. Recognition, by Court a quo, of fraud to the execution. Allegation, by the foreign company, that it did not become insolvent because it still has a great number of properties in its country of origin. Irrelevance – Consonant to the general rule of international Law, each State has to maintain jurisdiction over the actions in which its decisions may be made effective. Only foreign authority will have authority to execute the property located abroad, and the same way, only the Brazilian authorities can do it with regards to the properties located in Brazil. – The fraud to the execution is an institute of procedural Law. Its occurrence implies violation of the executive procedural function, as so the interests affected are said as the ones of public policy. It is about an attempt against the efficient development of the jurisdictional function on course. The institute that restrains the fraud to the execution defends not only the creditor, but the procedure itself. – The existence of property in the foreign entity in its country of origin is a theme that cannot be looked into by the Brazilian judiciary authority. If there is property in Switzerland, it is through a judicial measure to be adopted by the applicate creditor in that country, that will have the assets bound to the debt payment. The execution in Brazil aims at binding, to the payment, the national property of the foreign entity. If this property that has been transferred, after the filing of the action, taking away from the Brazilian authority the possibility to grant effectiveness to its own adjudicated, there is insolence and there is fraud to the execution. Appeal denied. EFG Bank European Financial Group versus Peixoto e Cury Advogados S/C Terceira Turma. Relatora Min. Nancy Andrighi. Adjudicated on 10/03/2009.

of Consumer Protection at any time, emphasizing that it would violate the procedural public policy (due to a legal process, contradictory and reasonable duration of the procedure)[1520].

[1520] Court precedent research carried out taking into consideration the period between 1/01/2000 and 1/01/2010 and the entries international public policy. PARANA. Tribunal de Justiça. Apelação Cível n. 328.919-8. PRIVATE INTERNATIONAL LAW. CONTRACT OF INTERNATIONAL FINANACING. CIVIL APPEAL. MONITORY ACTION. BANKING CONTRACT. FINANCING OF INTERNATIONAL SALE. EXIMBANK - EXPORT IMPORT BANK OF UNITED STATES. AGENCY OF NORTH-AMERICAN GOVERNMENT. SUB-ROGATION. PRINCIPLE "LOCUS REGIT ACTUM". APPLICABLE LAW TO THE CONTRACT. OBLIGATION ESTABLISHED AND WITH PRESCRIPTION OF FULFILLMENT ABROAD. CONSUMER PROTECTION CODE. NON-APPLICABILITY. CONTRACT GOVERNED BY FOREIGN LEGISLATION. DENIAL OF AN OPPORTUNITY TO BE HEARD; FILLING IN THE INSTRUCTION. NON-OCCURRENCE. FACT IN PROBATION IRRELEVANT TO THE SOLUTION OF THE CAUSE. PROCEDURAL PUBLIC POLICY. PROCEDURAL PUBLIC POLICY. PROCEDURAL. PRECLUDING FACT OF THE AUTHOR RIGHT. ALLEGATION AFTER CLOSING OF PLEADING STAGE. CONSUMER RIGHT. ISSUE OF PUBLIC POLICY. NON-INTEREST. PRECLUSION. INTERVENTION BY PROSECUTION OFFICE. NOT NECESSARY. PRIVATE LEGAL RELATIONSHIP. AVAILABLE INTERESTS. ABSENCE OF LEGAL PRESCRIPTION.COMPOUND INTERESTS. CONTRACT GOVERNED BY OUTSIDER LAW. BURDEN TO ALLEGE VIOLATION TO THE RIGHT OF GOVERN. PRESUMPTION OF STANDING. PRINCIPLE "LOCUS REGIT ACTUM". INTERNATIONAL CONTRACTS OF FINANCING. INTERESTS. AGREEMENT ESTABLISHED IN CONTRACT. BASIC TAXATION FOR INTER-BANKING LOANS. LIBOR - TAXATION IN THE ENGLISH MARKET. CONSTITUTIONAL LIMITATION OF INTERESTS. ART. 192, §3 OF FEDERAL CONSTITUTION. NOT SELF-APPLICABLE. PRECEDENT N. 648 OF THE SUPREME FEDERAL COURT. CONTRACT IN FOREIGN CURRENCY. PRESCRIPTION OF PAYMENT ABROAD. CONVERSATION ON THE PAYMENT DATE. Appeal 1 denied. Appeal 2 granted. 1. Law applicable to the contract - Principle of "locus regit actum". In the form of the filed "locus regit actum", established the obligation abroad, and decided that its fulfillment will be in that venue, it is the local Law that governs the legal relationship. In this instance, it is symptomatic that there would not even exist the perspective of entry of capital loan in Brazil, as the amounts would be immediately repassed by the borrower bank to the exporting company, both North-American. This contract is only discussed in Brazilian venue to make its judicial charge viable, since the debtor company does not have property in North-American territory, to repay the debt. 2. Consumer Protection Code. Although in the action there is no demonstration of the Law that governed the contract, it is more than evident that the govern by the North-American discipline excludes the incidence of the Brazilian legislation, even the Consumer Protection Code. To admit to surprise the creditor, that executed the contract in its domicile, with protective legislation in force in the country of the debtor, would represent an absolute breach of security in the international commercial relations. 3. Denial of an opportunity to be heard. To justify the absence of payment, the appellants intend to invoke the "exception non adimpleti contractus". The fact is that the alleged "impeding fact" will never be opposing the North-American bank, which fulfilled all the duties it was obliged to, that is, granted the amount to the borrower at the time and way agreed. Even because of the universal principle of relativity of the contracts, the occasional defect of the acquired product is opposing only the exporter, once the bank is a third person in relation to the international sales contract. 4. Allegation of impeding fact – untimeliness. Even if the CPC was applicable, there would be no legitimate justification to surpass public policy of consumer protection over the procedural public policy itself, despising constitutional guarantees of the applicant, like the ones of the due process of law, the contradictory and the reasonable duration of the process (respectively, art.5, items LIV, LV and LXXVIII, of the Federal constitution). The procedural relationship develops full right from the defendant reply, being certain that, the absence of mention in the defense on the impeding factor of the applicant right, excludes it from the scope of appreciation in that process. Thus, the issue will not be part of the issue in the action, being absolutely not interested in the case that be risen after the closing of the filing phase. 5. Prosecution Office. Intervention. The case in analysis does not fit in any of the constitutional or legal hypotheses where the participation of a prosecution agency. 6. Compound interest. Non-applicable the legal dispositions on the limitation and compound interest, as the Law of govern is foreign. The applicants did not perform the burden to allege occasional violation to the outsider legislation, the reason for which, due to the principle of locus regit actum, the legal relationship is presumably legitimate. 7. 8. Constitutional limitation of interests. The court precedents are peaceful on the non self-application of the already abrogated §3 of article 192 of the Federal Constitution. 9. Currency Conversion. The obligation was executed in the United States of America, with prescription of complete fulfillment in that same venue. Nothing more coherent, so, that the bank granted a loan in North-American dollars, with prescription of payment in the same currency, receives in exactly the same way as agreed. If it was different, there would be the risk to encumber the creditor by receiving a lower amount from the one effectively owed, frustrating the expectations when agreed with the negotiating relationship. Martiaço Indústria e Comércio de Artefatos

On that account, there seems to be a certain tendency in the court precedents appreciated to associate public policy to procedural guarantees of the taken legal process and the wide defense, exclusively. In short, the defense of constitutional guarantees happens at a procedural level.

In doctrinal terms, on the other hand, "public policy" is usually understood as a limit to the application of foreign Law by national judges[1521]. Anyway, the difficulty to stake content is persistent. This perception occurs through the identification of a tendency in the creation of generical concepts, mostly devoid of terminological accuracy, if not greatly comprehensive. In this sense, if some of the concepts listed by so many authors are taken literally, it would be possible to justify almost any thesis as violating public policy.

While SILVA approximates public policy to the notion of legislative policy[1522], RIBEIRO refers to the "essential legal-ethic principles that control the social life"[1523] of a State; DINIZ mentions the "essential rules to national companionship"[1524] and the aim to exclude "the application of unfair or immoral foreign Law"[1525]. CALIXTO assembles national sovereignty to the same concept, as well as good morals, economic order, and administrative order[1526]. DEL'OLMO ARAÚJO considers a violation to public policy the "damage to the State for contradicting ethic, legal or political principles"[1527]. This way, even the international transfer of technology have already been the object of constraints to protect public policy[1528].

PEREIRA, in turn, considers that if the Brazilian conflict legislation had adopted more flexible rules of connection, allowing the own ratification of

Metálicos Ltda e outros versus Export Import Bank of The United States – EXIMBANK. 15ª Câmara Cível. Relator Desembargador Jurandyr Souza Junior. Adjudicated on 03/05/2006.

[1521] There is a foreign doctrine that sees public policy as a discriminatory measure on the application of outsider Law, like, for example, BALESTRA citing the example of international loans. BALESTRA, Ricardo. R. El Orden Publico en la Contratación Internacional. In: Revista de Direito Mercantil, Industrial, Econômico e Financeiro, n. 55. São Paulo: RT, jul./set. 1984, p. 130.

[1522] SILVA, Agustinho Fernandes Dias da. Introdução ao Direito Internacional Privado. Rio de Janeiro: Freitas Bastos, 1975, p. 132.

[1523] RIBEIRO, Manuel Almeida. Introdução ao Direito Internacional Privado. Coimbra: Almedina, 2006, p. 59.

[1524] DINIZ, Maria Helena. Lei de Introdução..., p. 457.

[1525] Ibidem, p. 460.

[1526] CALIXTO, Negi. Ordem pública: exceção à eficácia do direito estrangeiro. Curitiba: UFPR, 1987, p. 72.

[1527] DEL´OLMO, Florisbal de Souza; ARAÚJO, Luis Ivani de Amorim. Op. cit., p. 170.

[1528] PRADO, Maurício Curvelo de Almeida. Contrato internacional de transferência de tecnologia: patente e know-how. Porto Alegre: Livraria do Advogado, 1997, p. 64-71.

possible undesirable results, there would be no reason why to make use of the notion of public policy[1529].

BATIFOLL and LAGARDE understand that, even if there are difficulties in its conceptualization, the system made viable by the notion of public policy is a need, as the national legislator could not grant a "blank check" to the group of the foreign legislators[1530]. In this sense, the referred system would allow the control over what would be acceptable or not from the point of view of the national legal system, replacing the unacceptable act by the legislation of the receptor country, carrying out necessary adaptations[1531], or, in other words, it would allow to "equilibrar el conflicto entre la cohesión interna del sistema del juez y la armonía International"[1532].

That is why it seems imperative that such analysis, in the Brazilian instance, is done from two premises: the constitutionality[1533] of the values involved and the respect to the human rights[1534]. In addition, any analysis excessively generalized does not seem appropriate, but a reflection of those same values established as essential by each entity individually considered. Perhaps an only exception may be known to this general rule: the full respect to the human rights, considered essential to define the own human condition.

The great majority of the authors stress that the analysis of public policy must be current[1535], that is, at the moment when the occasional conflict between the legislation/foreign act and the national ordination take place[1536]. Moreover, it is a relative and unstable concept[1537].

From the adjudicating and doctrinal positioning it is possible, however, to draw the conclusion that public policy comprises such a fundamental principle of

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[1529] PEREIRA, Izabel de Albuquerque. A Ordem pública nas arbitragens comerciais internacionais. In: TIBURCIO, Carmen; BARROSO, Luis Roberto. (Coords.). Op. cit., p. 508.
[1530] BATIFFOL, Henri; LAGARDE, Paul. Op. cit., p. 410.
[1531] Ibidem, p. 410; 420-422.
[1532] FERNÁNDEZ ARROYO, Diego P. (Coord.). Derecho internacional privado..., p. 296.
[1533] ROPPO, Enzo. Op. cit., p. 180-181; BASSO, Maristela. Curso..., p. 269; STRENGER, Irineu. Contratos..., p. 144; SARACHO CORNET, Teresita; DREYZIN DE KLOR, Adriana. Op. cit., p. 23-25.
[1534] STRENGER, Irineu. Contratos..., p. 142.
[1535] ANDRADE, Agenor Pereira de. Manual de Direito Internacional Privado. 2. ed. São Paulo: Sugestões Literárias, 1978, p. 143; RIBEIRO, Manuel Almeida. Op. cit., p. 59; CERDEIRA, Juan José. La jerarquía de las Fuentes y el orden público en el nuevo derecho internacional privado argentino. In: MARQUES, Claudia Lima; ARAUJO, Nadia de. (Orgs). Op. cit., p. 824-825; DOLINGER, Jacob. Direito internacional privado: parte geral..., p. 396.
[1536] BATIFFOL, Henri; LAGARDE, Paul. Op. cit., p. 412.
[1537] DOLINGER, Jacob. Direito internacional privado: parte geral..., p. 396.

the national legal system that it cannot be driven away by the will of the parties, or by a foreign act[1538].

May be up to a certain point the explanation to this phenomenon seems to be in the way the expression "public policy" is made positive in the most varied national normative instruments – art. 17 of the Law of Introduction of the Rules of the Brazilian Law[1539], for example – or international ones – art. 5 of the Inter-American Convention of Montevideo of 1979 on the general rules of Private International Law (Decree n.1979/1996)[1540].

Furthermore, in the Brazilian instance, the recent constitutional amendment (Constitutional Amendment n. 45) transferred the competence to ratify foreign judgments to the Superior Court of Justice. Because of that, as it has been seen, the most recent positioning on the theme has been granted by that Court. It is noticed, then, that in part there is typical difficulty derived from the legal adequacy (as the lack of a procedure, for example), the editing of great many new normative instruments, not always known by the legal operator.

It can still been mentioned as an example, the resolution n. 9/2005 of the Brazilian Supreme Court of Justice, edited to regulate the confirmatory procedure of foreign judgments which repeat the limitation of effects to foreign judgments that violate the national public policy (art. 6). Internationally speaking, but in an Inter-American scope, the convention of Montevideo of 1979 on arbitration had already had a similar way (Decree n. 2411/1997, art. 2, "h")[1541].

With regards to arbitral matters, even though the Geneva Protocol of 1923 (Decree n. 21187/1932) did not approach the theme, the New York Convention (Decree n.4311/2002) provides for the possibility to refuse the ratification of the foreign arbitral judgment under the justification of violation to

[1538] SOARES, Guido Fernando Silva Soares. A ordem pública..., p. 122.

[1539] "The laws, acts and judgments of another country, as well as any statements of will, will not be effective in Brazil, when violating national sovereignty, public policy and the good morals". Almost identical writing to the one of art 17 of Law n 3.071/1916 "The laws, acts, judgment of another country as well as the private conventions and dispositions, will not be effective violating national sovereignty, public policy and the good morals".

[1540] BRAZIL. Decree n. 1.979 of 9 August 1996 which enacts the Inter-American Convention on General Rules of Private International Law, concluded in Montevideo, Uruguay, on 8 May 1979. Federal Register of 12 August 1996.

[1541] BRAZIL. Decree n. 2.411 of 2 December 1997 which enacts the Inter-American Convention on Extra-territorial Efficacy of Judgment and Foreign Arbitral Reports concluded in Montevideo on 8 May 1979. Federal Register of 3 December 1997.

national public policy (art. v, 2, "b")[1542]. The same text is repeated by the Panama Convention of 1975 (Decree n. 1902/1996, art. 5, 2, "b")[1543] and by the Las Leñas Protocol, in the scope of MERCOSUL (Decree n. 2067/1996, art. 20, "f")[1544]. The Buenos Aires agreement, also in the scope of MERCOSUL, only refers to the Conventions of Panama, Montevideo and Las Leñas (art. 23 of Decree n. 4719 / 2003)[1545], or even the agreement celebrated between the countries of the MERCOSUL and Chile and Bolivia on international commercial arbitration (art. 23)[1546].

As for support is concerned, the Convention on payment of support abroad does not mention public policy as a limitation factor of the performance of the letter of request for the payment of support, mentioning only the national security and sovereignty (Decree n.56826 / 1965, art. VII, 2). The same way are the dispositions of the Convention of 1970 on the acquisition of evidence abroad in Civil or Commercial Subject (art. 12)[1547].

On the other hand, the Inter-American Convention CIDIP IV of Montevideo, 1989, established the "public policy" formula as limitation the execution of foreign judgments in civil and commercial subject[1548].

Even the Inter-American Convention of Mexico 1994 (CIDIP V) admits the possibility that the law of venue does not apply the Law appointed by the

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[1542] BRAZIL. Decree n. 4.311 of 23 July 2002 which enacts the Convention on the Recognition and Performance of Foreign Arbitral Judgment. Federal Register of 24 July 2002.

[1543] BRAZIL. Decree n. 1.902 of 09 May 1996 which enacts the Inter-American Convention on International Commercial Arbitration, of 30 January 1975. Federal Register of 10 May 1996.

[1544] BRAZIL. Decree n. 2.067 of 12 November 1996 which enacts the protocol of co-operation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrative matters. Federal Register of 13 November 1996.

[1545] BRAZIL. Decree n. 4.719 of 4 June 2003 which enacts the Agreement on International Commercial Arbitration of Mercosul. Federal Register of 5 June 2003.

[1546] BRAZIL. Legislative Decree n. 483 of 28 November 2001 which approves the text of the Agreement on International Commercial Arbitration between MERCOSUL, the Republic of Bolivia and the Republic of the Chile, concluded is Buenos Aires, on 23 July 1998. Federal Register of 03 December 2001.

[1547] HCCH. Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. Available on: <http://www.hcch.net/upload/text20_pt.pdf>. Brazil has recently approved the Legislative Decree n. 137/2013 that initiates the process of ratification of this Convention.

[1548] BRAZIL. Decree n. 1.560 of 18 July 1995 which enacts the Agreement of Judiciary Co-operation in Civil, Commercial, Labor and Administrative Matters, between the Government of the Federative Republic of Brazil and the Government of the Republic of Argentina, of 20 August 1991. Federal Register of 19 July 1995; BRAZIL. Decree n. 1.850 of 10 April 1996 with enacts the Agreement of Judiciary Co-operation in Civil, Commercial, Labor and Administrative Matters, between the Government of the Federative Republic of Brazil and the Government of the Eastern Republic of Uruguay, of 28 December 1992. Federal Register of 11 April 1996; BRAZIL. Decree n. 3.598 of 12 September 2000 which enacts the Agreement of Co-operation in Civil Matters between de Government of the Federative Republic of Brazil and the government of the French Republic, executed in Paris, on 28 May 1996. Federal Register of 13 September 2000; BRAZIL. Decree n. 6.891 of 2 July 2009 which enacts the Agreement of Co-operation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrative Matters, between the Member-States of Mercosul, the Republic of Bolivia and the Republic of Chile. Federal Register of 03 July 2009.

Convention on the grounds of violation to public policy (art.18)[1549], although its text has not been ratified by any of the members of the MERCOSUL.

Also with regards to the execution of provisional remedies, in the scope of MERCOSUL, the Protocol of Ouro Preto allows the requested State to refuse its execution when offensive to public policy (art. 17 of Decree n. 2626 / 1998). As for jurisdiction in contracts of transportation of cargo, the Agreement of Buenos Aires establishes the jurisdiction subscribed there as being of public policy (art. 4, "a")[1550]. This is the same tendency with regards to extraction[1551].

On the other hand, the Inter-American Convention on international restoration of minor approaches the issue from another point of view: the human rights and the children rights (art. 25 of Decree n. 1212)[1552], while the Protocol of São Salvador mentions, besides public policy, public moral and health and other rights and freedoms as limiters of the rights to strike (art. 8-2 of Decree n. 3321/1999)[1553].

As for the Vienna Convention of 1969, recently merged to the Brazilian Law, it approaches the issue from the perspective of universal consensus (art. 53 of Decree n. 7030 / 2009), whereas the Bustamante Code[1554] explicitly subscribed that those rules that prohibited the establishment of clauses contrary to public order would be of international public policy (art. 175).

Other Latin-American countries follow this same tendency of limitation of application of the foreign legislation which violates its international public policy. So, for example, Peru assures the same efficacy of the national Law, provided that its international public policy is respected (arts. 2049 and 2050 of

[1549] ORGANIZATION OF THE AMERICAN STATES. Inter-American convention.....

[1550] BRAZIL. Legislative Decree n. 208 of 20 May 2004 which approves the text of the Agreement on Jurisdiction in Issues of Contract of Cargo International Transportation between the member States of Mercosul, executed in Buenos Aires, on 5 July 2002. Federal Register of 21 May 2004.

[1551] BRAZIL. Decree n. 5867 of 3 August 2006 which enacts the Agreement of Extradition between the Member States of Mercosul and the Federative Republic of Bolivia and the Republic of Chile, of 10 December 1998. Federal Register of 04 August 2006.

[1552] "The restoration of minor approached according to this Convention may be denied when it clearly violates the basic principles of the already mentioned State, established in instruments of universal or regional character on human rights and children rights".

[1553] BRAZIL. Decree n. 3.321 of 3 December 1999 which enacts the Additional Protocol to the American Convention on Human Rights in Economic, Social and Cultural Matters, "Protocol of São Salvador", concluded on 17 November 1988, in San Salvador, El Salvador. Federal Register of 31 December 1999.

[1554] BRAZIL. Decree n. 18.871 of 13 August 1929. Which enacts the Havana Convention of International Private Law. Available on: <http://ccji.pgr.mpf.gov. br/ccji/legislacao/legislacaodocs/ bustamante.pdf>.

the Civil Code)[1555]; Uruguay mentions the respect to the essential principles of legal order in which its "legal individuality" is laid (art. 2404 of the Civil Code)[1556], and the Mexican legislation, the respect to the principles and essential institutions (art. 15)[1557].

The Argentinean legislation, in turn, prescribes that the foreign legislation will not have extra-territorial effects judgment will not be recognized, or will information to the foreign governmental authorities be offered, if their purpose is to stop free trade, free circulation of assets, services and people, and they intend to create expropriation of property, economic freeze, limitation of investments, circulation of assets, services, people or capital with the aim of changing the government or to affect self-determination[1558].

It can be mentioned an Argentinean precedent of the Supreme Court of Justice in which it is explicitly declared the limitation of private autonomy by imperatives of public policy and imperative international Law[1559].

The use of the expression "Public Policy" in a wide scope cannot be explained, exclusively, by an alleged Latin-American tradition, either. That is because the European Community Regulation on the judicial competence also uses it (art. 34.1) as a limit to the recognition of decision entered by a Member State, even if rules on competency are excluded (art. 35.3)[1560]. One example is the precedent of the Court of Justice of the European Communities which admitted public policy to sanction the violation to competition[1561].

The same way there can be cited: the Portuguese Civil Code mentions the violation to the fundamental principles of public policy as a limit to apply the

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[1555] PERU. Legislative Decree n. 295 of 24 july 1984 which enacts the Civil Code, available on: <http://www.abogadoperu.com/codigo-civil-libro-x-derecho-internacional-privado-titulo- 29-abogado-legal.php>.

[1556] URUGUAY. Civil Code of the Eastern Republic of Uruguay. Available on: <http://www.parlamento.gub.uy/codigos/codigocivil/2002/L4p2tfa.htm>.

[1557] MEXICO. Civil Code for the Federal District on common matters and to all the Republic in Federal matters of 1928. Available on: <http://www.diputados.gob.mx/LeyesBiblio/pdf/2.pdf>.

[1558] ARGENTINA. Law n. 24.871 of 5 September 1997. In: Código Civil de la República Argentina: Leyes complementarias, 32. ed. índice alfabético y temático. Buenos Aires: AZ, 2007, p. 955-956.

[1559] ARGENTINA. Corte Suprema de Justicia de la Nación. LA LEY1998-F,16. AUTONOMIA DE LA VOLUNTAD. CONTRATO INTERNACIONAL. TRANSPORTE DE MERCADERIA. TRANSPORTE MARITIMO. La Buenos Aires Cía. de seguros versus Capitán y/o Arm. y/o Prop. Buque Gladiator. Adjudicated on 25 August 1998.

[1560] EUROPE. Council. Regulation n. 44/2001 related to the judiciary competence to the recognition and performance of decisions in civil and commercial matters of 22 December 2000. Available on: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0044:20081204:PT:PDF.

[1561] BONOMI, Andrea. Globalização e Direito internacional Privado. In: POSENATO, Naiara. (Org.). Contratos internacionais: tendências e perspectivas. Ijuí: Unijui, 2006, p. 184.

foreign law (art. 22)[1562]; the same guidance is followed by the Spanish Civil codification (art. 12.2)[1563], by the Italian legislation (art. 16)[1564] and the Japanese one (art. 2 and 33)[1565].

For the adequate understanding of public policy, it seems indispensable that the constitutionalization is asserted to its content[1566]: It is important to point out that it is not about a normative reading of the system, replacing the Code or the law by the Constitution, but a reading whose premise is that certain values, established by the constitutional text, are essential for the Brazilian society, and so, they are compulsory in relation to application and binding effects[1567].

Therefore, when the analysis of possibility or not of concession of effects of a foreign legal act (judgment, arbitral report, contract, etc.) the judge would be in charge of the positive analysis and also the constitutionalized one[1568]. TIBURCIO and BARROSO, seeking opinion on ratification of judgment of expropriation of brand, draw to a similar conclusion when identifying public policy as a set of dominant values of a certain entity, normally made constitutionally positive or in the legislation in force (like the essential grounds of the republic)[1569]. Besides that, the authors emphasize that it may be understood in a material sense (e.g., protection to the perfect legal act, administrative good faith, right of property, equality of treatment) and procedural one (due to a legal process)[1570].

On the other hand, REICHSTEINER has an interesting contribution in the sense that, though public policy is a rule of DIPRI, and so, of the *Lex fori*, when

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[1562] PORTUGAL. Decree-Law n. 47.344 of 25 November 1966. Available on: <http://www.stj.pt/nsrepo/geral/cptlp/Portugal/CodigoCivil.pdf>.
[1563] SPAIN. Royal Decree of 24 July 1889. In: Código Civil y legislación especial. 2. ed. Madrid: Colex, 2003, p. 30.
[1564] ITALY. Law n. 218 of 31 May 1995 which reforms the Italian system of private international Law. In: Codice Civile e leggi complementari. 23. ed. Napoli: Simone, 2003, p. 1012.
[1565] JAPAN. Law n. 10 de 1898 which governs the application of law. Available on: <http://www.hawaii.edu/aplpj/articles/APLPJ_03.1_okuda.pdf>.
[1566] BASSO, Maristela. Curso...; p.23.
[1567] The relationship between the concept of public policy and fundamental rights, however, is not yet clear in the European court precedents. LANGE, Roel de. The european public policy, constitutional principles and fundamental rights. In: Erasmus Law Review, v. 1, n. 1, 2007, p. 03-24. The American Court precedents also deals with notions of morality and justice, as in the instance. Parsons & Whittemore Overseas Co. Inc. versus Societé Generale de l'Industrie du papier (RAKTA) which appreciated the application of the New York convention of 1958 (GONÇALVES, Eduardo Damião. Article V (item 2): comments to article V(2)(a)(b) of the New York Convention. In WALD, Arnoldo; LEMES, Selma Ferreira (Coord.). Arbitragem comercial internacional: a Convenção de Nova Iorque e o Direito Brasileiro. São Paulo: Saraiva, 2011, p. 290).
[1568] VARGAS, Alexis Galiás de Souza. Direito Internacional privado e Constituição. In: Revista de Direito Constitucional e Internacional, n. 35, abr./jun. 2001, p. 37-38.
[1569] TIBURCIO, Carmen. Op. cit., p. 379, 382-383.
[1570] Ibidem, p. 379, 385-407.

applying it, the judge should take into consideration "not only the basic principles of internal legal order, but also those of the international Law, consubstantiated in international treaties, in the international customary Law, in general principles of Law and other supranational sources which legally bind a State"[1571]. Such conclusion allows PEREIRA to state that the international Public Policy would also be violated when a judicial or arbitral decision that created obstacles to international trade were recognized[1572].

Thus, it is about recognizing the possibility of international contractual customs to be accepted by the national legal system. As a matter of fact, this is the tendency already ascribed to the arbitrators (see, for example, art. 2, § of the law of Brazilian arbitration) which would also be limited by public policy[1573]. Another example is the Venezuelan Law of private international Law[1574] which establishes the customs, usages and international practices of general acceptance to fulfill the need of carrying out the demanding of justice of the concrete case (art. 31). In addition, art. 30 makes reference to the principles of international trade recognized by international organizations.

Some authors identify in this device, for example, the indirect reference to the PICC[1575], while others justify the existence of protective contractual principles covered by the Lex Mercatoria[1576].

[1571] RECHSTEINER, Beat Walter. Op. cit., p. 158.

[1572] PEREIRA, Izabel de Albuquerque. Op. cit., p. 526-529.

[1573] "There are, however, at least two reasons, equally valid, compelling the arbitrators to meticulously observe public policy and so, the interests of the State and collectivity: (1) It is not true that the arbitration is exclusively related to private interests of the parties involved in a concrete litigation. The arbitration as an institution, especially the international commercial arbitration, is of interest of all the trade communities, national and international, being its reliability and compatibility with the coercive State ordinations essential to the certainty and stability of the international commercial and economic relations. (2) The attitude to ignore imperative rules and the principles of public policy applicable to the international relations would imply on the risk of denial of recognition and performance of the arbitral reports by the State jurisdictions, making the arbitration an exercise of dilettantism, without any practical efficacy" (ALMEIDA, Ricardo Ramalho. A Exceção de Ofensa à Ordem Pública na Homologação de Sentença Arbitral Estrangeira. In ALMEIDA, Ricardo Ramalho (Coord.). Arbitragem interna e internacional: questões de doutrina e da prática. Rio de Janeiro: Renovar, 2003, p. 164). In the same sense of the duty of the arbitrator to apply imperative rules of public policy: SUESCÚN MELO, Jorge. De las facultades de los árbitros para interpretar y aplicar normas de orden público. In SILVA ROMERO, Eduardo; MANTILLA ESPINOSA, Fabricio (Coord.). El contrato de Arbitraje. Rosario: Legis, 2008, p. 280-281; COSTA, José Augusto Fontoura; PIMENTA, Rafaela Lacôrte Vitale. Ordem pública na lei n. 9.307/96. In: CASELLA, Paulo Borba (Coord.). Arbitragem: lei brasileira e praxe internacional, 2. Ed., São Paulo: LTr, 1999, p.386-387; SANTOS, Manoel J. Pereira dos. Ordem pública e arbitragem. In: CASELLA, Paulo Borba (Coord.). Arbitragem: lei brasileira e praxe internacional, 2. Ed., São Paulo: LTr, 1999, p. 398-400 and, in the sense that the fulfillment of the rules of public policy reflect the fulfillment of the principle of effectiveness of arbitration and arbitral report, GRIGERA NAÓN, Horacio A. Orden público y arbitraje. In: PUCCI, Adriana Noemi (Coord.). Arbitragem comercial internacional. São Paulo: LTr, 1998, p. 92-96.

[1574] VENEZUELA. Ley de Derecho Internacional Privado. 1998. Available on: <http://www.tsj.gov.ve/legislacion/ldip.html>.

[1575] AGUIRRE ANDRADE, Alix; MANASÍA FERNÁNDEZ, Nelly. Op. cit., p. 70-71.

LALIVE mentions the existence of an international public policy, greatly concurrent with the classical international public policy, but which would be applied, in a dynamic way, to international arbitration, with the task of integrating the bases and the values of the "international entity", and the interests of the countries in development ("new international economic order")[1577]. Following this line of thought, PINHEIRO states that once the contracting parties opt for the incidence of rules derived from equity, general principles of Law or the *lex mercatoria*, the trier should seek the transnational public policy for the analysis of the limitations and incidence of imperative rules[1578].

The same way thinks GOLDSTAIJN[1579], referring to public policy, whereas KASSIS denies its existence[1580]. That is because, as LANDO explains, the international arbitrator would not apply domestic public policy to a certain State, but this would not mean to allege that they would not need to be effective as mandatory rules, as the International Public Policy and the imperative rules of the State with a higher connection with the case[1581].

Inside the system of the World Trade Organization, for examples, each country is allowed to adopt the necessary measures, by means of restriction to free trade, to protect is Public policy. It should be pointed out, however, that there is a certain control on its content, as, besides lawful, the measures cannot be discriminatory, protectionist, and must be necessary, on the substance of art. XX of GATT 1994[1582]. In other words, there is need of justification for the adoption of the restrictive measure.

[1576] AMISSAH, Ralph. Op. cit., p. 20-23.

[1577] LALIVE, Pierre. Ordre Public Transnational (ou Réellement International) et Arbitrage International. In: Revue d´Arbitrage. 1986, p. 368-371.

[1578] PINHEIRO, Luís de Lima. Direito Comercial..., p. 221.

[1579] GOLDSTAIJN, Aleksandar. The New Law Merchant Reconsidered. In: Festschrift Schmitthoff, Frankfurt, 1973, p. 171-185. Available on: <http://www.trans-lex.org/112500>.

[1580] KASSIS, Antoine. Théorie générale..., passim.

[1581] LANDO, Ole. The Law Applicable to the Merits of the Dispute. In: SARCEVIC, Petar. (Ed.). Essays on International Commercial Arbitration. London: Graham & Trotman, 1991, p. 157-159.

[1582] Article XX. General Exceptions. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (...); (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices; (e) relating to the products of prison labor; (f) imposed for the protection of national treasures of artistic, historic or archaeological value; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or

This device led to a series of new discussion on economic international Law on the content of public policy, since the hypotheses prescribed in the previously mentioned article start from public morality, the protection of people's health and life, animals and vegetal, and go to respect to consumers, intellectual property and legislation.

According to CARREAU and JUILLARD the general and cumulative criteria to identify the adequacy of this measures are: lawfulness of its object; absence of arbitrary or non-justified discrimination and disguised restriction to the trade; need of measures are: lawfulness of its object; absence of arbitrary or non-justified discrimination and disguised restriction to the trade; need of measure, either because there are no others, or because they are imposed by the legislation[1583].

Having these considerations as a starting point, the "court precedents" themselves of the WTO could be analyzed. Some well-known instances are the "Gasoline"[1584], "tires"[1585], "Shrimps"[1586] and "Tuna"[1587] in which environmental

consumption; (...)" (WTO. General Agreement on Tariffs and Trade 1994. Available on: <http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf>.

[1583] CARREAU, Dominique; JUILLARD, Patrick. Op. cit., p. 276.

[1584] It was about an instance when the American Clean Air Act was questioned; it intended to impose control of the atmospheric pollution with basis on the flue gases of gasoline. The appeal Organ understood that the American legislation, when establishing criteria for the classification of imported gasoline, imposed unjustifiable differentiated treatment. Thus, even though the measure was considered in accordance with article XXg of the GATT, it was recognized that there had been disguised discrimination and that it would not be necessary, as other measures were viable . Cs. OMC. Órgão de Apelação. DS 2. Venezuela v. EUA. Adjudicated on 29 April 1996. Available on: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm>. KANAS points out that in this event, as previously mentioned, the Appeal Agency, found support in the Vienna Convention of 1960 as a customary Law for the interpretation of international Law. KANAS, Vera Sterman. EUA – padrões para gasolina reformulada e convencional. In: LIMA, Maria Lúcia L. M. Padua; ROSENBERG, Bárbara. (Coords.). O Brasil e o contencioso na OMC. São Paulo: Saraiva, 2009. t. 1, p. 421-455.

[1585] It was about an instance in which the Brazilian prohibition of import of remanufactured tires was questioned. The Appeal Court considered the measure justifiable in the terms of Article XXb of the GATT 1994, although it understood that the measures would represent improper restriction to the (OMC. Órgão de Apelação DS 332. EC versus Brasil. Adjudicated on 03 December 2007. Available on: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm>.

[1586] It is about an instance in which it was questioned the North-American measures to import shrimps and products derived from them which had been fished without the precautions to impede the capture of sea turtles. The Appeal Agency considered that the measure was justifiable in the terms of article XX of the GATT 1994, though the way they had been implemented would represent improper restriction to the commerce. India, Malásia, Paquistão e Tailândia versus EUA. DS 58. Adjudicated on 12 October 1998. Available on: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>.

[1587] It is about an instance in which it is questioned some restrictive North-American measures to import tuna and products derived from it which were not certified as "Dolphin-Safe". The prediction of the Trial of this event is June 2011. WTO. Painel arbitral. DS 381. México versus EUA. Sub judice. Available on: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm>.

arguments were employed as a disguised restriction to the trade[1588]. On the other hand, on the "Amianthus"[1589] instance, the restriction to the trade was accepted as a necessary measure to the protection of the environment and the consumers. In this aspect, for example, even though the environmental interests have been taken into consideration by the Agency of appeal of the WTO, they should not be interpreted in a narrow way so as to allow commercial distortions[1590].

It can be concluded, so, that the content of what is considered, contemporaneously, as public policy, was reassessed so that it can be considered the existence of a real international public policy formed by "those devices of the *lex mercatoria* which limit the autonomy of will (e.g., the prohibition of agents of good faith in international trade, such as slave trade, drug trade, international pimping, etc.)"[1591]. This definition is relevant, as several international treaties establish the competence for judgment or indicate the applicable material Law with basis on the classification between internal and international contracts. On the other hand, even if they refer mainly to financial contracts and investments (thus executed between private parties and the State), it can be identified the growing internationalization of contracts, and as a consequence, a distinct legal regime. In this sense, public policy would not be domestic anymore to be given globalized outlines[1592].

On the other hand, and beyond that, public policy

> does not exhaust in a negative limit, but is also a positive commitment of the State to the execution of the fundamental principles (democracy, effective

[1588] "Of course, measures of this kind, though officially described as being intended to protect the environment, are not entirely uninfluenced by commercial concerns". (STERN, Brigitte; RUIZ FABRI, Hélène. (Dir.). Op. cit., p. 69).

[1589] It was an instance involving the prohibition, by France, the import and trade of amianthus and products which contained this substance. The appeal Agency of the System of Solution of Controversies understood that there had not been discriminatory or disguised protectionist, concluding that it was justifiable (protection to health) as (OMC. Órgão de Apelação. DS 135. Canada versus EC. Adjudicated on 12/03/2001. Available on: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm>. According to KANAS, this positioning is a reflection of the precedent created by the Gasoline instance. KANAS, Vera Sterman. Comunidade Européia – medidas relativas ao amianto e produtos que contêm amianto (DS 135). In: LIMA, Maria Lúcia L. M. Padua; ROSENBERG, Bárbara. (Coords.). Op. cit., p. 457-490.

[1590] "The environmental exception should not be interpreted narrowly as permitting a derogation from the principles that govern trade but as an objective to be achieved in the same way as the liberalization of trade itself". STERN, Brigitte; RUIZ FABRI, Hélène. (Dir.). La jurisprudence de l´OMC. Leiden: Martinus Nijhoff, 1998-2, p. 105.

[1591] SOARES, Guido Fernando Silva Soares. Contratos internacionais..., p. 169.

[1592] ORREGO VICUÑA, Francisco. De los contratos y tratados en el mercado mundial. In: DREYZIN DE KLOR, Adriana; FÉRNANDEZ ARROYO, Diego P.; PIMENTEL, Luiz Otávio. (Dir.). Op. cit., p. 21.

> possibility to take part in the life of intermediate communities, beyond the life of the State, fulfillment of the essential rights of the individual). So, public policy imposes a positive limit to the possibilities of regulation or self-regulation. The act of autonomy harmful to the constitutional directives, contrasting with the real notion of public policy, does not deserve remedy or has any effect on the State ordination. The act should not only not contrast with it as a negative concept of public policy, but should, instead, harmonize with the choices and the value on the merits of the ordination.[1593]

The role of public policy would be, thus, equally the introduction of the corrective social of the strict *lex mercatoria*[1594], even though it is recognized that the *lex mercatoria* can also help the "modernization" of these mechanisms of social control of the Market[1595]. Thus,

> There is nothing to fear, thus, in the use of precepts of the lex mercatoria, as, just like in the usages and customs, form a source of Law of the lowest hierarchy. They will not be efficient against positive law, let alone against rules of internal public policy. To ignore its existence and growing influence in the field of international legal relations, on the other hand, would be to deny a datum of reality.[1596]

Along the concept of international Public policy, part of the doctrine admits the existence of the so-called *lois the police* which would be rules of imperative and immediate application, even by the international arbitrator, due to the principle of effectiveness[1597]. KASSIS exemplifies them: they would be relevant rules to people and measure, regulation of foreign exchange, restriction of import, imperative rules concerning labor, social security, banking and stock exchange market, etc.[1598].

These rules, which would be applied in spite of the indication of the *lex fori*, would have as a role to protect the "political, economic or social organization of a State"[1599]. Contrary to the rules of public policy that would be applied as exceptions, that is, they would drive away the incidence of a foreign rule, the *lois the police* would have an active role, or else, they would be applicable regardless

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[1593] PERLINGIERI, Pietro. O Direito civil na legalidade..., p. 442.
[1594] Ibidem, p. 511.
[1595] Ibidem, p. 527.
[1596] GREBLER, Eduardo. O contrato internacional no Direito..., p. 28.
[1597] OSMAN, Filali. Op. cit., p. 392-403; FRIEDRICH, Tatyana Scheila. Normas imperativas de Direito Internacional privado: lois de police. Belo Horizonte: Fórum, 2007, p. 75.
[1598] KASSIS, Antoine. Le nouveau droit..., p. 180-181.
[1599] DOLINGER, Jacob. Direito internacional privado: contratos e obrigações no Direito internacional privado. Rio de Janeiro: Renovar, 2007, v. 2, p. 148. In the same sense: KASSIS, Antoine. Le nouveau droit..., p. 180.

the instance[1600]; in addition, the concept of public policy is more flexible, as it does not depend on legislative formalization[1601] and the connection between the contract and the State which adjudicates it is not indispensable[1602]. Its distinction itself would not reside in the content of each one of them[1603].

Some authors support the existence of imperative rules to be applied regardless the performance of the sovereign power, that is, truly binding from the State point of view as well. In this line of thought, so, there would be the creation of a universal international Law open to the participation of all the States, through multi-lateral venues, simultaneously binding to all of them. Although its application was moderate, its eligibility would allow to deal with truly universal themes, such as the environment and the human rights[1604]. The idea that the human rights are imperative rules take as a starting point the premise that they end up surpassing the national legal system itself[1605].

Although some authors recognize that the distinction between public policy and imperative rules is narrow[1606], being even able to represent a sole concept[1607], the notion of this kind of imperative nature seems to be useful at another level of analysis: when to admit the binding nature (*ius cogens*[1608]) to the human rights before the contractual custom.

6.3. THE LIMITS OUTSIDE DE STATE ORDER: THE POSSIBILITIES OF THE HUMAN RIGHTS

If from the international point of view it is possible to limit the content of a consuetudinary rule, defining contractual obligations from imperative of

[1600] Ibidem, p. 181.
[1601] DOLINGER, Jacob. Direito internacional privado: contratos..., p. 157.
[1602] KASSIS, Antoine. Le nouveau droit..., p. 182. As exemple of that conclusion the Rome Convention (art. 7º): "1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract...". EUROPE. Rome Convention Applicable Law to Contractual Obligational. Available on: <http://www.jus.uio.no/lm/ec.applicable.law.contracts.1980/landscape.a4.pdf>.
[1603] KASSIS, Antoine. Le nouveau droit..., p. 181.
[1604] CHARNEY, Jonathan I. Universal international law. In: The American Journal of International Law, v. 87, n. 4, out. 1993, p. 529-551.
[1605] FRIEDRICH, Tatyana Scheila. Op. cit., p. 231.
[1606] DOLINGER, Jacob. Direito internacional privado: contratos..., p. 161.
[1607] PEREIRA, Izabel de Albuquerque. Op. cit., p. 517.
[1608] Understood, according to VIRALLY, as the expression of "a common interest to international entities or as the ethic prescription universally recognized. VIRALLY, Michel. Réflexions sur le "jus cogens". In: Annuaire Français de Droit International, v. 12, 1966, p.25.

functioning and constitutionalization, on the other hand such tools become insufficient when the consuetudinary rule drives away from the strict control of the State.

In other words, both the notion of private autonomy and of public policy are constructions that depend on a State reference for comparison. Thus, in principle, it is possible to claim that a certain contract was established in such a way as to respect the limits imposed to the negotiating freedom of the parties, not violating, initially, public policy of a certain country, but with serious repercussions from the Human point of view. Hence, it is important to remember that the acceptance of a classical liberal argument would be enough to allow the transaction between two agents, from different countries, on obligations to be performed in a third territory with violation to the civil freedoms or basic rights (even if not constitutionally assured) of workers, consumers or local citizens. Any analysis which took into consideration only public policy such as nationally defined in these two countries; or whose starting point would be the premise of a wide negotiating freedom would and up legitimizing, for example, the exploitation of children labor, the disrespect at basic environmental and sanitary levels or unworthy compensation to a third person.

On that account, those instruments, excessively bound to the national logics are not always sufficient for the analysis on content of a contractual obligation, being it derived from a behavioral manifestation of the parties, or a national or international custom[1609]. In principle, so, it is indispensable the resource to an instrument which is so universalizing as the own idea of globalization or *Lex mercatoria*: the human rights.

According to FORST the human rights are a complex phenomenon with moral, legal, political and historical facets[1610]. Historically, they are justified on the ground of moral, political and legal bases. Anyway, they are usually assigned with

[1609] In international public Law the discussion on the incorporation of treaties to the national Law is classic. Two chains are outstanding: the monists that defend the existence of a sole legal system (prevailing the internal Law or the treaty, depending on the chain) and the dualists, to whom there would be no independence between the ordinations, being indispensable the national recognition to the content of the treaty. For further details on the regime of the member countries of MERCOSUL, see: FRADERA, Véra Maria Jacob de. Reflexões sobre..., p. 114-132.

[1610] FORST, Rainer. The justification of human rights and the basic right to justification: a reflexive approach. In: Ethics, v. 120. jul. 2010, p. 711-712.

the capacity of protection of minimal conditions of individual development, even the economic one, as reminded by BAPTISTA[1611].

(i) However, a consequence ascribed to the economic globalization is the virtual displacement of State exclusiveness to the plurality of institutions[1612] and normative sources. This State would no longer be the only one responsible for the remedy of the person, shifting part of it to international organizations, before the omnipresent "Market".

It is equally recognized that the Market itself would not have conditions to exclusively regulate matters[1613]. This way, even if the State lends part of its power, not all of it is appropriate in an exclusionary way. In addition, it is important to keep in mind that the mechanisms proper to the soft Law may be contradictory[1614]. Hence, there would be left the dilemma of how to solve the apparent contradictions that occasionally came up from the absence of a system endowed with State coherence.

It is in this way that it is stated that the relationship of the human rights with the private contractual Law is the supremacy one[1615], at a certain extent, being in charge of its co-ordination by the Constitution[1616] and other normative sources[1617]. Nonetheless, it should be highlighted that a certain room of autonomy is preserved[1618], even if normatively[1619]. On the other hand strict

[1611] BAPTISTA, Luiz Olavo. Mundilização, comércio internacional e Direitos humanos. In: PINHEIRO, Paulo Sérgio; GUIMARÃES, Samuel Pinheiro. (Orgs.). Direitos humanos no Século XXI. Brasília: IPRI, 1998, p. 260.

[1612] JAYME, Erik. Op. cit., p. 04-05.

[1613] "The market, despite its evident qualities, is not a mechanism capable to solve and combine all the situations presented in an economic system. On the one hand it has operational gaps; on the other hand it cannot assure the fulfillment of certain targets aimed by the entity through its channels of political expressions". NUSDEO, Fábio. Op. cit., p. 16-17.

[1614] D´AMATO sustains that the absence of coherence allowed conflicting rules to live together as those ones which devalue the female witness (typical of the Muslim Law) and others that criticize the discriminatory practice. D´AMATO, Anthony. Softness in International law: a self-serving quest for new legal materials: a reply to Jean d´Aspremont. In: European Journal of International Law, v. 20, n. 3, 2009, p. 899.

[1615] MOSSET ITURRASPE, Jorge; PIEDECASAS, Miguel A. Op. cit., p. 185.

[1616] Idem.

[1617] So, this positing would not deny, a pyramidal normative construction. However, it is recognized the problematic of the vision when facing the international Law and the classic monist and dualist doctrines. Though it is not denied, it is based on the assumption that the normative pluralism has some kind of control over the international sources, as it has been trying to be demonstrated. Although it is not exclusivity to the national State, this control seems to have, and in the other court precedents organisms tolerated by it, the main sustenance of protection. In this sense, BOGDANDY's position is partially shared, which does not deny hierarchic structure, but it neither denies the normative pluralism and the normative independence of the international Law. In: ICON, v. 6, n. 3/4,2008, p. 412-413.

[1618] "The private legal order is not, for sure, divorced from the Constitution. It is not free room of fundamental rights. However, the private law will lose its irreducible autonomy when the civilest regulations – legal or contractual – see its content substantially altered by the direct efficacy of the fundamental rights in the private legal order. The constitution, in turn, is called for its daily court rooms with the consequence of inevitable constitutional trivialization. If the private Law has to accept the basic principles of the fundamental

divisions between conflictual law and public international Law are no longer recognized. Contrary to those who still see distinct sources and duties[1620], both are subjected to the protection of the person.

BENYEKHLEF seems to identify this tendency and describes how the person's rights could influence the national judiciary, either by the acceptance of its reception (through the acceptance that the Conventions of Human Rights are not like the other ones and do not depend on some of their requirements); or by the understanding that they may be used as an element of persuasion of domestic decisions (transjudicalism)[1621].

In a contractual scope LORENZETTI's point of view stands out, in which he argues the existence of a Latin-American conception of contract, central in the role of the fundamental Rights, in which the customs are relevant in the system of general clauses and in the understanding of social behavior[1622]. In a wider scope, GALGANO admits that the *lex mercatoria*, when recognizing the notion of corrective equity "reacciona con la substitución obligatoria del contrato justo al contrato querido por las partes"[1623].

Such conclusions can also be applied to the conflictual and international Law. Thus, for example, ARAUJO explains that the operationalization of the conflictual rules would be carried out: applying the foreign Law or denying effects when it violates the Human Rights, either through the notion of public policy; or the *lois de police*[1624]. JAYME, in turn, argues the possibility of protection of the person through reinforcement, in certain occasions, of its private autonomy (either for the selection of the applicable law, or for the definition of the competent venue)[1625].

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rights and guarantees, also the fundamental rights have to recognize room for civil self-regulation, avoiding to become a right of no freedom "of the private Law" CANOTILHO, José Joaquim Gomes. Civilização do Direito Constitucional ou Constitucionalização do Direito Civil? A eficácia dos direitos fundamentais na ordem jurídico-civil no contexto do direito pós-moderno. In: GRAU, Eros Roberto; GUERRA FILHO, Willis Santiago. (Orgs.). Direito Constitucional: estudos em homenagem a Paulo Bonavides. São Paulo: Malheiros, 1998, p. 113.

[1619] FERNÁNDEZ ARROYO, Diego P. El Derecho Internacional Privado en el inicio del Siglo XXI. In: MARQUES, Claudia Lima; ARAUJO, Nadia de. (Orgs). Op. cit., p. 107.

[1620] BOER, Th. M. de. Living apart together: the relationship between public and private international law. In: Netherlands International Law Review, v. 57, 2010, p. 183-207.

[1621] BENYEKHLEF, Karim. Op. cit., p. 198-203.

[1622] LORENZETTI, Ricardo Luis. Tratado..., p. 34.

[1623] GALGANO, Francesco. El contrato..., p. 22.

[1624] ARAUJO, Nadia de. Direito Internacional Privado: teoria e prática brasileira. Rio de Janeiro: Renovar, 2003, p. 17-19.

[1625] JAYME, Erik. Op. cit., p. 17.

D'AMATO claims the need of adoption of filters to preserve the own notion of international Law, in other words, beyond the discussion on the existence of an *opinion juris*[1626]. As for CANÇADO TRINDADE, he highlights that the reconstruction of the international Law occurs in a humanist basis. Even if the author refers to the public international Law and his immediate concern is linked to the understanding of the role of the State and the limitation of sovereignty, it seems appropriate to lend him the conclusion that "Mankind cannot be visualized as a subject of the Law from the State Perspective; what is imposed is to recognize the limits of the States from the mankind perspective"[1627].

Similarly, an Argentinean interesting precedent can be cited, when the Supreme Court seeked in the international customs enough basis for the extradition of a defendant charged with crime against humanity[1628]. Although this example does have a contractual nature, the conclusion can also be lent to other instances which involve the same theme, even if from a diverse nature.

Moreover, the State is not the only economic and legal global agent, either[1629]. Because of this growing power alleged to the private party to exercise freedom of normative definition, its responsibility to the respect and implementation of standards more appropriate to the needs of man's protection can be accepted.

> Just as States, at one and the same time, are capable of breaching human rights standards and are charged with the responsibility of upholding those standards, so corporations and other global commercial actors are equally capable and can be expected to shoulder the same or similar responsibility.[1630]

[1626] D´AMATO, Anthony. Softness..., p. 905-910.
[1627] TRINDADE, Antônio Augusto Cançado. Os rumos..., p. 1109.
[1628] ARGENTINA. Corte Suprema de Justicia de la Nación. AR/JUR/1332/1995. ACCION PENAL. CRIMEN DE GUERRA. DELITO. DELITOS CONTRA LA VIDA. DELITOS DE LESA HUMANIDAD. DERECHO INTERNACIONAL PUBLICO. DERECHO PENAL. DERECHOS HUMANOS. ESTADO REQUIRENTE. EXTINCION DE LA ACCION PENAL. EXTRADICION. GARANTIAS CONSTITUCIONALES. GENOCIDIO. IMPRESCRIPTIBILIDAD. LEY APLICABLE. NON BIS IN IDEM. PENA. PRESCRIPCION. PRESCRIPCION DE LA ACCION PENAL. PROCEDIMIENTO PENAL. RECURSO ORDINARIO DE APELACION ANTE LA CORTE SUPREMA. RETROACTIVIDAD DE LA LEY. TIPICIDAD. TRATADO DE EXTRADICION. TRATADO INTERNACIONAL. Erich Priebke. Adjudicated on 02 November 1995.
[1629] MCCORQUODALE, Robert. An Inclusive International Legal System. In: Leiden Journal of International Law, v. 17, 2004, p. 477–504.
[1630] KINLEY, David. Human rights, globalization and the rule of law: friends, foes or family. In: UCLA Journal of International law and foreign affairs, v. 7.2002, p. 262. 1637 TRIPONEL, Anna. Business &Human rights law: diverging trends in the United States and France. In: American Uniform and International Law Review, v. 23, 2008, p. 874-898.

The accountability of business activity for violation of the Human Rights is not completely unknown. TRIPONEL points out the different approaches promoted by the French and American legislations. These initiatives start from the establishment of legal obligations, to the adoption of voluntary standards and the State accountability for violation by private parties[1631].

(ii) Secondly, it must be kept in mind, however, that this is a liberal and western construction[1632]. FREEMAN points out the equalitarian and individualist notion, marked by the subject abstraction of his context, of Human Rights may be highly controversial[1633].

This way, the own understanding of the Human Rights would need to be rethought, since non-western cultures may contribute to the enrichment of its current content[1634], even if the western model should not be abandoned, nor should other instruments invented by other cultures be adopted[1635].

FAVARQUE-COUSSON claims that the application of exception of public policy in the remedy of the fundamental rights despite seeming to be appropriate, would have the great difficulty to conduct the denial of application of the foreign legislations, that is why a certain level of harmony would be essential in its application[1636]. The author points out that the perspective of the fundamental Rights "messes up" the traditional understandings of the private International Law and the compared Law so as to make it viable the companionship of the different legal systems: "Partial harmony and no longer international, harmonization and no longer unification: these ones could be the aims that will allow the Private International Law and the compared Law to approach this twenty-first century, without confronting their logics"[1637].

[1631] TRIPONEL, Anna. Business & Human rights Law: diverging trends in the United States and France. In: American Uniform and International Law Review, v.23, 2008, p. 874-898.

[1632] CARDUCCI, Michele. Reflexões sobre a civilização dos direitos humanos. Cadernos da Escola de Direito e Relações Internacionais da UniBrasil, n. 12, 2010, p. 370; SUPIOT, Alain. Op. cit., p. 234. The author even compares it to actual religion, having the West adopted Messianic zeal, communitarian and scientific in its interpretation of Man's Rights. This way, not only the Human Rights would be the one "revealed" to the West, but they should also be imposed to the other countries, as they would correspond to the true understanding of human behavior. SUPIOT, Alain. Op. cit., p. 241-255.

[1633] FREEMAN, Michael. Direitos humanos universais e particularidades nacionais. In PINHEIRO, Paulo Sérgio; GUIMARÃES, Samuel Pinheiro. (Orgs.). Direitos humanos no Século XXI. Brasília: IPRI, 1998, p. 306-307.

[1634] ROULAND, Norbert. Op. cit., p. 267; SUPIOT, Alain. Op. cit., p. 255-272.

[1635] ROULAND, Norbert. Op. cit., p. 271.

[1636] FAUVARQUE-COSSON, Bénédicte. Direito comparado e direito internacional privado: a confrontação de duas lógicas através do exemplo dos direitos fundamentais. In: VIEIRA, Iacyr de Aguilar. (Org.). Estudos de Direito comparado e de Direito internacional privado. Curitiba: Juruá, 2011, t. 1, p. 271-275.

[1637] Ibidem, p. 278.

Under this perspective, FORST's contribution becomes sensitive, arguing the need of reformulation of the theory of the human Rights from the notion of respect to individual autonomy, that is, the right to be recognized as an agent to whom plausible justification are owned for any social or political action to be intended as compulsory[1638].

Within this perspective, the human Rights would perform the role to guarantee effective participation in decision-taking, individually assuring that the justification would obey reciprocity (with no risk of political termination) and generality (standard of respect to the "human community"), at the same time they were not unilateral or paternalist[1639].

It is interesting that this same idea is found in the basis of illegibility of the growing normative power of the Market, or, as GALGANO sums up, the idea that the market economy manages the economic consensus just like democracy manages the political consensus[1640]. It must be considered, thus, that the same "democratic" representation assured by the Western States of liberal model is not experienced at an international economic level. That is why the answer would be to trust the free game of Market and seek the illegibility in the economic consensus[1641]. After all, this is the logics, just like pointed out by TEUBNER, when paradox is installed and the contract establishes only primary self-referred rules[1642]. In addition, it must be remembered that a speech that highlights the protection of Human Rights from freedom intends, up to a certain extent, to establish room where private autonomy may deny them[1643].

(iii) Hence, to trust the "free game of Market" does not seem enough. The same powers that impede the political consensus in an international scope are the ones which define the rules of the game. These ones, in turn, not always take into consideration other values than the mere arguments of the own

[1638] FORST, Rainer. Op. cit., p. 719.
[1639] Idem.
[1640] GALGANO, Francesco. La globalizzazione..., p. 197.
[1641] Ibidem, p. 201.
[1642] TEUBNER, Gunther. Breaking frames: economic globalization and the emergence of lex mercatoria. In: European Journal of Social Theory. v. 5, n. 2, p. 199-217.
[1643] "The contemporary discussion of human rights in the private sphere is still too narrow if it chooses the criterion of private power in order to delineate a space within the private sector where constitutional rights should be applicable as opposed to a space of genuine private autonomy where they are not". TEUBNER, Gunther. Contracting worlds: the many autonomies of private law. In: Social and Legal Studies, v. 9, n. 3, 2000, p. 413.

exchanges and the "oiling" of their gears. Contrary to this speech, the *lex mercatoria* is not apolitical[1644].

Because of that and insofar as the power exercised by the Market, it is already advocated the possibility of accountability of the "Transnational Corporation" for the protection of "Human Rights"[1645]; assigning it the duty to respect and implement the protective standards of the Human rights, both in the internal and international markets (e.g., the prohibition of behavior that violate the right for life, freedom and physical integrity, protection to the labor rights – such as prohibition of forced labor, child labor and the right to collective bargaining; protection of the environment and of the rights of native communities)[1646]. Such responsibility should be thought about the participation of these Corporations in three scopes of the world economy: business ventures, trade and investment, and international financial help[1647].

On the other hand, typically private mechanisms are not always appropriate to this purpose. ZUMBANSEN comments that legal support to the speech of social self-regulation just diminishes and makes the role of Law and the legal institutions formal, as their main function is to assure predictability, effectiveness, reliability to the participants of the Market games, any interference as interest of public policy could be denied with basis on violation of private autonomy[1648].

In addition, TEUBNER claims:

> Driving motive behind such an extension of constitutional rights in the private sphere is the more general normative argument to constitutionalize private law. This is to argue not only for the infusion of the law of contract, tort and property with the values of the political constitution, which is important enough, but rather

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[1644] ZUMBANSEN mentions the non-political origin and the possibility of "repolitization" of the lex mercatoria (ZUMBANSEN, Peer. Piercing the legal veil: commercial arbitration and transnational law. In: European Law Journal, v. 8, n. 3, 2002, p. 430). In another text, referring to the adoption through the economic analysis of the right of defense of the social rules, the author clarifies his concern: "What really lies behind the plea for social norms over law is not a genuine interest in norm-formation but a disregard for processes of negotiation and contestation". ZUMBANSEN, Peer. Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law. In: Comparative Research in Law and Political Economy, v. 4, n. 3, 2008, p. 37.

[1645] WEISSBRODT, David; KRUGER, Muria. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. In: The American Journal of International Law, v. 97, n. 4, 2003, p. 901-922.

[1646] KINLEY, David; TADAKI, Junko. From talk to walk: the emergence of Human rights responsibilities for Corporations at International law. In: Virginia Journal of International Law, v. 44, n. 4, 2003-2004, p.931-1023.

[1647] KINLEY, David; NOLAN, Justine. Trading and aiding human rights: corporations in the global economy. In: Nordisk Tidsskrift for Menneskerettigheter, v. 25, n. 4. 2007, p.353-377.

[1648] ZUMBANSEN, Peer. The law of society: governance through contract. In: Indiana Journal of Global Legal Studies, v. 14, n. 2, 2007, p. 232.

> for transforming private law itself into a new constitutional law. If it is true that today's private governance regimes are producing vast amounts of law that govern, regulate and adjudicate wide areas of social activities then the question of a 'constitution' for these private regimes is as pressing as the constitutional question was for the monarchical political regimes in recent European history. Traditional private law could be fundamentally transformed to play this role of a private constitution protecting the many autonomies of civil society.[1649]

For example, an option supported is to give room to the *lex mercatoria* for the "debate and public control"[1650] and the recognition and protection of the Human rights through the acting of international organizations such as the specialized agencies of UN and WTO[1651]. Even if this positioning has been criticized[1652] by the alleged economic colonization of the theme[1653], the proposal is still interesting: not only the protection of the Human rights not only in the political agenda, but equally in the economic one[1654]. In principle, even though the obligations subscribed by the WTO treaty are not incompatible with the protection of Human rights, the truth is that the system of solution of controversies would not be adequate to interpret and impose them[1655].

According to ROULAND, pluralism is not a panacea[1656], but it allows the perception that certain values are concurrent, not exclusionary, and would preserve the possibility of communitarian unity. In other words, "It is the State responsibility to favor the practices of inter-recognition, leaving inherited or imported cultures fluid (...), recognize to the society the right of not suppressing it, but co-operating with it[1657].

Actually several entities adopt pluralist regimes, establishing, even constitutionally, the local customs. Along with that, it is also common that this several entities take part in the international normative production, making it

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[1649] TEUBNER, Gunther. Contracting worlds..., p. 414.
[1650] TEUBNER, Gunther. A Bukowina..., p. 27.
[1651] PETERSMANN, Ernst-Ulrich. Time for a United Nations 'Global Compact' for integrating human rights into the law of worldwide organizations: lessons from european integration. In: European Journal of International Law, v. 13, n. 3, 2002, p. 621-650.
[1652] HOWSE, Robert. Human rights in the WTO: whose rights, what humanity? Comments on Petersmann. In: European Journal of International Law, v. 13, n. 3, 2002, p. 651-659.
[1653] ALSTON, Philip. Resisting the merger and acquisition of human rights by trade law: a reply to Petersmann. In: European Journal of International Law, v. 13. n. 4, 2002, p. 815-844.
[1654] PETERSMANN, Ernst-Ulrich. Taking human dignity, poverty and empowerment of individuals more seriously: rejoinder to Alston. In: European Journal of International Law, v. 13, n. 4, 2002, p. 845-851.
[1655] MARCEAU, Gabrielle. WTO Dispute Settlement and human rights. In: European Journal of International Law, v. 13, n. 4, 2002, p. 753-814.
[1656] ROULAND, Norbert. Op. cit., p. 214.
[1657] Ibidem, p. 221.

viable the international expansion of protection of the human being[1658]. On the other hand, it seems possible to think about a certain degree of harmonization from the preservation of the fundamental Rights[1659].

Hence, it seems necessary the concentration on the pursuit of a viable pluralism, and not the concentration over the market homogenization. After all, not every human being is equal and the preservation of their differences is a major part of their construction as a Man[1660]. The viability of this system, however, will surely go through the political definition of the outlines acceptable to the difference[1661]. So here resides the Gordian knot of multi-culturalism: up to what point should the difference be respected?[1662] Or, in other words, how the human rights, of a universal character, should be implemented in pluralist and multi-cultural entities. The examples are varied, from the customary incidence of prohibitions of village for those who do wrongful act, to the detriment of constitutional prescription of freedom in the Solomon Islands[1663], going from the Laws of succession and the definition of line of descent in South Africa[1664] to the contractual obligation derived from a certain commercial custom.

The premises are that both, the fundamental Rights made constitutionally positive, and the Treaties of Human Rights should be employed as limiters of the

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[1658] This conversation, for example, is established in several sub-Saharan African countries. FRÉMONT, Jacques. Legal pluralism, customary law and human rights in francophone African countries. In: Victoria University of Wellington Law Review, v. 40, 2009, p. 149-165.

[1659] In this sense MAK claims that the judicial implementation of the standards of protection of the fundamental Rights (national and international) in relation to contracts, would end up influencing the definition of the court precedent line to be followed, besides leading the judges to align their solutions to those same standards. MAK, Chantal. Harmonizing effects of fundamental rights in European contract law. In: Erasmus Law Review, v. 1, n. 1, 2007, p. 75.

[1660] FACHIN, Melina Girardi. Fundamentos dos direitos humanos - teoria e práxis na cultura da tolerância. Rio de Janeiro: Renovar, 2009, passim. See, for example, articles XXII and XXVII of the Universal Declaration of Human Rights (1948) and the article 1 and 6 of the Declaration of the United Nations on the Right to Development (1986).

[1661] Nonetheless the task is not simple. It seems plausible to state that no solution can be reached with the same inspiration of judgment as the one by the Judiciary Commission of the British Private Council when announcing: "Certain tribes are so low in the rate of social organization that their usages and conceptions of rights and duties cannot be reconciled with the institutions or the ideas of a civilized entity. [...] Nevertheless, there are native peoples whose legal conceptions, though developed in a different way, are not less precise than ours. Once they are studied and understood, they are not less applicable than the laws derived from the English Law". ASSIER-ANDRIEU, Louis. Op. cit., p. 79.

[1662] "As democracy, at a worldwide level, is gained, with effect, both for the pluralist and constructivism methods, and by the political voluntarism of the "no" that the jurists have to help conduct. It is fed by tolerance, but also opposition to the intolerable one. And the idea itself of mankind comprehends this two undissociable dimensions. (DELMAS-MARTY, Mireille. Três desafios para um Direito Mundial. Rio de Janeiro: Lumen Juris, 2003, p. 192).

[1663] CARE, Jeniffer Corrin. Customary law and human rights in Solomon Islands: a commentary on Remisio Pusi v. Lei and others. In: Journal of Legal Pluralism, n. 43, 1999, p. 135-144.

[1664] GRANT, Evadné. Human rights, cultural diversity and customary law. In: Journal of African Law, v. 50, n. 1, 2006, p. 2-23.

content of the contractual custom[1665], that would be a possible interpretation for a global legal system ("law beyond the State"[1666]). Up to what point this notion can be fed in the idea of transnational public policy is still to be tested, mainly for its imposition to private parties[1667] and the understanding, regardless its nomenclature, that it is about a binding rule to command respect and implementation to those who perform jurisdiction, as well[1668]. The economic consensus is too superficial[1669] to obtain a feasible answer[1670].

[1665] LORENZETTI, Ricardo Luis. Teoria..., p. 361.
[1666] MICHAELS, Ralf. The true Lex..., p. 468.
[1667] SEELIG, however, points out the vagueness of the term and recommends cautiousness in its application by the arbitral Courts. SEELIG, Marie Louise. The notion of transnational public policy and its impact on jurisdiction, arbitrability and admissibility. In: Belgrade Law Review, n. 3, 2009, p. 133-134.
[1668] Even if PARK understood public policy and the imperative laws as potential doors to inappropriate interference in arbitral reports, the author demonstrated concern with the absence of mechanisms of control of the lex mercatoria: "The arbitral elaboration of a modern lex mercatoria requires national judicial control mechanisms to promote the relative predictability of result in international business dispute resolution that is necessary to permit informed decisions about the legal risks of commercial choices. Neither the parties to the dispute nor the public interests affected by the arbitration will be well served by letting the lex mercatoria develop free of judicial controls designed to ensure that arbitration fulfill the shared expectations of those who have entrusted them with their mission". PARK, William W. Op. cit., p. 138.
[1669] The oversimplism takes place, on the one hand, by the absence of the true "consensus": "The vertical re-construction of the world, just like the current perverse globalization is being carried out, intends to impose common rules of existence to every country, and if possible, at the same time and quickly. But this is not definite. The evolution we have been expecting will be accelerated at different moments and in different countries, and will be allowed by the maturing of the crisis. This new world announced will not be a top bottom construction, like the one we have been watching and deploring, but and edification whose trajectory is bottom-top". SANTOS, Milton. Por uma outra globalização: do pensamento único à consciência universal. 12. ed. São Paulo: Record, 2005, p. 169-170. Secondly, the simplicity of the speech is due to the absence of questioning of its own values: "The great technological mutation happens with the emergency of the information techniques, which - contrary to the machine techniques – are constitutionally divisible, flexible and sweet, adaptable to every means and culture, even if its current perverse usage is subjected to the interests of the great capital. But when its usage becomes democratic, these sweet techniques will be at the service of man. Nowadays it is widely talked about progress and promises of genetical engineering, which would lead to a mutation of the biological man, something still belongs to the domains of the history of science and technique. Nonetheless, little is talked about the conditions, also present today, that way assure a philosophical mutation of men, capable to assign a new sense to the existence of each person, and also, the planet. Ibidem, p.174.
[1670] Even if it is not the object of this book, it is appropriate to point out that several instances of this kind of conflict may be cited: "excision of the clitoris as a cultural practice (ASSIER-ANDRIEU, Louis. Op. cit., p. 55-57); different forms of political authority, distinct equivalence between the notions of rights and duties distinct relationship between law and religion (ROULAND, Norbert. Op. cit., p. 273-284).

VII CONCLUSION

> The new role of the jurists do not respond to the proud of an order, but a complaint of our historical time.[1671]

After the course of these reasons, it is time we assigned a more contemporaneous role to the contractual custom, especially in the Brazilian Law. This affirmation will take place by the defense that the custom as a source of contractual obligation in the Brazilian Law due to: (i) the need of recognition of the relevance of certain social facts that not necessarily are recognized by the legislator; (ii) the internationalization of the contractual regulation made viable by the process of globalization, some consuetudinary pictures join the contractual normative plot regardless any practice or opposition to sovereignty; (iii) the recognition that the custom may serve as a source of contractual obligations allow the adequate explanation of normativity and binding to certain behavior, at the same time that imposes limitations to voluntary practice.

In addition, it is pointed out that contractual custom is a formal and material source of the contractual Law with no necessary hierarchical dependence with regards to the legislative rule. This conclusion, in turn, is drawn because of the plural normative environment where the contract is inserted from the same processes of internationalization and globalization of contractual regulation.

It also must be highlighted that the custom does not depend on the binding power of the principle of private autonomy as a source of contractual obligation, even though just like it, there are limitations of internal and international order[1672]. In other words, the custom does not have the necessary contractual[1673] justification, even though it may serve as source of contractual obligations.

It is noticed, then, that if on the one hand, the process of legal globalization engenders the loss of State exclusivity of normative assertion, on

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[1671] GROSSI, Paolo. História da propriedade..., p. 121.
[1672] DALHUISEN, J. H. Custom and its revival in transnational private law. In: Duke Journal of comparative & international Law, v. 18, 2008, p. 351-352.
[1673] Ibidem, p. 348.

the other hand, it cannot be understood as a simple "deregulation". The proposal of normative centralization of the contractual custom, together with other possible negotiating sources, is not a synonym of absence of legal remedy[1674], but the expansion of the understanding of Law. This is the lesson that the analysis of arbitral court precedents and judiciary (especially on the CISG, PICC and INCOTERMS) revealed.

On the other hand, as BOBBIO points out, the positive ordination is related to that one originated from the consuetudinary rule. Hence, the issue seems to be what kind of relationship it is: co-ordination x subordination; exclusion x inclusion; indifference, refusal or absorption[1675]. The adoption of a system of normative creation (either monist, or pluralist) cannot be done uncritically. This is the conclusion drawn from the analysis of the contemporaneous construction of the *lex mercatoria* and the role assigned to the customs by the Brazilian legal system.

There are some reservations: first of all, the role of the local and State regulations is not denied[1676]. However, it stops being the only source of normatization. The fact should not be divorced from the Law[1677]. Nonetheless, it is not about something briefly strange to the Law, as according to ALEINIKOFF, this same approach could be done to investigate the tendency of the North-American Supreme Court to adopt international argumentation on the basis of its decisions. According to the author, it would be a process of adequacy to the phenomenon of globalization which would cast doubt on the traditional ways to think about sovereignty[1678].

Secondly, the same internationalization that allows this role, central and not excluding, to the contractual custom, also provides the necessary mechanisms for its control, as well as the adequacy to the contractual Law as a whole[1679]. Thus, together with the typically individual mechanisms (private

[1674] DELMAS-MARTY, Mireille. Três desafios..., p. 79.
[1675] BOBBIO, Norberto. Teoria geral..., p. 305-313.
[1676] BERMAN, Harold J.; KAUFMAN, Colin. Op. cit., p. 274.
[1677] "in the divorce between the Law and fact, the Law is the one with loss: the Black market made justice to the laws of indexation". (CARBONNIER, Jean. Op. cit., 7. ed., p. 293).
[1678] ALEINIKOFF, T. Alexander. International Law, sovereignty and American constitutionalism: reflections on the customary international law debate. In: The American Journal of International Law, v. 98, n. 1, jan. 2004, p. 91-108.
[1679] "There is always the possibility that the internal Law may benefit from the developments in the international spheres, so that the new configuration granted to the already existing concepts in the legal

autonomy) and State one (public policy and *lois de police*), there appear international mechanisms of control of negotiating custom. The legal globalization, so, is not necessarily unilateral or "perverse". This way it can be assured that protective contractual dispositions (labor and consumption[1680], for example) and human and fundamental rights prevail over certain customs.

The risks of globalization involve the instrumentalization of the procedure to satisfy purely economic interests and of western nuance[1681]. It should be thought, in normative terms, not on the basis of a co-operative net of sources[1682], but yet on the basis of the notion of a hierarchized system[1683], which, however, make the differences compatible[1684]. The law and the will are not the sole sources of eligibility. They are only sources of part of the normative content existing inside a plural and fragmented system[1685]. The origin of the unity must be searched elsewhere, in the basis of the human condition that make all individuals especial of legal concern, regardless the method adopted, as a real *jus* cogens[1686].

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systems, in the international scope, constitutes, many times, a factor of progress in relation to internal rights". FRADERA, Véra Maria Jacob de. A saga da uniformização..., p. 819.

[1680] MOSS, Giuditta Cordero. Contracts between consumer protection and trade usage: some observations on the importance of State Law contract. In: SCHULZE, Reiner. (Ed.). Common frame of reference and existing EC contract law. Munich: Sellier, 2008, p. 88-93.

[1681] GROSSI, Paolo. De la codificación..., p. 391; RAMOS, Carmem Lucia Silveira. Op. cit., p. 23.

[1682] Not least because the pluralism, by itself, can be as "totalitarian" as a centralized legal system. "En este sentido, el reconocimiento constitucional, como princípios fundamentales, de la libertad de comercio, de industria y de competencia, al lado y en posición paritaria con otros derechos humanos, de muy diverso espesor y significado político y moral, pudiera no ser suficiente para colmar la fractura, hoy existente al interior de los bloques históricos europeos, entre fracciones elitistas todavía ancladas en valores de identidad e intereses económicos territoriales radicales, y fracciones elitistas, por el contrario, que hoy no son san patrie porque operan a escala planetaria siguiendo una lógica meramente financiera". OLGIATI, Vittorio. El Nuevo pluralismo jurídico y la nueva lex mercatoria en la dinámica constitucional europea. In: SILVA, Jorge Alberto. (Coord.). Estudios sobre lex mercatoria: una realidad internacional. México: UNAM, 2006, p. 179-180.

[1683] DELMAS-MARTY points out that to structure the internal Law in relation to the international Law, subjecting "the right of the market to the man's right" would be the simplest way to solve the problem if this solution has already been denied by the European Court in 1996. (DELMAS-MARTY, Mireille. Três desafios..., p. 95). In addition, the strictly anational conception would suffer from the inconvenience of not existing, outside Europe, normative models that established them. This unity, however, could be searched, for example, in the notion of a "common" Law which cannot transpose or attempt against the "irreducible human being that at the same time express the identity of the human Community and the uniqueness of each one of those that make it". DELMAS-MARTY, Mireille. Por um direito..., p. 292.

[1684] DELMAS-MARTY, Mireille. Três desafios..., p. 118-125.

[1685] FISCHER-LESCANO, Andreas; TEUBNER, Gunther. Regime-collisions: the vain search for legal unity in the fragmentation of global law. In: Michigan Journal of International Law, v. 25, 2004, p. 999-1004.

[1686] "The construction of a set really common of fundamental values of the international community and its translation in the normative system, in a coherent and functional way, is not done in little and without any effort. While the process of this construction takes place, the right and its categories, together with its functioning, seem to be upheaval". NASSER, Salem Hikmat. Jus cogens ainda esse desconhecido. In: Revista Direito GV, v. 1, n. 2, 2005, p. 174.

One of the possible instruments for this conception of contractual Law is the re-evaluation of the normative content of the contractual custom, binding, but equally controlled[1687] as an instrument of creation of a Law "common to humanity"[1688], even if not necessarily unified.

[1687] MICHAELS, for example, refers to the control or complement of the content of the Lex mercatoria (constitutional control) by the constitutional Law . MICHAELS, Ralf. The true Lex..., p. 467-468.
[1688] OSLÉ, Rafael Domingo. Op. cit., p. 324.

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BRASIL. Superior Tribunal de Justiça. Agravo Regimental na Carta Rogatória n. 2807/México. CARTA ROGATÓRIA. AGRAVO REGIMENTAL. DILIGÊNCIA ROGADA. CITAÇÃO. PREJUÍZO À DEFESA. OFENSA À ORDEM PÚBLICA E À SOBERANIA NACIONAL. INOCORRÊNCIA. – A prática de ato de comunicação processual é plenamente admissível em carta rogatória. A simples citação não representa afronta à ordem pública ou à soberania nacional, destinando-se, apenas, a dar conhecimento da ação em curso e a permitir defesa do interessado. – No cumprimento das rogatórias, a esta Corte cumpre verificar se a diligência solicitada ofende a soberania nacional e a ordem pública, bem como se há autenticidade dos documentos e observância dos requisitos da Resolução n. 9/2005 deste Tribunal. Agravo regimental a que se nega provimento. Nitriflex

S/A Indústria E Comércio versus Transformadora de Petroquímicos Companhia Conservada em Estoque Comum de Capital Variável. Corte Especial. Relator Min. Barros Monteiro. Julgado em 13/03/2008.

BRASIL. Superior Tribunal de Justiça. Agravo Regimental na Carta Rogatória n. 3198/EU. CARTA ROGATÓRIA - CITAÇÃO - AÇÃO DE COBRANÇA DE DÍVIDA DE JOGO CONTRAÍDA NO EXTERIOR - EXEQUATUR - POSSIBILIDADE. Não ofende a soberania do Brasil ou a ordem pública conceder exequatur para citar alguém a se defender contra cobrança de dívida de jogo contraída e exigida em Estado estrangeiro, onde tais pretensões são lícitas. Abraham Orenstein versus Trump Tm Mahal Associates. Corte Especial. Relator Min. Humberto Gomes de Barros. Julgado em 30/06/2008.

BRASIL. Superior Tribunal de Justiça. Agravo regimental no agravo de instrumento n. 6418/SP. Maria Elvira Siciliano Villares e outros versus Corretora S. B. Câmbio e Títulos S.A. Terceira Turma. Relator Min. Dias Trindade. DIREITO PRIVADO. CORRETAGEM DE VALORES. MANDATO E COMISSÃO MERCANTIL. USO E COSTUME. AUTORIZAÇÃO RATIFICADA. E DE ESTILO E USO DO COMERCIO A AUTORIZAÇÃO VERBAL PARA A REALIZAÇÃO DE NEGOCIOS POR INTERMEDIO DE EMPRESA CORRETORA DE VALORES, ENTENDENDO-SE COMO RATIFICADOS OS ATOS NEGOCIAIS, PELA CONTINUIDADE DA PRATICA DE SEMELHANTES, AO LONGO DO TEMPO DE DURAÇÃO DO MANDATO. Julgado em 19 de dezembro de 1990.

BRASIL. Superior Tribunal de Justiça. Agravo regimental no agravo de instrumento n.761.303/PR. Oscar Luiz Cordeiro versus Banco Banestado S/A. Terceira Turma. Relator Min. Paulo Furtado. AGRAVO INTERNO NO AGRAVO DE INSTRUMENTO. CONTRATO BANCÁRIO. AUSÊNCIA DE FIXAÇÃO DA TAXA DOS JUROS REMUNERATÓRIOS CONTRATADOS. CLÁUSULA POTESTATIVA. APLICAÇÃO DA TAXA MÉDIA APURADA PELO BANCO CENTRAL DO BRASIL. AGRAVO PROVIDO EM PARTE. 1. "Na hipótese de o contrato prever a incidência de juros remuneratórios, porém sem lhe precisar o montante, está correta a decisão que considera nula tal cláusula porque fica ao exclusivo arbítrio da instituição financeira o preenchimento de seu conteúdo. A fixação dos juros, porém, não deve ficar adstrita ao limite de 12% ao ano, mas deve ser feita segundo a média de mercado nas operações da espécie. Preenchimento do conteúdo da cláusula de acordo com os usos e costumes, e com o princípio da boa fé (arts. 112 e 133 do CC/02)" (REsp 715.894/PR, Rel. Ministra NANCY ANDRIGHI, SEGUNDA SEÇÃO, DJ 19/03/2007). 2. Agravo interno parcialmente provido. Julgado em 23 de junho de 2009.

BRASIL. Superior Tribunal de Justiça. Agravo regimental nos embargos de declaração no recurso Especial n. 991037/RS. Terceira Turma. Relatora Min. Nancy Andrighi. Direito civil e processual civil. Contratos bancários. Agravo no recurso especial. Taxa de juros remuneratórios. Limitação. Comissão de permanência. Reexame de provas e interpretação de cláusulas contratuais. Inclusão do nome do devedor em cadastro de inadimplentes. - Na hipótese de o contrato prever a incidência de juros remuneratórios, porém sem lhe precisar o montante, está correta a decisão que considera nula tal cláusula porque fica ao exclusivo arbítrio da instituição financeira o preenchimento de seu conteúdo. A

fixação dos juros, porém, não deve ficar adstrita ao limite de 12% ao ano, mas deve ser feita segundo a média de mercado nas operações da espécie. Preenchimento do conteúdo da cláusula de acordo com os usos e costumes, e com o princípio da boa fé (arts. 112 e 133 do CC/02). - Recurso especial não é a via adequada para interpretar cláusulas contratuais ou reexaminar fatos e provas. - É admitida a incidência da comissão de permanência desde que não cumulada com juros remuneratórios, juros moratórios, correção monetária e/ou multa contratual. Precedentes. - A simples discussão judicial do débito não impede a inclusão do nome do devedor em cadastros de inadimplentes. Agravo no recurso especial não provido. Julgado em 16 de outubro de 2008.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 1.021.605/SP. Recurso especial. Responsabilidade civil. Instituição financeira. Transferência entre contas correntes. Autorização verbal. Costume no relacionamento entre as partes. Código de Defesa do consumidor. Responsabilidade objetiva. Não comprovada conduta descrita na inicial. Prova única. Possibilidade. Reexame de prova. Súmula 07/STJ. Dissídio. Ausência de similitude fática entre os arestos confrontados. Artur Construções e Empreendimentos Imobiliários Ltda e outro versus Banco Santander Noroeste S/A. Quarta Turma. Relator Min. Fernando Gonçalves. Julgado em 09 de fevereiro de 2010.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 1.058.165/RS. Direito Empresarial e Processual Civil. Recurso especial. Violação ao art. 535 do CPC. Fundamentação deficiente. Ofensa ao art. 5º da LICC. Ausência de prequestionamento. Violação aos arts. 421 e 977 do CC/02. Impossibilidade de contratação de sociedade entre cônjuges casados no regime de comunhão universal ou separação obrigatória. Vedação legal que se aplica tanto às sociedades empresárias quanto às simples. Não se conhece do recurso especial na parte em que se encontra deficientemente fundamentado. Súmula 284/STF. Inviável a apreciação do recurso especial quando ausente o prequestionamento do dispositivo legal tido como violado. Súmula 211/STJ. A liberdade de contratar a que se refere o art. 421 do CC/02 somente pode ser exercida legitimamente se não implicar a violação das balizas impostas pelo próprio texto legal. O art. 977 do CC/02 inovou no ordenamento jurídico pátrio ao permitir expressamente a constituição de sociedades entre cônjuges, ressalvando essa possibilidade apenas quando eles forem casados no regime da comunhão universal de bens ou no da separação obrigatória. As restrições previstas no art. 977 do CC/02 impossibilitam que os cônjuges casados sob os regimes de bens ali previstos contratem entre si tanto sociedades empresárias quanto sociedades simples. Negado provimento ao recurso especial. Ancart Participações Ltda versus Registro de Imóveis da 2ª Zona de Porto Alegre. Terceira Turma. Relator Min. Nancy Andrighi. Julgado em 14 de abril de 2009.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 1063768/SP. Processo civil. Recurso Especial. Execução judicial proposta, no Brasil, em face de pessoa jurídica estrangeira. Alienação, no curso do processo, pela ré, de todo o seu patrimônio localizado no Brasil. Reconhecimento, pelo Tribunal a quo, de fraude à execução. Alegação, pela empresa estrangeira, de que ela não foi reduzida à insolvência porque ainda tem vultoso patrimônio em seu país de origem. Irrelevância. - Consoante a regra geral de direito internacional, cada Estado deve

manter jurisdição sobre as causas nas quais suas decisões possam ser efetivadas. Somente a autoridade estrangeira terá jurisdição para executar o patrimônio localizado no exterior, e, da mesma forma, somente a autoridade brasileira poderá fazê-lo com relação ao patrimônio situado no Brasil. - A fraude à execução é instituto de direito processual. A sua ocorrência implica violação da função processual executiva, e portanto os interesses molestados são ditos como de ordem pública. Trata-se de atentado contra o eficaz desenvolvimento da função jurisdicional em curso. O instituto que reprime a fraude à execução defende não apenas o credor, mas o próprio processo. - A existência de patrimônio da sociedade estrangeira em seu país de origem é tema que não compete à autoridade judiciária brasileira investigar. Se há patrimônio na Suíça, é por medida judicial a ser adotada pelo credor naquele país que tais bens serão vinculados ao pagamento da dívida. A execução que corre no Brasil visa à vinculação, ao pagamento, do patrimônio nacional da empresa estrangeira. Se esse patrimônio que foi transferido, após a propositura da ação, retirando da autoridade brasileira a possibilidade de dar efetividade ao seu próprio julgado, há insolvência e há fraude à execução. Recurso a que se nega provimento. EFG Bank European Financial Group versus Peixoto e Cury Advogados S/C Terceira Turma. Relatora Min. Nancy Andrighi. Julgado em 10/03/2009.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 1177915/RJ. RECURSO ESPECIAL. EXCEÇÃO DE INCOMPETÊNCIA. CLÁUSULA DE ELEIÇÃO DE FORO ESTRANGEIRO. CONTRATO INTERNACIONAL DE IMPORTAÇÃO. OFENSA AO ART. 535 DO CPC NÃO CONFIGURADA. INTERPRETAÇÃO DE CLÁUSULAS CONTRATUAIS. REEXAME DE PROVAS. INCIDÊNCIA DAS SÚMULAS 05 E 07 DO STJ. AUSÊNCIA DE QUESTÃO DE ORDEM PÚBLICA. 1. Não se verifica ofensa ao art. 535 do CPC, tendo em vista que o acórdão recorrido analisou, de forma clara e fundamentada, todas as questões pertinentes ao julgamento da causa, ainda que não no sentido invocado pelas partes. 2. A reforma do julgado demandaria a interpretação de cláusula contratual e o reexame do contexto fático-probatório, providências vedadas no âmbito do recurso especial, a teor do enunciado das Súmulas 5 e 7 do STJ. 3. As conclusões da Corte a quo no sentido de que, in casu, é de importação a natureza do contrato entabulado entre as partes e de que é o país estrangeiro o local de execução e cumprimento das obrigações, decorreram da análise de cláusulas contratuais e do conjunto fático-probatório carreado aos autos, pelo que proscrito o reexame da questão nesta via especial. 4. "A eleição de foro estrangeiro é válida, exceto quando a lide envolver interesses públicos" (REsp 242.383/SP, Rel. Ministro HUMBERTO GOMES DE BARROS, TERCEIRA TURMA, julgado em 03/02/2005, DJ 21/03/2005 p. 360). 5. Recurso especial desprovido. Fórmula F3 Brazil S/A versus Ducati Motor Holding SPA. Terceira Turma. Relator Min. Vasco Della Giustina. Julgado em 13/04/2010.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 134246/SP. Ação declaratória. Casamento no exterior. Ausência de pacto antenupcial. Regime de bens. Primeiro domicílio no Brasil. 1. Apesar do casamento ter sido realizado no exterior, no caso concreto, o primeiro domicílio do casal foi estabelecido no Brasil, devendo aplicar-se a legislação brasileira quanto ao regime legal de bens, nos termos do art. 7º, § 4º, da Lei de Introdução ao Código Civil, já que os cônjuges, antes do matrimônio, tinham domicílios diversos. 2. Recurso especial

conhecido e provido, por maioria. Waldemar Haddad versus Leo James Russel, Espólio de Leuza Bernardes e outros. Terceira Turma. Relator Min. Ari Pargendler. Julgado em 20/04/2004

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 13560/SP. LOCAÇÃO COMERCIAL. RENOVATORIA. CLAUSULA ELISIVA DO DIREITO A RENOVAÇÃO. NULIDADE. E NULA CLAUSULA CONTRATUAL QUE ELIDE O DIREITO A RENOVAÇÃO DO CONTRATO DE LOCAÇÃO COMERCIAL REGIDO PELO DECRETO N. 24.150/34. HIPOTESE LEGAL LIMITATIVA DA LIBERDADE DE CONTRATAR (ARTIGO 30 DA ''LEI DE LUVAS''). Lanchonete Feijão Amigo Ltda versus Maria de Almeida Henriques. Terceira Turma. Relator Min. Claudio Santos. Julgado em 18/12/1991.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 155242/RJ. DIREITO CIVIL. NEGÓCIO FIDUCIÁRIO. SIMULAÇÃO. COMPRA E VENDA DE IMÓVEL, COM PROMESSA DE DEVOLUÇÃO. PAGAMENTO DE PARTE DO FINANCIAMENTO PELO VENDEDOR. ENRIQUECIMENTO SEM CAUSA. NEGÓCIO REAL E NÃO APARENTE. ARTS. 102, 103 E 104, CC. VALORES JURÍDICOS. HERMENÊUTICA. RECURSO PROVIDO. I - O negócio fiduciário, embora sem regramento determinado no direito positivo, se insere dentro da liberdade de contratar própria do direito privado e se caracteriza pela entrega de um bem, geralmente em garantia, com a condição, verbi gratia, de ser devolvido posteriormente. II - Na lição de Francesco Ferrara, "o negócio fiduciário, como querido realmente, produz todos os efeitos ordinários, ainda que entre si os contratantes assumam a obrigação pessoal de usar dos efeitos obtidos unicamente para o fim entre eles estabelecido" (A simulação dos negócios jurídicos, São Paulo: Saraiva, 1939, p. 76). III - No negócio simulado há uma distância entre a vontade real e a vontade manifestada, ao contrário do negócio fiduciário, no qual a vontade declarada corresponde à realidade. IV - No cotejo entre dois valores protegidos pelo Direito, cabe ao julgador prestigiar o de maior relevo e que no caso se manifesta com maior nitidez. Marítima Seguros S/A versus Valter Apolinário Filho. Quarta Turma. Relator Min. Sálvio de Figueiredo Teixeira, Julgado em 15 de fevereiro de 1999.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 242.383/SP. RECURSO ESPECIAL - PREQUESTIONAMENTO - SÚMULAS 282/STF E 211/STJ - REEXAME DE PROVAS E INTERPRETAÇÃO CONTRATUAL - SÚMULAS 5 E 7 - JURISDIÇÃO INTERNACIONAL CONCORRENTE - ELEIÇÃO DE FORO ESTRANGEIRO - AUSÊNCIA DE QUESTÃO DE ORDEM PÚBLICA - VALIDADE – DIVERGÊNCIA NÃO-CONFIGURADA. 1. Em recurso especial não se reexaminam provas e nem interpretam cláusulas contratuais (Súmulas 5 e 7). 2. A eleição de foro estrangeiro é válida, exceto quando a lide envolver interesses públicos. 3. Para configuração da divergência jurisprudencial é necessário demonstrar analiticamente a simetria entre os arestos confrontados. Simples transcrição de ementa ou súmula não basta. Cláudio Ferranda e outro versus Amoco Chemical Holding Company. Terceira Turma. Relator Min. Humberto Gomes de Barros. Julgado em 03/02/2005.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 258.103/MG. DIREITO DO CONSUMIDOR. APLICAÇÃO DO CÓDIGO DE DEFESA DO CONSUMIDOR.

PRECEDENTES. CLÁUSULA ABUSIVA. ART. 51, IV, CDC. NÃO-CARACTERIZAÇÃO. RECURSO DESACOLHIDO. I - Na linha da jurisprudência desta Corte, aplicam-se às instituições financeiras as disposições do Código de Defesa do Consumidor. II - Não é abusiva a cláusula inserida no contrato de empréstimo bancário que versa autorização para o banco debitar da conta-corrente ou resgatar de aplicação em nome do contratante ou coobrigado valor suficiente para quitar o saldo devedor, seja por não ofender o princípio da autonomia da vontade, que norteia a liberdade de contratar, seja por não atingir o equilíbrio contratual ou a boa-fé, uma vez que a cláusula se traduz em mero expediente para facilitar a satisfação do crédito, seja, ainda, por não revelar ônus para o consumidor. III - Segundo o magistério de Caio Mário, "dizem-se [...] potestativas, quando a eventualidade decorre da vontade humana, que tem a faculdade de orientar-se em um ou outro sentido; a maior ou menor participação da vontade obriga distinguir a condição simplesmente potestativa daquela outra que se diz potestativa pura, que põe inteiramente ao arbítrio de uma das partes o próprio negócio jurídico". [....] "É preciso não confundir: a 'potestativa pura' anula o ato, porque o deixa ao arbítrio exclusivo de uma das partes. O mesmo não ocorre com a condição 'simplesmente potestativa' Carlos Alberto de Almeida versus Banco Boavista S/A. Quarta Turma. Relator Min. Sálvio de Figueiredo Teixeira. Julgado em 20 de março de 2003.

BRASIL. Superior Tribunal de Justiça. Recurso especial n. 4930/SP. LOCAÇÃO - RENOVATORIA - DECRETO 24 150. CONSIDERAM-SE INVALIDAS CLAUSULAS CONTRATUAIS QUE VISEM A AFASTAR A INCIDENCIA DAS NORMAS LEGAIS QUE ASSEGURAM O DIREITO A RENOVAÇÃO DA LOCAÇÃO. RESTRIÇÕES A AUTONOMIA DA VONTADE E LIBERDADE DE CONTRATAR DECORRENTES DA LEI. Cinemas São Paulo Ltda versus SAMU – Sociedade de Administração, Melhoramentos Urbanos e Com. Ltda. Terceira Turma. Relator Min. Eduardo Ribeiro. Julgado em 18 de dezembro de 1991.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 49872/RS. COMERCIAL. CEDULA RURAL. AÇÃO DE REVISÃO DO CONTRATO E EMBARGOS DO DEVEDOR. CORREÇÃO DO DEBITO VINCULADA AO IPC. IMPOSSIBILIDADE DE SER REAJUSTADA EM MARÇO/96 PELA BTN. PRINCIPIO DA LIBERDADE DE CONTRATAR INCIDENCIA DA LEI 8.088/90 COM RELAÇÃO AS PARCELAS DE ABRIL E MAIO/90. RECURSO PARCIALMENTE PROVIDO. I - HAVENDO SIDO CONTRATADA A CORREÇÃO MONETARIA PELO IPC E NÃO SE TRATANDO DE FINANCIAMENTO COM RECURSO PROVENIENTES DA POUPANÇA RURAL OU SIMPLES, IMPÕE SEJA RESPEITADO O INDICE PACTUADO, NÃO LOGRANDO EXITO A PRETENSÃO DE CORREÇÃO, EM MARÇO/90, PELO BTN. II - INJUSTIFICAVEL SE TORNA PRETENDER REVISÃO DE CONTRATO PELA SUPOSTA DESPROPORÇÃO ENTRE OS VARIOS INDEXADORES EM UM SO MES, JÁ QUE CEDIÇO O CARATER INSTAVEL E INFLACIONARIO DA NOSSA ECONOMIA, ESPECIALMENTE EM SE TRATANDO DE MUTUO RURAL NÃO-VINCULADO A POUPANÇA. III - POSSIVEL E A OPÇÃO DO MUTUARIO NO TOCANTE AO REAJUSTE NOS MESES DE ABRIL E MAIO/90 PELOS INDICES DO BTN, NOS TERMOS DO ART. 5. DA LEI 8.088/90. Banco Itaú S/A versus Fernando Campos Domingues. Quarta Turma. Relator Min. Sálvio de Figueiredo Teixeira, Julgado em 08 de abril de 1999.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 617244/MG. Atrium Empresa de Viagens e Turismo Ltda e outros versus United Airlines Inc. e outros. Quarta Turma. Relator Min. Cesar Asfor Rocha. DIREITO COMERCIAL. CONTRATO DE COMISSÃO MERCANTIL. VENDA DE PASSAGENS AÉREAS. PERCENTUAL DEVIDO ÀS AGÊNCIAS DE VIAGENS (COMISSÁRIAS). REDUÇÃO UNILATERAL PELAS COMPANHIAS DE AVIAÇÃO (COMITENTES). Em contrato verbal de comissão mercantil, pode o comitente reduzir unilateralmente o valor das comissões referentes a negócios futuros a serem realizados pelas comissárias, à míngua de ajuste expresso em sentido contrário. Recursos especiais conhecidos pelo dissídio, mas improvidos. Julgado em 07 de março de 2006.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 6619/RS. Responsabilidade pela guarda de animais. Danos às plantações de vizinho. Artigos 1.527 e 588 do Código Civil. Honorários de Advogado na Assistência Judiciária. Dimaper Distribuidora de Materiais de Perfuração Ltda versus Willibaldo Hedler. Quarta Turma. Relator Min. Athos Carneiro. Julgado em 19 de março de 1991.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 715.894/PR. Banco Banestado versus Urbalon Pavimentação e Obras Ltda. Segunda Seção. Relatora Min. Nancy Andrighi. Direito bancário. Contrato de abertura de crédito em conta corrente. Juros remuneratórios. Previsão em contrato sem a fixação do respectivo montante. Abusividade, uma vez que o preenchimento do conteúdo da cláusula é deixado ao arbítrio da instituição financeira (cláusula potestativa pura). Limitação dos juros à média de mercado (arts. 112 e 113 do CC/02). Art. 6º da LICC. Questão constitucional. Honorários advocatícios. Ação condenatória. Estabelecimento em valor fixo. Impossibilidade. Necessidade de observância da regra do art. 20, §3º, do CPC. - As instituições financeiras não se sujeitam ao limite de 12% para a cobrança de juros remuneratórios, na esteira da jurisprudência consolidada do STJ. - Na hipótese de o contrato prever a incidência de juros remuneratórios, porém sem lhe precisar o montante, está correta a decisão que considera nula tal cláusula porque fica ao exclusivo arbítrio da instituição financeira o preenchimento de seu conteúdo. A fixação dos juros, porém, não deve ficar adstrita ao limite de 12% ao ano, mas deve ser feita segundo a média de mercado nas operações da espécie. Preenchimento do conteúdo da cláusula de acordo com os usos e costumes, e com o princípio da boa fé (arts. 112 e 133 do CC/02). - A norma do art. 6º da LICC foi alçada a patamar constitucional, de modo que sua violação não pode ser discutida em sede de recurso especial. Precedentes. - Tratando-se de ação condenatória, os honorários advocatícios têm de ser fixados conforme os parâmetros estabelecidos no art. 20, §3º do CPC. Merece reforma, portanto, a decisão que os estabelece em valor fixo. Precedentes. Recursos especiais da autora e do réu conhecidos e parcialmente providos. Julgado em 26 de abril de 2004.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 73.049/SP. Daher Cutait e outro versus Espólio de Nagib Matte Merhej Quarta Turma. Relator Min. Ruy Rosado de Aguiar. HONORARIOS MEDICOS. LEGITIMIDADE "AD CAUSAM". CHEFE DE EQUIPE. COSTUME. O CHEFE DE EQUIPE CIRURGICA, QUE CONTRATA DIRETAMENTE OS SERVIÇOS COM O PACIENTE OU SEUS FAMILIARES, E ASSUME AS ATRIBUIÇÕES DE FIXAR HONORARIOS E

DISTRIBUI-LOS ENTRE ASSISTENTES LIVREMENTE POR ELE ESCOLHIDOS, TEM LEGITIMIDADE PARA COBRAR OS HONORARIOS CORRESPONDENTES AOS SERVIÇOS PRESTADOS PELA EQUIPE. PRAXE PROFISSIONAL RECONHECIDA NO V. ACORDÃO. ART. 1.218 DO CODIGO CIVIL E ART. 6. DO CPC. RECURSO CONHECIDO E PROVIDO. Julgado em 13 de novembro de 1995.

BRASIL. Superior Tribunal de Justiça. Recurso Especial n.877.074/RJ. SAB Trading Comercial Exportadora S/A versus TRANSCOCAMAR Transportes e Comércio Ltda. Terceira Turma. Relatora Min. Nancy Andrighi. Comercial. Recurso especial. Ação de cobrança. Prestação de serviço de transporte rodoviário. Cargas agrícolas destinadas a embarque em porto marítimo. Cobrança originada por atraso no desembaraço das mercadorias no destino. Discussão a respeito da responsabilidade do contratante pelo pagamento das 'sobrestadias'. Requerimento de produção de prova testemunhal para demonstração de costume comercial relativo à distribuição de tal responsabilidade. Natureza dos usos e costumes mercantis. Sistema de registro dos costumes por assentamento nas Juntas Comerciais. Costume 'contra legem'. Conflito entre duas fontes subsidiárias de direito comercial (Lei civil e costume comercial) no contexto relativo à vigência do Código Comercial de 1850 e do Código Civil de 1916. - Atualmente, a Lei nº 8.934/94 atribui competência às Juntas Comerciais para proceder ao assentamento dos usos e práticas mercantis. Impertinente, portanto, a alegação da recorrente no sentido de que nenhum regulamento portuário indica ser de responsabilidade da contratante do serviço de transporte o pagamento das eventuais 'sobrestadias', pois não cabe a tais regulamentos consolidar usos e costumes mercantis relativos ao transporte terrestre de bens. - Há desvio de perspectiva na afirmação de que só a prova documental derivada do assentamento demonstra um uso ou costume comercial. O que ocorre é a atribuição de um valor especial - de prova plena - àquela assim constituída; mas disso não se extrai, como pretende a recorrente, que o assentamento é o único meio de se provar um costume. - Não é possível excluir, de plano, a possibilidade de que a existência de um costume mercantil seja demonstrada por via testemunhal. - Da simples autorização para produção de prova testemunhal não decorre, automaticamente, qualquer imputação de responsabilidade a uma das partes. Trata-se apenas de, uma vez demonstrada a existência do costume, tomá-lo como regra jurídica para a solução do litígio. Tal solução, porém, dependerá ainda da verificação da subsunção do suporte fático àquele comando, em atividade cognitiva posterior. - A adoção de costume 'contra legem' é controvertida na doutrina, pois depende de um juízo a respeito da natureza da norma aparentemente violada como sendo ou não de ordem pública. - Na hipótese, não se trata apenas de verificar a imperatividade ou não do dispositivo legislado, mas também analisar o suposto conflito entre duas fontes subsidiárias do Direito Comercial – quais sejam, a lei civil e o costume mercantil, levando-se em conta, ainda, que a norma civil apontada como violada - qual seja, o art. 159 do CC/16 - não regula, de forma próxima, qualquer relação negocial, mas apenas repete princípio jurídico imemorial que remonta ao 'neminem laedere' romano. - Especialmente em um contexto relativo ao período em que não havia, ainda, ocorrido a unificação do direito privado pelo CC/02, é impossível abordar o tema de forma lacônica, como se fosse possível afirmar, peremptoriamente e sem maiores aprimoramentos, a invalidade apriorística de todo e qualquer costume comercial em face de qualquer dispositivo da Lei civil, ainda que remotamente

aplicável à controvérsia. Recurso especial parcialmente conhecido e, nessa parte, não provido. Julgado em 12 de maio de 2009.

BRASIL. Superior Tribunal de Justiça. Resolução n. 9 de 04 de maio de 2005. Dispõe, em caráter transitório, sobre competência acrescida ao Superior Tribunal de Justiça pela Emenda Constitucional nº 45/2004. Diário da Justiça de 10 de maio de 2005.

BRASIL. Superior Tribunal de Justiça. Sentença Estrangeira Contestada n. 349/SP. SENTENÇA ESTRANGEIRA – JUÍZO ARBITRAL – CONTRATO INTERNACIONAL ASSINADO ANTES DA LEI DE ARBITRAGEM (9.307/96). 1. Contrato celebrado no Japão, entre empresas brasileira e japonesa, com indicação do foro do Japão para dirimir as controvérsias, é contrato internacional. 2. Cláusula arbitral expressamente inserida no contrato internacional, deixando superada a discussão sobre a distinção entre cláusula arbitral e compromisso de juízo arbitral (precedente: REsp 712.566/RJ). 3. As disposições da Lei 9.307/96 têm incidência imediata nos contratos celebrados antecedentemente, se neles estiver inserida a cláusula arbitral. 4. Sentença arbitral homologada. Mitsubishi Electric Corporation versus Evadin Indústrias Amazônia S/A. Corte Especial. Relatora Min. Eliana Calmon. Julgado em 21/03/2007.

BRASIL. Superior Tribunal de Justiça. Sentença Estrangeira Contestada n. 646/EU. PROCESSUAL CIVIL. SENTENÇA ESTRANGEIRA. HOMOLOGAÇÃO. CONTRATO FIRMADO POR MÚTUO CONSENTIMENTO. EXCLUSÃO DE RESPONSABILIDADE. POSSIBILIDADE. REQUISITOS LEGAIS ATENDIDOS. HOMOLOGAÇÃO DEFERIDA. AUSÊNCIA DE OFENSA À ORDEM PÚBLICA OU À SOBERANIA. INTERVENÇÃO DE TERCEIRO. ASSISTENTE LITISCONSORCIAL. POSSIBILIDADE. 1. A homologação de sentença estrangeira submete-se a procedimento passível de admitir a intervenção voluntária do assistente, o qual, no plano fático, será o destinatário dos efeitos jurídicos da decisão, posto sub-rogado processual. Precedente: AgRg na SEC 1035 /EX Relatora Ministra ELIANA CALMON DJ 07.08.2006. 2. O assistente litisconsorcial não é interveniente secundário e acessório, uma vez que a relação discutida entre o assistido e o seu adversário também lhe pertence. O seu tratamento é igual àquele deferida ao assistido, isto é, atua com a mesma intensidade processual. Não vigoram, nessa modalidade, as regras que impõem ao assistente uma posição subsidiária, como as dos art.s 53 e 55 do diploma processual. (...) Por essa razão, a atuação do assistente qualificado é bem mais ampla do que a do assistente simples. No que concerne aos atos benéficos e atos prejudiciais praticados pelo assistido, aplica-se o regime do litisconsórcio unitário; por isso, a priori, não se admite que o assistente litisconsorcial seja prejudicado por um ato de liberalidade daquele". (Luiz Fux, in, Curso de Direito Processual Civil, Editora Forense, 3ª Edição, pág. 281/282). 3. O ingresso do sub-rogado no feito, de forma qualificada, como um verdadeiro litisconsorte, não é interditado, cuja atividade não se subordina à do assistido, porquanto a sentença homologanda interfere na relação jurídica que envolve o assistente e o adversário do assistido, uma vez titular de direitos relativos àquela lide, por ter arcado com as despesas necessárias tanto ao reparo dos danos causados à aeronave quanto ao deslocamento e à acomodação dos passageiros que se encontravam a bordo da mesma. 4. In casu, a homologação refere-se exatamente à sentença estrangeira, a qual considerou exeqüível as

disposições sobre a responsabilidade limitada e escolha de regência de lei com fundamento em contrato firmado entre as partes litigantes, designado nos autos de "GTA" - General Terms Agreements (Contratos em termos gerais), no qual a VARIG S/A adquiriu da GE, dentre outros bens, um motor de aeronave modelo CF6-80C2B2, com número de série n. 690165. 5. Deveras eleito o direito aplicável à espécie em manifestação de vontade livre (GTA) referido pactum, mutadis mutandis, faz as vezes de "compromisso" insuperável pela alegação de aplicação em contrato internacional do Código de Defesa do Consumidor - CDC, lei interna, sob o argumento de que apenação inversa investiria contra a ordem pública. 6. A sentença estrangeira, cumpridos os requisitos erigidos pelo art. 5º incisos I, II, III e IV da Resolução 09/STJ, revela-se apta à homologação perante o STJ, em consonância com a Lei de Introdução ao Código Civil, artigo 15, a saber: Será executada no Brasil a sentença proferida no estrangeiro, que reuna os seguintes requisitos: a) haver sido proferida por juiz competente; b) terem sido os partes citadas ou haver-se legalmente verificado à revelia; c) ter passado em julgado e estar revestida das formalidades necessárias para a execução no lugar em que , foi proferida; d) estar traduzida por intérprete autorizado; e) ter sido homologada pelo Supremo Tribunal Federal. Parágrafo único. Não dependem de homologação as sentenças meramente declaratórias do estado das pessoas. 7. O Supremo Tribunal Federal já assentou que "o objetivo do pedido de homologação não é conferir eficácia ao contrato em que se baseou a justiça de origem para decidir, mas à sentença dela emanada", nos termos da Sec 4948/ EU, de relatoria do Min. Nelson Jobim, julgada pelo Pleno, e publicada no DJ 26-11-1999. Precedentes: SEC 894/UY, Rel. Ministra NANCY ANDRIGHI, CORTE ESPECIAL, julgado em 20/08/2008, DJe 09/10/2008; SEC 1.397/US, Rel. Ministro FRANCISCO PEÇANHA MARTINS, CORTE ESPECIAL, DJ 03.09.2007. 8. Deveras, resta prejudicada a alegação de que a empresa teria assumido a condição de consumidora quando celebrou o GTA, atraindo a incidência da Lei 8.078/90 - Código de Defesa do Consumidor, que veda a exoneração do dever de indenizar nas hipóteses de negligência ou culpa grave porquanto foge ao juízo de delibação de cunho estritamente formal, e a fortiori afasta a afronta à ordem pública. 9. A existência de ação de seguradora em face da requerente da homologação, em nada interfere no presente procedimento à luz dos artigos 89 e 90 do CPC, posto tratar-se de competência concorrente, versada sobre lide obrigacional. 10. O juízo de delibação é meramente formal, sem o denominado Revision au fond, sendo certo que o art. 90 do CPC torna a existência de ação posterior no território nacional indiferente para fins de homologação. Precedente desta Corte: SEC 611/US, DJ 11/12/2006. 11. Homologação de sentença estrangeira deferida. General Electric Company versus Varig Viação Aérea Rio Grandense. Corte Especial. Relator Min. Luiz Fux. Julgado em 05/11/2008.

BRASIL. Superior Tribunal de Justiça. Sentença estrangeira contestada n. 802/EU. SENTENÇA ESTRANGEIRA. HOMOLOGAÇÃO. INEXISTÊNCIA DE OFENSA À ORDEM PÚBLICA, À SOBERANIA NACIONAL E AOS BONS COSTUMES. 1. Sentença arbitral que decorreu de processo sem qualquer vício formal. 2. Contestação da requerida no sentido de que não está obrigada a cumprir o seu encargo financeiro porque a requerente não atendeu à determinada cláusula à contratual. Discussão sobre a regra do exceptio non adimpleti contractus, de acordo com o art. 1.092 do Código Civil de 1916, que foi

decidida no juízo arbitral. Questão que não tem natureza de ordem pública e que não se vincula ao conceito de soberania nacional. 3. Força constitutiva da sentença arbitral estrangeira por ter sido emitida formal e materialmente de acordo com os princípios do nosso ordenamento jurídico. 4. Homologação deferida. Honorários advocatícios fixados em 10% (dez por cento) sobre o valor da causa. Thales Geosolutions INC versus Fonseca Almeida Representações e Comércio LTDA. Corte Especial. Relator Min. José Delgado. Julgado em 17/08/2007.

BRASIL Superior Tribunal de Justiça. Sentença Estrangeira contestada n. 879/EU. PROCESSUAL CIVIL. SENTENÇA ESTRANGEIRA. HOMOLOGAÇÃO. AUSÊNCIA DE CITAÇÃO. 1.Sentença estrangeira que condenou seguradora brasileira em cota de retrocessão, consoante negócio jurídico inquinado de invalidade, posto firmado por agente incapaz, indicado em consórcio de empresas assinado por quem não detinha poderes mercê da manutenção da higidez da personalidade jurídica de cada uma das empresas. 2. Alegação que contaminou a cláusula de eleição de foro e, a fortiori, a competência do juízo. 3. Citação irregular levada a efeito em face de pessoa jurídica que não detinha poderes para receber a comunicação processual. 4. A homologação de sentença estrangeira reclama prova de citação válida da parte requerida, seja no território prolator da decisão homologanda, seja no Brasil, mediante carta rogatória, consoante a ratio essendi do art. 217, II, do RISTJ. 5. Deveras, é assente na Suprema Corte que: "A citação de pessoa domiciliada no Brasil há de fazer-se mediante carta rogatória, não prevalecendo, ante o princípio direcionado ao real conhecimento da ação proposta, intimação realizada no estrangeiro. Inexistente a citação, descabe homologar a sentença.(...)" (SEC 7696/HL, Relator Ministro Marco Aurélio, DJ de 12.11.2004) 6. Precedentes jurisprudenciais do STF: SEC 6684/EU, Relator Ministro Sepúlveda Pertence, DJ de 19.08.2004; SEC 7570/EU, Relatora Ministra Ellen Gracie, DJ de 30.04.2004 e SEC 7459/PT, Relator Ministro Nelson Jobim, DJ de 30.04.2004. 7. In casu, consoante destacado pelo Procurador-Geral da República às fls. 496/499, "a própria requerente na peça inicial informa que a citação da requerida fora "efetivada através do serviço postal dos Estados Unidos da América, após haver a C.T. Corporation" informado por carta, "que ela não havia sido contratada pela requerida para prestar este serviço de recepção de citações judiciais" (fls. 5)". Ademais, nem mesmo a requerida compareceu, voluntariamente, ao juízo processante. Domiciliada em território brasileiro, a requerida deveria ser citada por carta rogatória e não à luz da formas processuais anglo-americanas. Assim, não houve citação da empresa brasileira, nem esta compareceu ao tribunal estrangeiro, razão por que não há como emprestar validade à decretação da revelia. 8. Outrossim, o acordo cujo descumprimento fundou a condenação, não restou firmado por signatário habilitado, sendo certo que a requerente não esclareceu quem detinha poderes, na época da assinatura do contrato, para em nome do grupo de Empresas Seguradoras Brasileiras, comprometer a participação da empresa requerida no referido contrato, nem trouxe aos autos qualquer comprovante que autorizasse tal gestão, muito embora instado a fazê-lo por determinação advinda de cota do Parquet Federal. 9. Deveras, a legitimação para firmar o contrato não restou suprida por administradora do consórcio, porquanto, à luz do negócio, restou hígida a individualidade e personalidade jurídica das empresas, e que contaminou o compromisso e, a fortiori, a competência eleita. Precedentes do STF: SEC6753

/ UK - Reino Unido da Grã-Bretanha e da Irlanda do Norte, Relator Ministro Maurício Corrêa, DJ de 04.10.2002, por isso que a ação deveria ter sido proposta no foro do domicílio do réu. 10. Destarte, posto matéria de ordem pública, conhecível de ofício, vislumbra-se nítida nulidade, ante a ausência de motivação da decisão homologanda, em afronta ao art. 216, RISTF e 17 da LICC que assim dispõe: "As leis, atos e sentenças de outro país, bem como quaisquer declarações de vontade, não terão eficácia no Brasil, quando ofenderem a soberania nacional, a ordem pública e os bons costumes". Nesse sentido são uníssonas a doutrina e a jurisprudência: (SEC 2521, relator Ministro Antônio Neder). 11. Homologação indeferida (art. 217, I e II e 216, RISTF c/c 17 da LICC). Universal Marine Insurance Company LTD versus União Novo Hamburgo Seguros S/A. Corte Especial. Relator Min. Luiz Fux. Julgado em 02/08/2006.

BRASIL. Superior Tribunal de Justiça. Sentença Estrangeira Contestada n. 3035/França. SENTENÇA ARBITRAL ESTRANGEIRA. LEGITIMIDADE ATIVA. INTERESSE. CONTRATO DE COMPRA E VENDA. MÉRITO DA DECISÃO ARBITRAL. ANÁLISE NO STJ. IMPOSSIBILIDADE. AUSÊNCIA DE VIOLAÇÃO À ORDEM PÚBLICA. 1. O pedido de homologação pode ser proposto por qualquer pessoa interessada nos efeitos da sentença estrangeira. 2. O mérito da sentença estrangeira não pode ser apreciado pelo Superior Tribunal de Justiça, pois o ato homologatório restringe-se à análise dos seus requisitos formais. Precedentes. 4. O pedido de homologação merece deferimento, uma vez que, a par da ausência de ofensa à ordem pública, reúne os requisitos essenciais e necessários a este desideratum, previstos na Resolução n. 9/2005 do Superior Tribunal de Justiça e dos artigos 38 e 39 da Lei 9.307/96. 4. Pedido de homologação deferido. Atecs Mannesmann GMBH versus Rodrimar S/A Transportes Equipamentos Industriais e Armazéns Gerais. Corte Especial. Relator Min. Fernando Gonçalves. Julgado em 19/08/2009.

BRASIL. Supremo Tribunal Federal. Agravo de Instrumento n.34.544/PA. Obrigação constituída no Brasil. Está sujeita à lei nacional. Havendo lei (art. 9º da Lei de Introdução ao Código Civil, art. 651, §3º da Consolidação das Leis do Trabalho) não é de aplicar-se o costume que favorece a lei do pavilhão. Agravo desprovido. Booth (Brasil) Limited. versus Pedro Martins dos Santos. Segunda Turma, Rel. Min. Hermes Lima. Julgado em 15 de outubro de 1965.

BRASIL. Supremo Tribunal Federal. Agravo Regimental na Carta Rogatória n. 5815/DF. CARTA ROGATÓRIA. AÇÃO PARA RECEBIMENTO DE VALORES RELACIONADOS COM RESSEGURO, AJUIZADA NA INGLATERRA, CONTRA EMPRESAS SEGURADORAS, DOMICILIADAS NO BRASIL. ALEGAÇÕES, DAS EMPRESAS CITADAS NO BRASIL, DE DUPLICIDADE INDEVIDA DE ROGATÓRIAS; DE COMPETÊNCIA EXCLUSIVA DA JUSTIÇA BRASILEIRA; E DE LESÃO À ORDEM PÚBLICA ECONÔMICA NACIONAL E INTERNACIONAL, NO PLANO SECURATÓRIO; TUDO COMO OBSTÁCULO AO "EXEQUATUR". ALEGAÇÕES REPELIDAS. AGRAVO REGIMENTAL IMPROVIDO. 1. A DUPLICIDADE DE CARTAS ROGATÓRIAS NÃO CONFIGURA VIOLAÇÃO À ORDEM PÚBLICA, NO BRASIL, ESTANDO REVESTIDAS DOS REQUISITOS LEGAIS. NÃO CABE À JUSTIÇA BRASILEIRA EXAMINAR TAL ALEGAÇÃO, PODENDO AS IMPUGNANTES, SE QUISEREM SE SUJEITAR À JURISDIÇÃO INGLESA, SUSCITAR A QUESTÃO PERANTE A AUTORIDADE COMPETENTE. 2.

TRATANDO-SE DE CAUSA PARA A QUAL A JUSTIÇA BRASILEIRA TEM COMPETÊNCIA CONCORRENTE (RELATIVA) (ART. 88 DO C.P.C) E NÃO ABSOLUTA (ART. 89), SEU AJUIZAMENTO PERANTE À JUSTIÇA INGLESA NÃO FERE À ORDEM PÚBLICA NACIONAL. PRECEDENTES. 3. INDEMONSTRADA PELAS EMPRESAS IMPUGNANTES A ALEGAÇÃO DE LESÃO À ORDEM PÚBLICA NACIONAL E INTERNACIONAL, NO PLANO SECURATÓRIO, TAMBÉM NÃO SE VISLUMBRA LESÃO À ORDEM JURÍDICA BRASILEIRA, COM A PROPOSITURA DE AÇÃO DE ADIMPLEMENTO CONTRATUAL PERANTE À JUSTIÇA DA INGLATERRA. SOBRETUDO, PODENDO ELAS RECUSAREM SUBMISSÃO ÀQUELA JURISDIÇÃO. Iochpe Seguradora S/A versus Halvanon Insurance Company Limited. Tribunal Pleno. Relator Min. Sydney Sanches. Julgado em 20/10/1992.

BRASIL. Supremo Tribunal Federal. Embargos no Recurso em Mandado de Segurança n. 19023/RS. Não se havendo estipulado a retribuição dos serviços médicos, nem concordando as partes sobre ela, será fixada por arbitramento, segundo o costume do lugar, o número e a natureza das visitas. Ulisses Cardoso de Castro e outros versus Demóstenes Silveiro de Castro. Tribunal Pleno, Rel. Min. Hahnemann Guimarães. Julgado em 24 de junho de 1955.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 12.878/SP. Os usos e costumes comerciais que estabelecem regras supletivas para a serenidade das transações mercantis, desde que não contrárias aos preceitos da lei – art. do códig. Comercial – fazem lei entre as partes e sobre elas expressamente convencionadas. Mançor Daud versus Cia Agrícola e Comissária de São Paulo. Segunda Turma. Relator Min. Afrânio Costa. Julgado em 29 de dezembro de 1959.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 14.465/SP. Comércio: usos e costumes são admitidos, excepcionalmente, para suprir lacunas ou deficiências da lei; por motivos óbvios, jamais os podem acolher os tribunais, contra preceito legal expresso. João Ferreira Vazin versus Waldemar dos Reis Meireles. Segunda Turma. Relator Min. Afrânio Antônio da Costa, julgado em 02 de junho de 1953.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 153.531-8/SC. Costume. Manifestação cultural. Estímulo. Razoabilidade. APANDE – Associação Amigos de Petrópolis Patrimônio Proteção aos Animais e Defesa da Ecologia e outros versus Estado de Santa Catarina. Segunda Turma, Rel. Min. Marco Aurélio Mello. Julgado em 03 de junho de 1997.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 19.757/SP. Os usos e costumes, por mais arraigados que estejam no comercio, não prevalecem sobre disposição legal. Fonte subsidiaria da lei, ou cae em desuso, ou se torna inexistente com o advento da lei ou nela se consubstancia. Machado Sant´ Ana & Cia. Ltda. versus John Hume. Segunda Turma. Relator Min. Afrânio Antonio da Costa. Julgado em 13 de janeiro de 1953.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 20829/SE. Não é possível a formação de uma regra jurídica baseada no costume, se há lei em vigor

que prescreva em sentido contrário. Epaminondas Ferreira Machado e outros versus S. Barretos e Filhos. Segunda Turma. Relator Min. Abner de Vasconcelos. Julgado em 05 de agosto de 1952.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 24.150/RJ. Os costumes uma vez respeitados durante anos, integram a vontade contratual das partes dando um caráter de verdadeiro vinculum juris. Consolidação das leis de trabalho. Interpretação de seus preceitos. Art. 8. Não conhecimento do recurso extraordinário. Carlos Pereira Porto versus Cia. Docas da Bahia. Segunda Turma. Relator Min. Lafayette de Andrada. Julgado em 13 de outubro de 1953.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 30.125/RJ. Esso Standard do Brasil Inc. versus Francisco Gimeno ou Francisco Henrique Gimeno. Tribunal Pleno, Rel. Min. Victor Nunes Leal. Julgado em 16 de fevereiro de 1967.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 57.717/SP. Banco Brasileiro de Descontos S.A. versus Viação Leste-Oeste S.A. Tribunal Pleno, Rel. Min. Victor Nunes Leal. Julgado em 14 de outubro de 1965.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 58.414/GO. Antônio de Velasco Figueiredo versus Digo Vila Verde Gutierre. Primeira Turma, Rel. Min. Evandro Lins e Silva. Julgado em 12de outubro de 1965.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 68.704/MG. Venda de gado. Sendo negócio em que é costume ser feito verbalmente, não nega vigência ao art. 141 do C.C. acórdão que o admite provado apenas por testemunhas, principalmente se confirmado, posteriormente, por gestos e atitudes do vendedor. Razoável interpretação da lei e dissídio de jurisprudência não comprovado. Aplicação das Súmulas n.s 400 e 291. Recurso extraordinário não conhecido. José Martins Cardoso versus Hermínio Martins Cardoso. Primeira Turma, Rel. Min. Raphael de Barros Monteiro. Julgado em 07 de novembro de 1969.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 72.463/PR. Contrato mercantil. Costume dado como provado à vista das provas, nada se aduzindo quanto às condições indispensáveis à sua vigência. Recurso Extraordinário não conhecido. Brasiland Comercial e Agrícola S/A versus Manoel de Deus Rocha. Primeira Turma. Relator Min. Raphael de Barros Monteiro. Julgado em 29 de outubro de 1971.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 76.301/GO. Parceria Agrícola. Prova. Não nega vigência à lei federal decisão que, baseada nos costumes rurais, considera provada por testemunhas a existência de contrato de parceria agrícola. Recurso Extraordinário não conhecido por basear-se em prova. Abel Pedro Coimbra versus Limírio Alves Neto. Primeira Turma. Min. Aliomar Baleeiro. Julgado em 31 de agosto de 1973.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 79.545/BA. Vendas a termo. Usos e costumes. I. Nas operações de venda de cacau a termo, os usos e costumes preenchem o vazio das disposições legais, que reconhecem a licitude desses negócios inevitavelmente expostos à especulação da Bolsa de

Mercadorias. II. Nenhuma lei reserva ao produtor, que vende a termo, a mais valia decorrente da alta de preços entre o fechamento e a liquidação do negócio. III. Não nega vigência aos arts. 1092 e 1130 do Código Civil, o Acórdão, que, interpretando cláusulas contratuais e os usos e costumes da praça, decidiu que o comprador, depois de interpelar o vendedor, não estava obrigado a depositar previamente o preço para exigir a entrega da mercadoria. Espólio de Antônio Olimpio da Silva versus Mattos, Souza e Cia. Primeira Turma. Relator Min. Aliomar Baleeiro. Julgado em 22 de novembro de 1974.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 80.004/SE. CONVENÇÃO DE GENEBRA, LEI UNIFORME SOBRE LETRAS DE CÂMBIO E NOTAS PROMISSÓRIAS - AVAL APOSTO A NOTA PROMISSÓRIA NÃO REGISTRADA NO PRAZO LEGAL - IMPOSSIBILIDADE DE SER O AVALISTA ACIONADO, MESMO PELAS VIAS ORDINÁRIAS. VALIDADE DO DECRETO-LEI Nº 427, DE 22.01.1969. EMBORA A CONVENÇÃO DE GENEBRA QUE PREVIU UMA LEI UNIFORME SOBRE LETRAS DE CÂMBIO E NOTAS PROMISSÓRIAS TENHA APLICABILIDADE NO DIREITO INTERNO BRASILEIRO, NÃO SE SOBREPÕE ELA ÀS LEIS DO PAÍS, DISSO DECORRENDO A CONSTITUCIONALIDADE E CONSEQUENTE VALIDADE DO DEC-LEI Nº 427/69, QUE INSTITUI O REGISTRO OBRIGATÓRIO DA NOTA PROMISSÓRIA EM REPARTIÇÃO FAZENDÁRIA, SOB PENA DE NULIDADE DO TÍTULO. SENDO O AVAL UM INSTITUTO DO DIREITO CAMBIÁRIO, INEXISTENTE SERÁ ELE SE RECONHECIDA A NULIDADE DO TÍTULO CAMBIAL A QUE FOI APOSTO. RECURSO EXTRAORDINÁRIO CONHECIDO E PROVIDO. Belmiro da Silveira Goes versus Sebastião Leão Trindade. Relator Min. Xavier de Albuquerque. Tribunal Pleno. Julgamento em 1º/06/1977.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário nº90.083-7/MG. Doação de cabeças de gado a filhas do casal. Nulidade argüida pela mãe, anos após o desquite e partilha dos bens, invocando ausência de seu consentimento, somente válido se houvesse um instrumento público ou particular. Elizabeth Oliveira Silva versus Tiago Tavares dos Santos e outros. Primeira Turma, Rel. Min. Carlos Thompson Flores. Julgado em 06 de maio de 1980.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n.153.531-8/SC. Costume. Manifestação cultural. Estímulo. Razoabilidade. Preservação da fauna e da flora. Animais. Crueldade. A obrigação de o Estado garantir a todos o pleno exercício de direitos culturais, incentivando a valorização e a difusão das manifestações, não prescinde da observância da norma do inciso VII do artigo 225 da Constituição Federal, no que veda prática que acabe por submeter os animais à crueldade. Procedimento discrepante da norma constitucional denominado "farra do boi". APANDE – Associação Amigos de Petrópolis Patrimônio Proteção aos Animais e Defesa da Ecologia e outros versus Estado de Santa Catarina. Segunda Turma, Rel. Min. Marco Aurélio Mello. Julgado em 03 de junho de 1997.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n.30.125/RJ. Cheque visado. Cheque marcado. Efeitos diversos. Costume comercial. Esso Standard do Brasil Inc. versus Francisco Gimeno ou Francisco Henrique Gimeno. Tribunal Pleno, Rel. Min. Victor Nunes Leal. Julgado em 16 de fevereiro de 1967.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n.57.717/SP. Cheque visado. Cheque marcado. Efeitos diversos. Costume comercial. Banco Brasileiro de Descontos S.A. versus Viação Leste-Oeste S.A. Tribunal Pleno, Rel. Min. Victor Nunes Leal. Julgado em 14 de outubro de 1965.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n.58.414/GO. Juros. A proibição de sua cobrança, acima da taxa legal, e norma de direito público, que deve ser cumprida. O costume contra legem não pode ser fundamentado de decisão judicial, porque a lei só se revoga por outra lei. Repressão da usura decorrente do próprio texto da constituição. Recurso extraordinário conhecido e provido. Antônio de Velasco Figueiredo versus Digo Vila Verde Gutierre. Primeira Turma, Rel. Min. Evandro Lins e Silva. Julgado em 12 de outubro de 1965.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n.90.083-7/MG. Doação de cabeças de gado a filhas do casal. Nulidade argüida pela mãe, anos após o desquite e partilha dos bens, invocando ausência de seu consentimento, somente válido se houvesse um instrumento público ou particular. Elizabeth Oliveira Silva versus Tiago Tavares dos Santos e outros. Primeira Turma, Rel. Min. Carlos Thompson Flores. Julgado em 06 de maio de 1980.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 466.343-1/SP. PRISÃO CIVIL. Depósito. Depositário infiel. Alienação fiduciária. Decretação da medida coercitiva. Inadmissibilidade absoluta. Insubsistência da previsão constitucional e das normas subalternas. Interpretação do art. 5º, inc. LXVII e §§1º, 2º e 3º, da CF, à luz do art. 7º, §7º, da Convenção Americana de Direitos Humanos (Pacto de San José da Costa Rica). Recurso Improvido. Julgamento conjunto do RE nº 349.703 e dos HCs nº 87.585 e nº 92.566. É ilícita a prisão civil de depositário infiel, qualquer que seja a modalidade do depósito. Banco Bradesco S/A versus Luciano Cardoso Santos. Relator Min. Cezar Peluso. Tribunal Pleno. Julgamento em 03 de dezembro de 2008.

BRASIL. Supremo Tribunal Federal. Sentença Estrangeira Contestada n. 7209/Itália. SENTENÇA ESTRANGEIRA - TRAMITAÇÃO DE PROCESSO NO BRASIL - HOMOLOGAÇÃO. O fato de ter-se, no Brasil, o curso de processo concernente a conflito de interesses dirimido em sentença estrangeira transitada em julgado não é óbice à homologação desta última. BENS IMÓVEIS SITUADOS NO BRASIL - DIVISÃO - SENTENÇA ESTRANGEIRA - HOMOLOGAÇÃO. A exclusividade de jurisdição relativamente a bens imóveis situados no Brasil - artigo 89, inciso I, do Código de Processo Civil - afasta a homologação de sentença estrangeira a versar a divisão. Giuseppe Vaglio versus Daniela Montenegro Messeder. Tribunal Pleno. Relator Min. Ellen Gracie. Julgado em 30/09/2004.

BRASIL. Supremo Tribunal Federal. Sentença Estrangeira Contestada n. 4415/EU. SENTENÇA ESTRANGEIRA. ESTADOS UNIDOS DA AMÉRICA. INCOMPETÊNCIA DO JUÍZO. OFENSA À ORDEM PÚBLICA. JÚRI CIVIL. DECISÃO NÃO FUNDAMENTADA. I - A competência internacional prevista no artigo 88 do CPC é concorrente. O réu domiciliado no Brasil pode ser demandado tanto aqui quanto no país onde deva ser cumprida a obrigação, tenha ocorrido o fato ou praticado o ato, desde que a respectiva legislação preveja a

competência da justiça local. II - O Supremo já firmou entendimento no sentido de que o sistema do júri civil, adotado pela lei americana, não fere o princípio de ordem pública no Brasil. III - Sentença devidamente fundamentada com invocação da legislação norte-americana respectiva, do veredicto do júri, bem como das provas produzidas. Ação homologatória procedente. Minpeco S/A versus Naji Robert Nahas. Tribunal Pleno. Relator Min. Francisco Rezek. Julgado em 11/12/1996.

BRASIL. Supremo Tribunal Federal. Sentença Estrangeira Contestada n. 5041/EU. Sentença estrangeira de divórcio com cláusulas referentes à menor. Pedido de homologação. - Quanto às cláusulas referentes à guarda da menor, é de homologar-se a que atribui a custódia da menor a seu pai, porquanto inexiste, no Brasil, princípio de ordem pública que vede que a custódia de uma criança seja dada a seu genitor. Homologação parcial da sentença estrangeira. Carlos Ferreira Lima versus Lúcia Maria Pires Galvão. Tribunal Pleno. Relator Min. Néri da Silveira. Julgado em 28/06/1996.

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IRAN-UNITED STATES CLAIMS TRIBUNAL. Laudo n. 370 (429-370-1).APPLICATION OF CISG - CISG APPLICABLE AS 'RECOGNIZED INTERNATIONAL LAW OF COMMERCIAL CONTRACTS'. DAMAGES - DUTY TO MITIGATE - PRESERVATION OF THE GOODS - UNREASONABLE DELAY IN PAYMENT - RIGHT TO SELL - RIGHT TO RETAIN REASONABLE EXPENSE (ART. 88 CISG) Watkins-Johnson Co. & Watkins-Johnson Ltd. v. The Islamic Republic of Iran & Bank Saderat Iran. 28.07.1989. Available on: www.unilex.info/case.cfm?pid=1&do=case&id=38&step=FullText.

ITALIA. Corte di Appello di Genova. 211. FOB CLAUSE - APPLICABILITY TO SALES CONTRACT AS INTERNATIONAL TRADE USAGE BINDING UNDER ART. 9 CISG.Marc Rich & Co. A.G. Versus Iritecna S.p.A. 24.03.1995. Available on: www.unilex.info/case.cfm?pid=1&do=case&id=198&step=Abstract.

ITALIA. Tribunale di Padova - Sez. Este. REFERENCE BY PARTIES TO THE "LAWS AND REGULATIONS OF THE INTERNATIONAL CHAMBER OF COMMERCE, PARIS, FRANCE" AS THE LAW GOVERNING THE CONTRACT – INEFFECTIVE BECAUSE TOO VAGUE AND IMPRECISE - DOES NOT AMOUNT TO AN IMPLIED EXCLUSION OF CISG UNDER ART. 6. REFERENCE BY PARTIES TO LEX MERCATORIA, UNIDROIT PRINCIPLES OR CISG (WHERE THE LATTER IS NOT PER SE APPLICABLE) AS THE LAW GOVERNING THE CONTRACT – NOT VERITABLE CHOICE OF LAW CLAUSE – MERELY AMOUNTS TO INCORPORATION OF SUCH NON-BINDING RULES INTO THE CONTRACT. UNIFORM INTERPRETATION AND APPLICATION OF CISG (ART. 7(1) CISG) – RECOURSE TO INTERNATIONAL CASE-LAW. CONTRACT FOR DELIVERY IN INSTALMENTS AT BUYER'S REQUEST ("REQUIREMENT CONTRACT") – COVERED BY CISG. SELLER'S FAILURE TO DELIVER GOODS - AMOUNTS TO FUNDAMENTAL BREACH (ART. 25 CISG) - BUYER ENTITLED TO TERMINATE CONTRACT (ART. 49(1)(B) CISG) – CONDITIONS. Ostroznik Savo v. La Faraona soc. coop. a r.l. 11.01. 2005. Available on: www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText.

NEW ZELAND. Court of Appeal of New Zealand. Caso n. (2000) NZCA 350. Hideo Yoshimoto versus Canterbury Golf International Limited. 27.11.2000.

PARANÁ. Tribunal de Alçada. Apelação cível nº 144790-9. ARRENDAMENTO MERCANTIL - REINTEGRAÇÃO DE POSSE - FORO DE ELEIÇÃO - CONTRATO DE ADESÃO - CÓDIGO DE DEFESA DO CONSUMIDOR - CLÁUSULA ABUSIVA - INEFICÁCIA DO FORO ELEITO, EM PREJUÍZO DA PARTE ADERENTE - APELAÇÃO PROVIDA. 1 . As normas do Código de Defesa do Consumidor são aplicáveis aos contratos bancários em geral, abrangendo igualmente as operações de leasing, porque as arrendantes também são instituições financeiras reguladas pelo Banco Central do Brasil e, portanto, caracterizadas como fornecedoras de produtos e prestadoras de serviços (art. 3º, caput e seus §§, do CDC), enquanto os tomadores de crédito bancário ou usuários de quaisquer serviços prestados pelas instituições financeiras são consumidores, ainda que por equiparação, abrangidos pelo disposto no art. 29 do mesmo CDC. 2. Como é direito básico do consumidor, além do acesso aos órgãos judiciários, a facilitação da defesa de seus direitos (art. 6º, incs. VII e VIII do CDC), no contrato de adesão, por inexistir a liberdade plena de contratar, é ineficaz a cláusula de eleição de

foro em prejuízo da parte aderente, devendo ser aplicadas as regras gerais de competência em seu favor. Lusomar Comércio E Representação De Alimentos Ltda. versus Banestado Leasing S.A. - Arrendamento Mercantil. Terceira Câmara Cível. Relator Juiz Domingos Ramina. Julgado em 04 de abril de 2000.

PARANÁ. Tribunal de Alçada. Apelação Cível nº 152753-1. AÇÃO REVISIONAL. ARRENDAMENTO MERCANTIL. FINANCIAMENTO VINCULADO À VARIAÇÃO CAMBIAL. DÓLAR NORTE-AMERICANO. ALTERAÇÃO DO REGIME FORÇA A MODIFICAÇÃO DA POLÍTICA ECONÔMICA OPERADA EM JANEIRO/99 - LIBERAÇÃO DO CÂMBIO PELO BANCO CENTRAL. AUSÊNCIA DE COMPROVAÇÃO QUE OS RECURSOS VIERAM DO EXTERIOR (ART. 6º, DA LEI 8.880/94). REVISÃO NECESSÁRIA, TAMBÉM EM CONTA DA ONEROSIDADE EXCESSIVA QUE IMPLICOU O FATO SUPERVENIENTE PARA O DEVEDOR, PARA RESTABELECIMENTO DO EQUILÍBRIO DO CONTRATO. APLICAÇÃO DO ART. 6º, INCISO V, DO CÓDIGO DE DEFESA DO CONSUMIDOR. ATUALIZADOR PELO DÓLAR SUBSTITUÍDO PELO INPC/IGPM. SENTENÇA CONFIRMADA. APELAÇÃO DESPROVIDA. A liberdade de contratar não é absoluta, ou seja, limita-se à supremacia da ordem pública, a partir do surgimento do estado social democrático de direito. Quando onerosa a relação contratual, gerando impossibilidade subjetiva de se executarem os contratos, perfeitamente plausível a revisão judicial, sem que se esteja, com isso, afrontando o princípio 'pacta sunt servanda', uma vez que as matizes de tal regra têm delineamentos na atualidade, ainda mais nos contratos bancários. Tendo a alteração de política cambial provocado uma onerosidade excessiva ao devedor, cumpre aplicar-se a teoria da imprevisão, adotada de forma objetiva pelo art. 6º, do CDC, devendo ser revisto o contrato para que, a partir de janeiro de 1999, as prestações sejam atualizadas pela variação média do INPC/IGMPM. Bankboston Leasing S/A - Arrendamento Mercantil versus Sandra Baker Hessel. Relator Juiz Sérgio Arenhart. Julgado em 24 de outubro de 2000.

PARANÁ. Tribunal de Alçada. Apelação Cível nº 165483-9. CIVIL E PROCESSUAL CIVIL - LOCAÇÃO - DESCONTO-BONIFICAÇÃO E MULTA MORATÓRIA - DOUTRINA - CUMULAÇÃO - INADMISSIBILIDADE - MANTENÇA DAQUELA QUE MENOS ONERA O LOCATÁRIO - CODECON - INEXISTÊNCIA DE RELAÇÃO DE CONSUMO - INAPLICABILIDADE - POSIÇÃO DO SUPERIOR TRIBUNAL DE JUSTIÇA - ORÇAMENTO DE REFORMA - IMPRESTABILIDADE - VALOR DEPOSITADO ANTECIPADAMENTE EM GARANTIA - COMPENSAÇÃO - RECURSO PROVIDO. A despeito de lícita, porque em consonância com o princípio da liberdade de contratar, a cláusula estabelecendo desconto no valor do aluguel a título de benefício-pontualidade é inexigível juntamente com a multa moratória, já que ambas encontram supedâneo no fato do atraso no pagamento, constituindo a cumulação bis in idem. Simples orçamento não encerra poder de convencimento para ensejar cobrança de valores a título de reparos no imóvel locado, já que as declarações constantes de documento particular presumem-se verdadeiras em relação ao signatário, competindo porém ao interessado provar a veracidade do fato (CPC, art. 368 e § único). Cristovão Alves Pinto e outros versus Francisco Ávila. Sexta Câmara Cível. Relator Juiz Carvilio da Silveira Filho. Julgado em 18 de junho de 2001.

PARANÁ. Tribunal de Alçada. Apelação Cível nº 166924-9. LOCAÇÃO - DESPEJO - FALTA DE PAGAMENTO DE ALUGUERES - REAJUSTE CONSENSUAL - VALIDADE E EFICÁCIA - VÍCIO DE CONSENTIMENTO (CC, ART. 147, II) NÃO DEMONSTRADO - EXIGIBILIDADE DO VALOR ACORDADO - INEXISTÊNCIA, OUTROSSIM, DE DEPÓSITO DA PARTE INCONTROVERSA - LEI 8.245/91, ARTS. 62 E 67 - INTELIGÊNCIA - ENTREGA DAS CHAVES APÓS O JULGAMENTO DE PRIMEIRO GRAU - FATO NOVO - ARTIGO 462, CÓDIGO DE PROCESSO CIVIL - APLICAÇÃO AOS TRIBUNAIS - DOUTRINA - JURISPRUDÊNCIA - APELAÇÃO PROVIDA. É lícito o reajuste do aluguel em valor superior aos índices legais, mediante mútuo consenso, na medida em que encontra respaldo jurídico no artigo 18 da Lei 8.245/91; admitindo o locatário que anuiu com a majoração proposta, não o socorre a singela alegação de vício do consentimento, sem ao menos indicar no que consistiria o defeito capaz de invalidar o ato jurídico (CC, art. 147). Pode-se, com inteira liberdade, por acordo mútuo, contratar o aluguel original, a vigorar na primeira locação, bem como novo aluguel no curso dessa locação, ... Em qualquer hipótese, óbice não há de, mediante consentimento mútuo, acordarem as partes sobre o aluguel da locação, primitivo ou posterior à sua prorrogação compulsória. É a conseqüência natural, sem rodeios, do princípio em que se assenta a lei, da liberdade contratual (Silva Pacheco). Sexta Câmara Cível. Relator Juiz Mendes Silva. Nair Copinski e outras versus Eloi Volpe. Julgado em 19 de novembro de 2001.

PARANÁ. Tribunal de Alçada. Apelação Cível nº 171932-4. LOCAÇÃO - ENCARGOS - PRÊMIO PONTUALIDADE E MULTA MORATÓRIA - COBRANÇA CUMULATIVA - BIS IN IDEM - INADMISSIBILIDADE - MANTENÇA DAQUELA QUE MENOS ONERA O LOCATÁRIO - CLÁUSULA PENAL - PREVISÃO EM CONTRATO - LEGITIMIDADE E EXIGIBILIDADE - DOUTRINA - RECURSO PRINCIPAL PARCIALMENTE PROVIDO E PROVIDO O ADESIVO. O princípio da liberdade de contratar permite que, nas locações, sejam convencionadas multa moratória e cláusula penal, devida aquela em razão do pagamento tardio do aluguel e esta em decorrência de infração contratual, sendo todavia inexigíveis, cumulativamente, a primeira com o acréscimo correspondente ao denominado "prêmio pontualidade", já que encontram justificativa na mesma rubrica (mora). A lei não proíbe nem veda a livre convenção, uma vez que se assenta sobre o princípio da liberdade contratual... Admite, expressamente, a cobrança de multa ou penalidade (Silva Pacheco). Renato Volpi versus Lauro Pasternak e Inajá Sloboda. Sexta Câmara Cível. Relator Juiz Mendes Silva. Julgado em 30 de abril de 2001.

PARANÁ. Tribunal de Alçada. Apelação Cível nº 183255-3. Ação Cautelar Inominada em Caráter Inibitório e Preparatório e Ação Ordinária (revisional). Sistema Financeiro da Habitação. Apelação. Inaplicabilidade do Código de Defesa do Consumidor. Contrato anterior à Lei. Desacolhimento ante ao reconhecido interesse de ordem pública. TR. Substituição pelo INPC. Manutenção. Dívida. Amortização. Precedência à atualização do saldo devedor. Manutenção. Contrato de Seguro. Obrigatoriedade do valor do Prêmio corresponder à revisão do financiamento. Possibilidade. Respeito à liberdade de contratar em condições mais vantajosas. Manutenção. Saldo devedor. Reajuste atrelado à variação do salário mínimo. Mutuário sem vínculo empregatício. Permissibilidade legal. Art. 9.º, § 4.º, DL 2.164/84. Anatocismo. Tabela Price. Caracterização. Parcelas.

Amortizações. Manutenção. cadastros de proteção ao crédito. Inclusão dos nomes dos mutuários. Impossibilidade. Honorários Advocatícios. Percentual acordado previamente no contrato. Impropriedade. Incumbência do Juiz. Adesivo. Inadimplemento contratual. Cláusula de vencimento antecipado. Potestividade. Desacolhimento. DL 70/66. Inconstitucionalidade. Inocorrência. Possibilidade de cessão sem prévia anuência do mutuário. Ausência de interesse. Manutenção. Fundo de Assistência Habitacional (FUNDHAB). Devolução do valor pago. Desistência da porção recursal formulada no julgamento. |Possibilidade. Não conhecimento. Juros. Cláusula de majoração. Manutenção. INPC. Adequação às demais cláusulas do contrato. Acolhimento. Multa contratual. CDC. Redução. Acolhimento. Cláusula de responsabilização por débito remanescente. Potestividade. Nulidade reconhecida. Cláusula-mandato. Potestividade. Nulidade reconhecida. Recurso de Apelação. Desprovido. Recurso Adesivo. Conhecido em parte e parcialmente provido. Quinta Câmara Cível. Relator Juiz Edson Vidal Pinto. Julgado em 11 de dezembro de 2002.

PARANÁ. Tribunal de Alçada. Apelação Cível nº 190965-5. APELAÇÃO CÍVEL - AFASTAMENTO DA TAXA DE "JUROS REAIS" DE 0,5% AO MÊS - APLICABILIDADE DE OFÍCIO DO LIMITE CONSTITUCIONAL DE 12% - NÃO EXISTE ARGUMENTO JURÍDICO CAPAZ DE JUSTIFICAR E AUTORIZAR EXATAMENTE O QUE O CONSTITUINTE EXPRESSAMENTE PROIBIU - O FORNECEDOR DE SERVIÇOS BANCÁRIOS E DE CRÉDITO ESTÁ EXPRESSAMENTE ENQUADRADO NOS DISPOSITIVOS DO CODECON - A LIBERDADE DE CONTRATAR, COMO QUALQUER OUTRA LIBERDADE SOFRE LIMITAÇÕES NO MODERNO ESTADO DE DIREITO - CAPITALIZAÇÃO DE JUROS QUE NÃO SE ENQUADRA NAS HIPÓTESES EXCEPCIONADAS - COMISSÃO DE PERMANÊNCIA A TAXAS DE MERCADO - ABUSIVIDADE - NEGADO PROVIMENTO AO RECURSO. BB Financeira S/A Crédito, Financiamento e Investimento versus Alberto Bosak Filho e Outros. Oitava Câmara Cível. Relator Juiz Antenor Demeterco Junior. Julgado em 10 de junho de 2002.

PARANA. Tribunal de Alçada. Apelação Cível nº 218396-0. APELAÇÃO CÍVEL - AÇÃO DE RESTITUIÇÃO - CONTRATO DE LOCAÇÃO - BÔNUS OU CLÁUSULA PONTUALIDADE - MULTA MORATÓRIA - IMPOSSIBILIDADE DE CUMULAÇÃO - HONORÁRIOS ADVOCATÍCIOS - PRESTAÇÃO DE SERVIÇOS - CONTRATO QUE GERA EFEITO ENTRE AS PARTES - DECISÃO CORRETA - RECURSO DESPROVIDO. A despeito de lícita, porque em consonância com o princípio da liberdade de contratar, a cláusula estabelecendo desconto no valor do aluguel a título de benefício-pontualidade é inexigível juntamente com a multa moratória, já que ambas encontram supedâneo no fato do atraso no pagamento, constituindo a cumulação bis in idem. S.W.A. Administradora de Bens Próprios LTDA. versus Auto-Mecânica Monte Castelo Ltda. Sétima Câmara Cível. Relator Juiz Prestes Mattar. Julgado em 16 de dezembro de 2000.

PARANA, Tribunal de Alçada. Apelação Cível n. 247562-9. AÇÃO DE PRECEITO COMINATÓRIO - REMOÇÃO DE CRUZ FINCADA À MARGEM DE RODOVIA - NOTIFICAÇÃO PREMONITÓRIA EFETUADA PARA RETIRADA E NÃO CUMPRIDA - EXERCÍCIO REGULAR DE DIREITO - NORMAS REGULAMENTADORES ESPECÍFICAS - NÃO APLICABILIDADE DO INSTITUTO

DE USOS E COSTUMES. "1 - A concessionária que administra e explora rodovias Estaduais e Federais, no exercício regular de direito, detém a prerrogativa de adotar os procedimentos que entender pertinente para a execução da tarefa, o que levou esta a retirar a cruz, depois de descumprida a notificação, pois sendo um bem particular não podia permanecer em lugar de domínio público sem autorização e previsão legal. 2 - O uso e costume, previsto no art. 4º da Lei de Introdução do Código Civil, só se aplica quando a lei for omissa. 3 - Recurso conhecido, mas a que se nega provimento". Almerina Margarida Sordi Pomin, Cláudio César Pomin, Vânia Maria Pomin Marques, Jacyara Marta Pomin Gomes, Delcides Pomin Júnior, Fernando Luis César Pomin versus Rodovias Integradas do Paraná S.A. Primeira Câmara Cível. Relator Juiz Antônio de Sá Ravagnani. Julgado em 09 de novembro de 2004.

PARANÁ. Tribunal de Justiça. Apelação Cível nº 104931-8. APELAÇÃO CÍVEL - CONTRATO DE ABERTURA DE CRÉDITO EM CONTA CORRENTE - SUPER CHEQUE - CONTRATO DE ADESÃO - PERÍCIA CONTÁBIL - VERIFICAÇÃO DA PRÁTICA DE ANATOCISMO DE PARTE DA INSTITUIÇÃO BANCÁRIA - ENCARGOS CONTRATUAIS - OMISSÃO AO CLIENTE FERINDO SUA LIBERDADE DE CONTRATAR - RECÁLCULO DA DÍVIDA - MÁ-FÉ NÃO CONFIGURAÇÃO - APELO PARCIALMENTE PROVIDO COM INVERSÃO DOS ÔNUS DE SUCUMBÊNCIA. Jorge da Silva Filho & CIA. LTDA. e outro versus Banco do Estado do Paraná S.A.. Quinta Câmara Cível. Des. Bonejos Demchuk. Julgado em 12 de junho de 2001.

PARANÁ. Tribunal de Justiça. Apelação Cível nº 108529-4. APELAÇÃO CÍVEL - CONTRATO DE ABERTURA DE CRÉDITO EM CONTA CORRENTE - SUPER CHEQUE - CONTRATO DE ADESÃO - VERIFICAÇÃO DA PRÁTICA DE ANATOCISMO DE PARTE DA INSTITUIÇÃO BANCÁRIA - ENCARGOS CONTRATUAIS - TAXA DE JUROS - OMISSÃO AO CLIENTE FERINDO SUA LIBERDADE DE CONTRATAR - APELO NEGADO. Banco do Estado do Paraná S/A versus Clayton Petterle Júnior e outro. Quinta Câmara Cível. Des. Bonejos Demchuk. Julgado em 09 de outubro de 2001.

PARANÁ, Tribunal de Justiça. Apelação Cível nº 166460-0. AÇÃO DE COBRANÇA - HONORÁRIOS MÉDICOS - PROFISSIONAL NÃO CREDENCIADO JUNTO AO CONVÊNIO UTILIZADO PELA RÉ DURANTE O INTERNAMENTO DE SEU FILHO - CIÊNCIA DA APELANTE DE QUE OS HONORÁRIOS SERIAM COBRADOS SEPARADAMENTE - VALOR COBRADO EM COMPATIBILIDADE COM OS SERVIÇOS PRESTADOS (CIRURGIA NEUROLÓGICA) - ARTIGO 333, INCISO I DO CPC - RECURSO DESPROVIDO. 1. Tem legitimidade ad causam para cobrança de honorários profissionais o chefe da equipe médica, pelos seus serviços e de todos os membros da equipe. 2. Existindo ajuste prévio para pagamento de honorários médicos, estes são devidos, se efetivada a locação de serviços profissionais. 3. A fixação da retribuição, deve ser razoável e compatível com o gabarito profissional, considerando o costume do lugar, o tempo de serviço e sua qualidade. 4. Desincumbindo-se o autor, satisfatoriamente do ônus da prova que lhe incumbia, sem qualquer contraprova de fato modificativo por parte do réu, impõe-se a procedência do pedido.Lucia de Fátima Rodrigues Orlandini versus Hiroshi Nakano. Primeira Câmara Cível. Relator Des. Lauro Augusto Fabrício de Melo. Julgado em 27 de março de 2001.

PARANÁ. Tribunal de Justiça. Apelação Cível n. 167032-0. Ação monitória. Contrato de transporte internacional por rodovia. Pagamento do frete. Responsabilidade do exportador/vendedor ou do importador/comprador. Cláusula FOB ou CIF. Ônus da prova. Embargos infringentes. Alcan Alumínio do Brasil Ltda. versus Transportadora Alexandra do Brasil Ltda., Rel. Des. Ruy Cunha Sobrinho. Acórdão de 03 de março de 2005.

PARANÁ, Tribunal de Justiça. Apelação Cível nº 215955-7. AÇÃO DE COBRANÇA DE HONORÁRIOS MÉDICOS. COMPROVAÇÃO DOS SERVIÇOS PRESTADOS E DA INADIMPLÊNCIA EM RELAÇÃO AO MESMO. DIREITO DO PROFISSIONAL MÉDICO EM RECEBER A PAGA RESPECTIVA. QUANTUM PLEITEADO QUE NÃO FOI, TODAVIA, OBJETO DE ACERTAMENTO PRÉVIO ENTRE AS PARTES. ARBITRAMENTO DA RETRIBUIÇÃO AFETO AO JUÍZO. QUANTUM CORRETAMENTE FIXADO. APELAÇÃO DESPROVIDA. RECURSO ADESIVO. DESERÇÃO. NÃO CONHECIMENTO. 1.Ao recurso adesivo se aplicam as mesmas regras do recurso principal, quanto às condições de admissibilidade. A ausência de preparo acarreta a deserção e impede o seu conhecimento. 2.Comprovada a efetiva prestação dos serviços, faz jus o profissional médico à remuneração respectiva. 3."Não se tendo estipulado, nem chegado a acordo as partes, fixar-se-á por arbitramento a retribuição, segundo o costume do lugar, o tempo do serviço e a sua qualidade". Inteligência do artigo 1218 da lei civil. 4."A transação não aproveita, nem prejudica senão aos que nela intervieram, ainda que diga respeito a coisa indivisível" (art. 1031. do CC). 5.Assim, a transação firmada pela entidade hospitalar e a paciente não alcança o médico, se não inclui os serviços por ele prestados, ainda a mercê da remuneração respectiva (art. 1036 do CC de 1916). Francisca do Espírito Santo e Margot do Espírito Santo Costa versus Luciano Alves Façanha. Décima Câmara Cível. Relator Des. Lauri Caetano da Silva. Julgado em 21 de agosto de 2003.

PARANÁ. Tribunal de Justiça. Agravo de instrumento nº 306664-4. MEDIDA CAUTELAR. AÇÃO DECLARATÓRIA. EMPRÉSTIMOS BANCÁRIOS. SERVIDOR PÚBLICO. BLOQUEIO DE SALÁRIO DEPOSITADO EM CONTA CORRENTE PARA SATISFAÇÃO DO CRÉDITO DA INSTITUIÇÃO FINANCEIRA. FUNÇÃO SOCIAL DO CONTRATO. REQUISITOS DA AÇÃO CAUTELAR PREENCHIDOS. PRESTAÇÃO DE CAUÇÃO. EXIGIBILIDADE. Das preliminares 1. O prazo de prescrição do direito de ação é o das ações pessoais, nos termos do que dispõe o artigo 205 do Código Civil de 2002, in verbis: "A prescrição ocorre em dez anos, quando a lei não lhe haja fixado prazo menor". (TAPR; 6ª CC; Acórdão nº18091; Apel. Civ. nº 0260254-0; Rel. Paulo Habith; j. 31.08.2004; un.; DJ 6707.) 2. Em sede de agravo de instrumento é incabível a extinção do processo - ação cautelar - sem julgamento do mérito, quando o tema não foi submetido ao juízo de primeiro grau. 3. "A fim de garantir a efetiva indenização dos prejuízos que eventualmente o requerido venha a sofrer, nos casos enumerados no CPC 811, o juiz pode determinar a prestação de caução como condição para a concessão de liminar." (Nery Júnior, Nelson; Nery, Rosa Maria de Andrade, Código de Processo Civil comentado e legislação extravagante, São Paulo: Ed. RT; 8ª ed., 2004, p.1189). Do mérito 1.Verificada a existência dos requisitos legais autorizativos - fumus boni iuris e periculum in mora - não há que se falar em revogação da liminar concedida. 2. "Tem nossos tribunais entendido sobre a impossibilidade de retenção de salário de funcionário, visto que, mesmo que creditados os

vencimentos em conta corrente, tal não descaracteriza seu caráter alimentar. Por empréstimo feito pela agravada, o agravante apenas pode cobrá-lo judicialmente, mas não descontar como vinha fazendo, mesmo que tenha autorização por escrito, se posteriormente a devedora mutuaria não mais o consentir" (RT 803/262)1 3. A aplicação do princípio do pacta sunt servanda encontra-se, atualmente, mitigado tendo em vista a aplicação da teoria da função social do contrato que é decorrência lógica do princípio constitucional dos valores da solidariedade e da construção de uma sociedade mais justa (CF 3º, I)2, nos termos do que dispõe o art. 421 do Código Civil de 2002, in verbis: "A liberdade de contratar será exercida em razão e nos limites da função social do contrato." RECURSO CONHECIDO E PARCIALMENTE PROVIDO. Banco Rural S/A versus Antônio José Cruz Malassise. Décima sexta Câmara Cível. Relator Des. ShiroshiYendo. Julgado em 09 de novembro de 2005.

PARANA. Tribunal de Justiça. Apelação Cível n. º 328.919-8. DIREITO INTERNACIONAL PRIVADO. CONTRATO DE FINANCIAMENTO INTERNACIONAL. APELAÇÃO CÍVEL. AÇÃO MONITÓRIA. CONTRATO BANCÁRIO. FINANCIAMENTO DE COMPRA E VENDA INTERNACIONAL. EXIMBANK - EXPORT IMPORT BANK OF UNITED STATES. AGÊNCIA DO GOVERNO NORTE AMERICANO. SUBROGAÇÃO. PRINCÍPIO "LOCUS REGIT ACTUM". LEI APLICÁVEL AO CONTRATO. OBRIGAÇÃO CONSTITUÍDA E COM PREVISÃO DE CUMPRIMENTO NO EXTERIOR. CÓDIGO DE DEFESA DO CONSUMIDOR. INAPLICABILIDADE. CONTRATO REGIDO POR LEGISLAÇÃO ESTRANGEIRA. CERCEAMENTO DE DEFESA. SUPRESSÃO DA INSTRUÇÃO. INOCORRÊNCIA. FATO PROBANDO IRRELEVANTE A SOLUÇÃO DA CAUSA.ORDEM PÚBLICA PROCESSUAL. FATO IMPEDITIVO DO DIREITO DO AUTOR. ALEGAÇÃO APÓS ENCERRAMENTO DA FASE POSTULATÓRIA. DIREITO DO CONSUMIDOR. MATÉRIA DE ORDEM PÚBLICA. IMPERTINÊNCIA. PRECLUSÃO. INTERVENÇÃO DO MINISTÉRIO PÚBLICO. DESNECESSIDADE. RELAÇÃO JURÍDICA PRIVADA. INTERESSES DISPONÍVEIS. AUSÊNCIA DE PREVISÃO LEGAL. CAPITALIZAÇÃO DE JUROS. CONTRATO REGIDO POR DIREITO ALIENÍGENA. ÔNUS DE ALEGAR VIOLAÇÃO AO DIREITO DE REGÊNCIA. PRESUNÇÃO DE LEGITIMIDADE. PRINCÍPIO "LOCUS REGIT ACTUM". CONTRATOS INTERNACIONAIS DE FINANCIAMENTO. JUROS. PACTUACAO EXPRESSA EM CONTRATO. TAXA BÁSICA PARA EMPRÉSTIMOS INTERBANCÁRIOS. LIBOR - TAXA NO MERCADO INGLÊS. LIMITAÇÃO CONSTITUCIONAL DE JUROS. ART. 192, §3º DA CONSTITUIÇÃO FEDERAL. NÃO AUTO-APLICÁVEL. SÚMULA N. 648 DO SUPREMO TRIBUNAL FEDERAL. CONTRATO EM MOEDA ESTRANGEIRA. PREVISÃO DE PAGAMENTO NO EXTERIOR. CONVERSÃO NA DATA DO PAGAMENTO. Recurso de apelação 1 desprovido. Recurso de apelação 2 provido. 1. Lei aplicável ao contrato - Princípio do "locus regit actum". Na forma do consagrado postulado do "locus regit actum", constituída a obrigação no exterior, e estipulado que o seu cumprimento se dará naquela sede, é a lei local que disciplina a relação jurídica. Neste particular, é sintomático que sequer existia a perspectiva do ingresso do capital mutuado no Brasil, posto que os valores seriam imediatamente repassados pelo banco mutuante à empresa exportadora, ambos de nacionalidade norte-americana. Somente se discute este contrato no foro brasileiro para que seja viável a sua cobrança judicial, haja vista que a empresa devedora provavelmente não conta com bens no território norte-americano, para saldar o débito. 2.

Código de Defesa do Consumidor. Embora inexista nos autos a demonstração do direito que regia o contrato, é mais que evidente que a regência pela disciplina norte-americana exclui a incidência da legislação brasileira, inclusive do Código de Defesa do Consumidor. Admitir que se surpreenda o credor, que celebrou o contrato em seu domicílio, com legislação protetiva vigente no país do devedor, representaria uma absoluta quebra da segurança das relações comerciais internacionais. 3. Cerceamento de defesa. Para justificar a ausência de pagamento, os embargantes pretendem invocar a "exceptio non adimpleti contractus". Ocorre que o alegado "fato impeditivo" jamais poderá ser oponível contra o banco norte-americano, que cumpriu com todos os deveres pelos quais se obrigou, isto é, concedeu o montante mutuado no tempo e modo contratados. Até por força do princípio universal da relatividade dos contratos, o eventual vício da mercadoria adquirida é oponível unicamente frente ao exportador, vez que o banco é terceiro em relação ao contrato de compra e venda internacional. 4. Alegação de fato impeditivo - intempestividade. Ainda que fosse aplicável o CDC, não haveria justificativa legítima para se sobrepor a ordem pública de proteção ao consumidor sobre a própria ordem pública processual, vilipendiando garantias constitucionais da parte autora, como as do devido processo legal, do contraditório e da duração razoável do processo (respectivamente, art. 5º, incisos LIV, LV e LXXVIII, da Constituição Federal). A relação processual se aperfeiçoa de pleno direito a partir da resposta do réu, sendo certo que, a ausência de menção na defesa sobre o fato impeditivo do direito do autor, o exclui do âmbito de apreciação naquele processo. Assim, a matéria não fará parte do controvertido nos autos, sendo absolutamente impertinente que seja levantada após ultimada a fase postulatória. 5. Ministério Público - Intervenção. O caso em análise não se amolda a qualquer das hipóteses constitucionais ou legais em que se exige a participação do órgão ministerial. 6. Capitalização de juros. Inaplicáveis as disposições legais nacionais acerca da limitação e capitalização de juros, posto que a lei de regência é a estrangeira. Os embargantes não se desincumbiram do ônus de alegar eventual infração à legislação alienígena, razão pela qual, por força do princípio do "locus regit actum", a relação jurídica é presumidamente legítima. 7. 8. Limitação Constitucional de juros. A jurisprudência é pacífica sobre a não auto-aplicabilidade do já revogado §3º do artigo 192 da Constituição Federal. 9. Conversão monetária. A obrigação foi constituída nos Estados Unidos da América, com previsão de integral cumprimento naquela mesma sede. Nada mais coerente, portanto, que o banco que concedeu o empréstimo em dólares norte-americanos, com previsão de pagamento na mesma moeda, o receba na exata forma contratada. Diferente fosse, estar-se-ia correndo o risco de onerar o credor com o recebimento de quantia inferior à efetivamente devida, frustrando as expectativas possuía quando aderiu à relação negocial. Martiaço Indústria e Comércio de Artefatos Metálicos Ltda e outros versus Export Import Bank of The United States – EXIMBANK. 15ª Câmara Cível. Relator Desembargador Jurandyr Souza Junior. Julgado em 03/05/2006.

PARANA, Tribunal de Justiça. Apelação Cível nº 385495-9. APELAÇÃO CÍVEL - AÇÃO DE COBRANÇA DE PRÊMIO DE BINGO, CUMULADA COM INDENIZAÇÃO POR DANOS MORAIS - JOGADOR QUE COMPLETA A CARTELA, MAS ANUNCIA SOMENTE APÓS JÁ TEREM SIDO CONTEMPLADOS OUTROS PARTICIPANTES - APLICAÇÃO DE COSTUME COMO FONTE DO DIREITO - PREMIAÇÃO INDEVIDA - PRETENSÃO IMPROCEDENTE - SENTENÇA CORRETA - RECURSO

DESPPROVIDO. A legislação pátria autoriza a utilização dos costumes como fonte do direito quando, para o caso sub judice, não houver expressa disposição reguladora da matéria, como neste feito em que, o autor pretende receber prêmio de bingo onde, mesmo tendo sido o primeiro a completar a cartela, somente anunciou a ocorrência após terem sido outros participantes contemplados por números que foram sorteados a posteriori. Francisco Antônio da Silveira versus Loja Maçônica XV de Novembro, Geni Aparecida Vieira de Oliveira, Genésio Lopes, Altair Pereira da Silva e Sérgio Reis Bordonal. Sexta Câmara Cível. Relator Des. Prestes Mattar. Julgado em 13 de março de 2007.

PARANA, Tribunal de Justiça. Apelação Cível n°424941-6. APELAÇÃO CÍVEL. AÇÃO DE ARBITRAMENTO DE HONORÁRIOS ADVOCATÍCIOS - LOCAÇÃO DE SERVIÇOS RESCINDA POR INICIATIVA DO LOCADOR - RENÚNCIA DE MANDATO NO CURSO DA LIDE EM RAZÃO DA SUBSTITUIÇÃO DO CONTRATANTE POR EMPRESA CESSIONÁRIA DE CRÉDITO - RESPONSABILIDADE DESTA PELOS HONORÁRIOS ATÉ A INTERRUPÇÃO DOS SERVIÇOS - POSSIBILIDADE, OBSERVADAS AS CIRCUNSTÂNCIAS DO TRABALHO. Apelo desprovido. 1. Toda a espécie de serviço ou trabalho lícito, material ou imaterial, pode ser contratada "mediante retribuição", a teor do disposto no artigo 1.216 do Código Civil de 1916 (art. 594 do CC/2002). Na locação de serviços, não havendo prazo estipulado, nem se podendo inferir da natureza do contrato, ou do costume do lugar, qualquer das partes, a seu arbítrio, mediante prévio aviso, pode rescindir o contrato (art. 1221). Por isto, o advogado que renuncia ao mandato mediante prévia notificação do mandante (art. 1277, § 1º e 2º) não perde o direito à remuneração vencida até o final da prestação de serviços (EOAB, art. 22, § 2º). 2. A responsabilidade da cessionária de crédito pelo pagamento dos honorários arbitrados na sentença decorre da sub-rogação convencional (CC/1916, art. 986 e 987), e do próprio regime da cessão (CC/1916, art. 1066, c/c arts. 58 e 59, e CPC, art. 567, II) ao qual se vinculou. Rio Paraná Companhia Securitizadora de Créditos Financeiros versus Oliveira Martins dos Reis. Décima segunda Câmara Cível. Relator Des. Ivan Bortoleto. Julgado em 28 de maio de 2008.

PARANA, Tribunal de Justiça. Apelação Cível n. 461216-8. APELAÇÃO CÍVEL. EMBARGOS DE TERCEIRO. AÇÃO DE RESCISÃO CONTRATUAL CONVERTIDA EM EXECUÇÃO. PENHORA JUDICIAL DE VEÍCULO. BEM VENDIDO ANTES DA CITAÇÃO DO DEVEDOR, NOS AUTOS DE EXECUÇÃO. AQUISIÇÃO DO BEM PELA APELANTE/EMBARGANTE APÓS SUCESSIVAS TRANSFERÊNCIAS. AUSÊNCIA DE ANOTAÇÃO NO DETRAN DE BLOQUEIO JUDICIAL PROIBINDO A VENDA. BOA-FÉ DA EMBARGANTE/APELANTE. INAPLICABILIDADE DA PRESUNÇÃO DE FRAUDE. COSTUME DO MERCADO DE COMPRA E VENDA DE VEÍCULOS, ONDE BASTA A CERTIDÃO - JUNTADA NOS AUTOS PELA APELANTE - E ATUALIZADA, DO DEPARTAMENTO DE TRÂNSITO ATESTANDO A INEXISTÊNCIA DE PENDÊNCIA OU BLOQUEIO JUDICIAL SOBRE O BEM. SENTENÇA REFORMADA. EMBARGOS DE TERCEIRO ACOLHIDOS COM DETERMINAÇÃO DE LIBERAÇÃO DA PENHORA E DESBLOQUEIO DA CONSTRIÇÃO. APELAÇÃO CÍVEL CONHECIDA E PROVIDA. Maria da Glória Amorin versus Nair Sant´Ana Mirais. Sétima Câmara Cível. Relator Des. Ruy Francisco Thomaz. Julgado em 11 de março de 2008.

PARANA, Tribunal de Justiça. Apelação Cível nº 470210-5. IRB Resseguros Brasil S. A versus Companhia de Seguros do Estado de São Paulo. RECURSO DE APELAÇÃO DE COMPANHIA DE SEGUROS DO ESTADO DE SÃO PAULO SEGURO. TRATOR. TRANSPORTE SOBRE CAMINHÃO. PROVA TESTEMUNHAL QUE ESTAVA FRENADO E CALÇADO. PERDA DO CONTROLE DO CAMINHÃO EM UMA CURVA. CAUSA PRIMÁRIA DO EVENTO. AUSÊNCIA DE AGRAVAÇÃO DO RISCO EM RAZÃO DO VEÍCULO TRANSPORTADOR. CÓDIGO DE DEFESA DO CONSUMIDOR, ART. 51, CAPUT, INCISO IV. CLÁUSULA ABUSIVA. DESVANTAGEM EXAGERADA PARA O CONSUMIDOR. DEVER DE CUMPRIR O QUE AVENÇADO. RECURSO CONHECIDO E NÃO PROVIDO RECURSO DE APELAÇÃO DE IRB RESSEGUROS BRASIL S. A. DENUNCIAÇÃO DA LIDE. JURISPRUDÊNCIA DOMINANTE DO TRIBUNAL DE JUSTIÇA DO ESTADO DO PARANÁ. IMPOSSIBILIDADE. RECURSO CONHECIDO E PROVIDO 1. Há nulidade das cláusulas quando as regras lançadas no art. 51, caput, inciso IV da Lei nº 8.078/90, posto que estabelecem obrigações consideradas iníquas, abusivas e colocam o consumidor em desvantagem exagerada e são incompatíveis com a boa-fé e com a equidade, devendo ser honrado o que contratado. 2. Robusta prova oral testemunhal no sentido de que a causa do evento, queda do trator de sobre o caminhão que o transportava, ocorreu em razão do motorista perder o controle em uma curva, realizando manobra para evitar a queda do caminhão em um precipício. Trator transportado com calços, de forma rotineira, conforme costume na região. 3. Entendo que o Instituto de Resseguro do Brasil - IRB, não responde perante os segurados pelo montante assumido em resseguro, não podendo figurar como litisconsorte necessário. Isto porque a regra do artigo 68 do Decreto-Lei 73/1966 encontra-se revogada pelo artigo 12 da Lei 9932/99 e recentemente alterada pelo artigo 31, da Lei Complementar nº 126 de 15/01/2007. Oitava Câmara Cível. Relator. Des. José Sebastião Fagundes Cunha. Julgado em 08 de julho de 2008.

PARANÁ. Tribunal de Justiça. Apelação Cível n. 499103-7. APELAÇÕES CÍVEIS. AÇÃO ORDINÁRIA DE CUMPRIMENTO CONTRATUAL C/C RESCISÃO E COBRANÇA DE MULTA. APELO DO AUTOR. PROVA TESTEMUNHAL. MOMENTO PROCESSUAL PARA CONTRADITA EM AUDIÊNCIA. SIMPLES FATO DE SER FUNCIONÁRIO DA EMPRESA NÃO TORNA SUSPEITA A TESTEMUNHA. TRANSPORTE DA PRODUÇÃO POR PROFISSIONAL INDICADO PELO PRODUTOR. NEGATIVA EM ENTREGAR O FUMO SOB ALEGAÇÃO DE PEQUENA QUANTIDADE QUANDO O COSTUME É DE VÁRIAS ENTREGAS EM PEQUENAS QUANTIDADES E APREENSÃO DE 4.600 KG MEDIANTE SEQUESTRO QUANDO A PREVISÃO DA PRODUÇÃO SERIA DE 7.000 KG. CARACTERIZAÇÃO DO DESCUMPRIMENTO CONTRATUAL. PARCIAL REFORMA, A FIM DE INTEGRAR AO PATRIMÔNIO DA AUTORA SOMENTE QUANTIDADE DE FUMO NECESSÁRIA PARA COBRIR OS VALORES DEVIDOS PELO RÉU. APELO DA RÉ. NÃO CARACTERIZADA A RELAÇÃO CONSUMERISTA ENTRE PRODUTOR E INDÚSTRIA DE FUMO. CONTRATO BILATERAL. INAPLICABILIDADE DO CDC. MULTA ELEVADA PARA 10%, CONFORME CLÁUSULA CONTRATUAL. RECURSO PROVIDO. PROVIMENTO PARCIAL DO APELO DO RÉU, PROVIMENTO DO RECURSO DA AUTORA. Pedro Pereira Padilha e Souza Cruz S/A versus Pedro Pereira Padilha e Souza Cruz S/A. Sexta Câmara Cível, Relator Des. Sérgio Arenhart. Julgado em 30 de setembro de 2008.

PARANA, Tribunal de Justiça. Apelação Cível nº 519237-6. APELAÇÃO CÍVEL - AÇÃO DECLARATÓRIA DE NULIDADE E INEXIGIBILIDADE DE TÍTULO DE CRÉDITO C/C INDENIZAÇÃO POR DANOS MORAIS - DUPLICATA SACADA PELO DESCUMPRIMENTO DE CONTRATO DE BLOQUEIO (DESISTÊNCIA DE RESERVAS DE APARTAMENTOS EM HOTEL DIAS ANTES DA DATA AVENÇADA) - VALOR DO TÍTULO QUE SE REFERE À UMA CLÁUSULA PENAL ESTIPULADA NO MONTANTE EQUIVALENTE A UMA DIÁRIA DE CADA UNIDADE RESERVADA (CLÁUSULA "NO-SHOW") - ALEGAÇÃO DE QUE O COSTUME NA CIDADE DE LONDRINA SERIA O DA NÃO COBRANÇA DA CLÁUSULA "NO-SHOW", FATO QUE TORNARIA INDEVIDO O DÉBITO APONTADO PELO CREDOR - ALEGAÇÃO INSUBSISTENTE, DIANTE DA SUA EXPRESSA CONTRATAÇÃO E CLARA MANIFESTAÇÃO DO PRESTADOR DE SERVIÇO EM COBRÁ-LA QUANDO DO DESCUMPRIMENTO DO CONTRATO - NECESSIDADE DE COMPROVAÇÃO NÃO SOMENTE DA EXISTÊNCIA DE TAL COSTUME NA PRÁTICA EMPRESARIAL LONDRINENSE, MAS TAMBÉM DA INTENÇÃO DAS PARTES EM ADOTÁ-LO, FATOS ESTES NÃO CONFIRMADOS NOS AUTOS, ALÉM DE TAMBÉM FERIR DIRETAMENTE O ART. 335, CPC - DEMONSTRAÇÃO DE PREJUÍZO PARA A COBRANÇA DA CLÁUSULA PENAL - DESNECESSIDADE - PRÉVIA ESTIPULAÇÃO DE SEU VALOR QUANDO DA CONTRATAÇÃO, DE ACORDO COM PRÓPRIA NATUREZA JURÍDICA DA CLÁUSULA PENAL - DISCUSSÕES ACERCA DO VALOR ATRIBUÍDO À CLÁUSULA "NO-SHOW" - ABUSIVIDADE E EXCESSO NÃO VERIFICADOS - EXEGESE DOS ARTS. 412 E 413 DO CC - NULIDADE DA DUPLICATA POR RETRATAR UMA CLÁUSULA PENAL E NÃO UM SERVIÇO PRESTADO - ARGUMENTO QUE DEVE SER ACOLHIDO, A DESPEITO DE QUE TAL TÍTULO TENHA POR SUBSTRATO A PRESTAÇÃO DE SERVIÇOS DE HOTELARIA - PRECEDENTES - INSERÇÃO DO NOME DO DEVEDOR EM CADASTROS DE PROTEÇÃO AO CRÉDITO QUE É DIREITO, APESAR DISSO - INDENIZAÇÃO POR DANOS MORAIS INDEVIDA - PECULIARIDADES DO CASO - ÔNUS SUCUMBENCIAL REFORMULADO. I- NO PRESENTE CASO, AO FIRMAR O CONTRATO DE BLOQUEIO (RESERVAS DE APARTAMENTOS EM HOTEL), ENTABULARAM AS PARTES UMA CLÁUSULA PENAL (GARANTIA NO-SHOW), OU SEJA, NO CASO DE CANCELAMENTO DAS RESERVAS EFETUADAS, SERIA COBRADO O VALOR EQUIVALENTE A UMA DIÁRIA DE CADA APARTAMENTO. SEM AMPARO A TESE DA APELANTE AO AFIRMAR QUE A COBRANÇA DA CLÁUSULA NO-SHOW SERIA CONTRÁRIA AOS COSTUMES DA PRÁTICA EMPRESARIAL NA CIDADE DE LONDRINA, LOGO, SERIA ELA INEXIGÍVEL.CONFORME O ART. 335, CPC, A APLICAÇÃO DOS USOS E COSTUMES NA RESOLUÇÃO DAS LIDES DEVE SE ATER ÀS SITUAÇÕES NÃO REGULADAS PELO DIREITO, FATO ESTE NÃO OBSERVADO NO PRESENTE CASO, JÁ QUE AS PARTES OBJETIVAMENTE CONTRATARAM A CLÁUSULA NO-SHOW. DIANTE DISSO, O NÃO PAGAMENTO DA CLÁUSULA PENAL EM TELA SERIA UMA AFRONTA AO PRINCÍPIO DO PACTA SUNT SERVANDA QUE CONTINUA A EXISTIR NA RELAÇÃO ENTRE PARTICULARES, APESAR DE SUA RELATIVIZAÇÃO EM ALGUNS CASOS ESPECÍFICOS, O QUE NÃO É A HIPÓTESE EM COMENTO. OUTROSSIM, DE ACORDO COM A LIÇÃO DO SAUDOSO JURISTA RUBENS REQUIÃO, MESMO QUE DEMONSTRADO NO PRESENTE CASO QUE O COSTUME DAS PRÁTICAS EMPRESARIAIS LONDRINENSES SERIA O DA NÃO COBRANÇA DA CLÁUSULA NO-SHOW, DEVERIA ESTAR TAMBÉM COMPROVADA QUE ERA ESTA A INTENÇÃO DO

CREDOR, FATOS ESTES NÃO VERIFICADOS NOS AUTOS. II- SABE-SE QUE A DUPLICATA SOMENTE "... É ADMITIDA QUANDO DECORRENTE DE UMA RELAÇÃO CAUSAL QUE A ELA DÁ SUPORTE, OU SEJA, SOMENTE AO SE VERIFICAR A EXISTÊNCIA DE UM CONTRATO DE COMPRA E VENDA OU DE PRESTAÇÃO DE SERVIÇOS E QUE HÁ DE SE ADMITIR (...)" SUA EXTRAÇÃO (BERTOLDI, MARCELO M.; RIBEIRO, MÁRCIA CARLA PEREIRA. CURSO AVANÇADO DE DIREITO COMERCIAL (VOL. 2). SÃO PAULO : RT, 2003. P. 141). CONFORME A LIÇÃO DE NELSON NERY JUNIOR E ROSA MARIA DE ANDRADE NERY, QUANDO "... A CLÁUSULA PENAL É ESTIPULADA COM OBJETIVO DE INDENIZAÇÃO, O DANO FICA PRÉ-ESTABELECIDO PELO VALOR CONSTANTE DA CLÁUSULA PENAL, DISPENSANDO-SE A PROVA DO DANO, O QUE FACILITA A DECISÃO SOBRE SEU MONTANTE EM PROCESSO JUDICIAL" (NERY JR, NELSON; NERY, ROSA MARIA DE ANDRADE. CÓDIGO CIVIL COMENTADO. SÃO PAULO : RT, 2006. P. 400.). LÍCITA, PORTANTO, A COBRANÇA DESSA CLÁUSULA PENAL. III- ASSIM, HÍGIDO É O DIREITO DO APELADO EM PERSEGUIR O PAGAMENTO DA CLÁUSULA NO SHOW, PORQUANTO, RESTOU INCONTROVERSO O FATO DO APELANTE SER INADIMPLENTE PARA COM A AVENÇA FIRMADA PORQUANTO O DEVEDOR APELANTE DEU CAUSA AO ATO DO CREDOR EM BUSCAR COBRÁ-LA. TODAVIA, AO FAZÊ-LO POR MEIO DE SAQUE DE DUPLICATA INCORREU EM EQUÍVOCO PORQUANTO O MEIO ESCOLHIDO NÃO É HÁBIL PARA A COBRANÇA DE CLÁUSULA PENAL. EM OUTRAS PALAVRAS, A NULIDADE IDENTIFICADA NÃO TEM ENFOQUE NA DÍVIDA, MAS TÃO SOMENTE NA VIA ELEITA PARA COBRÁ-LA. IV- "Conforme o texto da Lei de Duplicatas, a fatura deve discriminar 'os serviços prestados', desautorizando a lei que se discrimine multa contratual ou outros encargos como objeto do saque" (TJPR - XI Ccv - Ap Civel 0525798-1 - Rel.: Mário Rau - Julg.: 14/01/2009 - Unanime - Pub.: 10/02/2009 - DJ 76) V- NO PRESENTE CASO É HÍGIDO O DIREITO DO APELADO EM COBRAR O PAGAMENTO DA CLÁUSULA NO SHOW, PORQUANTO, RESTOU INCONTROVERSO O FATO DO APELANTE SER INADIMPLENTE PARA COM A AVENÇA FIRMADA. OU SEJA, O DEVEDOR APELANTE DEU CAUSA AO ATO DO CREDOR EM SACAR A DUPLICATA. TODAVIA, O MEIO ESCOLHIDO PARA TAL É ILEGAL. EM OUTRAS PALAVRAS, A NULIDADE APONTADA NÃO DECORRE DE UMA DÍVIDA ORIUNDA DE UM ATO ILÍCITO OU CONTRÁRIO À NORMA, MAS TÃO SOMENTE DA VIA ELEITA. VI- DIANTE DISSO, PRIMEIRAMENTE, É FORÇOSO OBSERVAR QUE "INDEVIDO" NÃO SERIA O PROTESTO, MAS O TÍTULO ESCOLHIDO PARA INSTRUMENTÁ-LO (DUPLICATA AO INVÉS DO CONTRATO). CONTUDO, A INSCRIÇÃO PERANTE CADASTRO DE DEVEDORES É LEGÍTIMA, PORQUANTO É INCONTROVERSA A CONDIÇÃO DE DEVEDOR DO ORA APELANTE, NÃO HAVENDO QUE SE FALAR EM INDENIZAÇÃO POR SUA INSCRIÇÃO EM CADASTROS DE PROTEÇÃO AO CRÉDITO, UMA VEZ QUE TAL PROCEDIMENTO DIZ RESPEITO AO EXERCÍCIO REGULAR DO DIREITO DO CREDOR EM FORÇAR O ADIMPLEMENTO DA OBRIGAÇÃO ASSUMIDA. VII- ASSIM, DETERMINAR A CONDENAÇÃO DO APELADO - TITULAR DE UM DIREITO RECONHECIDO - A INDENIZAR POR DANOS MORAIS O APELANTE (EM FACE DE HAVER PROTESTADO UMA DUPLICATA AO INVÉS DO PRÓPRIO CONTRATO), FERIRIA A RAZOABILIDADE DE UM JULGAMENTO DE BOM SENSO E A PRÓPRIA IMAGEM DO JUDICIÁRIO PERANTE O JURISDICIONADO, POIS SE ESTARIA RECONHECENDO UM CONTRA-SENSO A EVOCAR O VELHO

ADÁGIO POPULAR: "FOI BUSCAR LÃ E SAIU TOSQUIADO." O JUIZ NÃO DEVE SER UM AUTÔMATO. DEVE PONDERAR ACERCA DO USO DE CERTAS CONCLUSÕES PRONTAS DO PRÓPRIO JUDICIÁRIO PARA CASOS CONCRETOS E PROJETAR SUAS CONSEQÜÊNCIA NO MUNDO DOS FATOS. NO CASO IN CONCRETO NÃO HÁ CABIMENTO PARA A INDENIZAÇÃO A TÍTULO DE DANOS MORAIS EM FAVOR DA AUTORA APELANTE. RECURSO PARCIALMENTE PROVIDO. Bella Vista Viagens e Turismo Ltda. versus Atlântica Hotels Internacional Brasil. Décima terceira Câmara Cível. Relator Des. Gamaliel Seme Scaff. Julgado em 22 de julho de 2009.

PARANA, Tribunal de Justiça. Apelação Cível nº 533995-5. APELAÇÃO CÍVEL. DEMANDA ORDINÁRIA DE REVISÃO CONTRATUAL CUMULADA COM REPETIÇÃO DE INDÉBITO/COMPENSAÇÃO, DEPÓSITO JUDICIAL DO VALOR INCONTROVERSO, EXIBIÇÃO DE DOCUMENTO E ANTECIPAÇÃO DE TUTELA. I. CAPITALIZAÇÃO DE JUROS. IMPOSSIBILIDADE. INCONSTITUCIONALIDADE DO ARTIGO 5º DA MEDIDA PROVISÓRIA 2170-36/01 RECONHECIDA PELA CORTE ESPECIAL DO EXTINTO TRIBUNAL DE ALÇADA DO PARANÁ, NO JULGAMENTO DO INCIDENTE DE INCONSTITUCIONALIDADE Nº 264940-7/01. II. JUROS REMUNERATÓRIOS. ALEGAÇÃO DE COBRANÇA DOS VALORES PREVISTOS PELO CONSELHO MONETÁRIO NACIONAL. CONTRATO JUNTADO AOS AUTOS QUE NÃO PREVÊ A TAXA DE JUROS INCIDENTE. DEMAIS CONTRATOS NÃO JUNTADOS AOS AUTOS PELA INSTITUIÇÃO FINANCEIRA. LIMITAÇÃO DOS JUROS A 12% (DOZE POR CENTO) AO MÊS. II.1. IMPOSSIBILIDADE DE UTILIZAÇÃO DA SÚMULA 596 DO SUPREMO TRIBUNAL FEDERAL COM O INTUITO DE IMPEDIR A LIMITAÇÃO DOS JUROS REMUNERATÓRIOS, MESMO PORQUE ESTA LIMITAÇÃO NÃO OCORRE COM AMPARO NO DECRETO 22.626/33, MAS SIM COM ESCOPO NO ARTIGO 591 DO CÓDIGO CIVIL. SUPERIOR TRIBUNAL DE JUSTIÇA VEM ENTENDENDO QUE AS INSTITUIÇÕES FINANCEIRAS NÃO SE SUBMETEM AO PATAMAR LEGAL EM VIRTUDE DE NÃO ESTAREM SUJEITAS ÀS REGRAS DO DECRETO 22.626/33 EM VIRTUDE DA EDIÇÃO LEI 4.594/64, TODAVIA ESTE DIPLOMA LEGISLATIVO NÃO FIXA QUALQUER TAXA DE JUROS, APENAS PREVÊ A POSSIBILIDADE DE COBRANÇA ACIMA DO FIXADO EM LEI, DESDE QUE AUTORIZADO PELO CONSELHO MONETÁRIO NACIONAL. II.2. CIRCUNSTÂNCIA DE PRÁTICAS ABUSIVAS SEREM REITERADAMENTE PRATICADAS POR INSTITUIÇÕES FINANCEIRAS QUE NÃO AS TORNA USO E COSTUME. COSTUMES SÃO PRÁTICAS USUAIS TORNADAS REGRAS NO MEIO SOCIAL, PORÉM A POSSIBILIDADE DE COBRANÇA DE JUROS NÃO FIXADOS EM CONTRATOS PELAS INSTITUIÇÕES FINANCEIRAS NÃO SE ENCAIXA NESTE CONCEITO, SÓ SENDO PERMITIDO EM VIRTUDE DO VETUSTO ENTENDIMENTO ADOTADO PELO SUPERIOR TRIBUNAL DE JUSTIÇA. II.3. AFIRMAÇÃO DE QUE O CONTRATANTE NÃO TEM O DIREITO INFORMADO, NO ATO DA CONTRATAÇÃO, ACERCA DE TODOS OS ASPECTOS DO CONTRATO, OBVIAMENTE QUE NÃO RESPEITA AO PRINCÍPIO DE BOA-FÉ. SITUAÇÃO QUE TORNA MAIS SINGULAR ESTE ENTENDIMENTO É AUTORIZAR A COBRANÇA DA TAXA MÉDIA DE MERCADO MESMO NAS HIPÓTESES EM QUE A INSTITUIÇÃO FINANCEIRA NÃO APRESENTA OS CONTRATOS, QUANDO TEM O ÔNUS DE FAZÊ-LO. ORIENTAÇÃO DO SUPERIOR TRIBUNAL DE JUSTIÇA AUTORIZA QUE A INSTITUIÇÃO FINANCEIRA AJA DE ACORDO COM SUA CONVENIÊNCIA, POIS SE O CONTRATO PREVÊ JUROS MENORES

QUE OS DE MERCADO PODE DEIXAR DE APRESENTÁ-LO E, DESTA FORMA, PODERÁ COBRAR JUROS MAIS ELEVADOS. III. NECESSIDADE DE DISTRIBUIÇÃO DOS ÔNUS DA SUCUMBÊNCIA EM VIRTUDE DE O AUTOR/APELADO TER SUCUMBIDO EM PARCELA DE SEU PEDIDO. IV. RECURSO PARCIALMENTE PROVIDO. UNIBANCO - União De Bancos Brasileiros AS versus Evandro Cardoso Piperno e outro. Décima Terceira Câmara Cível. Relator Des. Rosana Andriguetto de Carvalho. Julgado em 13 de maio de 2009.

PARANA, Tribunal de Justiça. Apelação Cível nº 553439-8. APELAÇÃO CÍVEL - AÇÃO DECLARATÓRIA DE INEXISTÊNCIA DE TÍTULOS C/C ANULAÇÃO DE PROTESTOS, INDENIZAÇÃO POR DANOS MORAIS - FATOS - SACADOR QUE EMITE TÍTULOS SEM CAUSA DEBENDI E REALIZA ENDOSSO TRANSLATIVO COM FACTORING - ENDOSSATÁRIA QUE RECEBE CONFIRMAÇÃO DE RECEBIMENTO DE ENTREGA DE MERCADORIAS (VIA FAX-SÍMILE) DO SACADO - PORÉM, EXISTÊNCIA DE CONLUIO ENTRE FUNCIONÁRIO DA EMPRESA DEVEDORA E O SACADOR DAS DUPLICATAS "FRIAS" - MÉRITO - COSTUME NA NEGOCIAÇÃO DE CÁRTULAS ENTRE AS EMPRESAS - BOA-FÉ DA ENDOSSATÁRIA (FACTORING) - FUNCIONÁRIO DA EMPRESA DEVEDORA QUE ENVIAVA CONFIRMAÇÃO (TANTOS PARA AS DUPLICATAS COM LASTRO EM RELAÇÃO COMERCIAL COMO PARA AQUELAS SEM CAUSA) - APLICAÇÃO DA TEORIA DA APARÊNCIA - RESPONSABILIDADE OBJETIVA DO EMPREGADOR PELOS ATOS DE SEU PREPOSTO (ART. 932, III, DO NOVO CÓDIGO CIVIL, E SÚM. 341, DO STF) - APONTAMENTO DOS BORDERÔS A PROTESTO - INDENIZAÇÃO POR DANOS MORAIS - CONDENAÇÃO DA EMITENTE/ENDOSSANTE E DA ENDOSSATÁRIA - DESCABIMENTO DA CONDENAÇÃO EM RELAÇÃO À ENDOSSATÁRIA - INEXISTÊNCIA DE PUBLICIDADE - EVENTUAIS DANOS QUE DEVEM SER TRIBUTADOS À DESONESTIDADE DO EX-PREPOSTO - IMPUTAÇÃO À ENDOSSATÁRIA, TERCEIRA DE BOA-FÉ, (FACTORING) QUE NÃO TRADUZIRIA JUSTIÇA - CONDENAÇÃO EM VERBAS DE SUCUMBÊNCIA EM SEDE DE MEDIDA CAUTELAR - POSSIBILIDADE - PROCEDIMENTO CONTENCIOSO - REDUÇÃO NO ARBITRAMENTO DAS CUSTAS PROCESSUAIS E HONORÁRIOS ADVOCATÍCIOS. I - A ENDOSSATÁRIA, ZAGO FOMENTO, ANTES DE RECEBER OS BORDERÔS DA A.J. FERNANDES CONFIRMAVA COM A SACADA ESCOELETRIC SE HAVIAM RECEBIDO AS MERCADORIAS CORRESPONDENTES E, PORTANTO, CERTIFICANDO-SE DA HIGIDEZ DAS CÁRTULAS. ESTE TRÂMITE OCORRIA VIA FAX-SÍMILE, CUJO FUNCIONÁRIO ALEX SANDERSON MAIA ERA RESPONSÁVEL PELO AVISO DE CONFIRMAÇÃO, OU AO MENOS APARENTAVA SER, POIS DESTE MODO PROCEDEU DIVERSAS VEZES E TRABALHAVA NO DEPARTAMENTO DE COMPRAS E FORNECIMENTO, APLICANDO-SE AO CASO EM TELA A TEORIA DA APARÊNCIA. II - O EMPREGADOR ASSUME O RISCO DO EMPREENDIMENTO E OS ATOS PRATICADOS POR SEUS PREPOSTOS, EXERCENDO INCLUSIVE PODER DIRETIVO E DISCIPLINAR, ENTRETANTO POSSUI RESPONSABILIDADE OBJETIVA PELAS FALTAS E DANOS OCASIONADOS POR SEUS EMPREGADOS OU PREPOSTOS, SEGUNDO DISPOSIÇÃO DO ART. 932, III, DO NOVO CÓDIGO CIVIL, E SÚMULA 341 DO STF. III - PELA MESMA RAZÃO, O TERCEIRO DE BOA-FÉ NÃO PODE SOFRER IMPUTAÇÃO A TÍTULO DE DANOS MORAIS SE O EVENTUAL DANO EXPERIMENTADO PELA EMPRESA TEVE COMO CAUSA GENÉSICA, UM ATO DE DESONESTIDADE DE UM (EX) PREPOSTO SEU. ALÉM

DO MAIS, "SE A NOTIFICAÇÃO DO DEVEDOR, PREVISTA NO ART. 14 DA LEI N.º 9.492/97, FOR FEITA POR PORTADOR DO TABELIONATO OU POR CORRESPONDÊNCIA, NÃO HÁ PUBLICIDADE DO APONTAMENTO DO TÍTULO PARA PROTESTO E, POR ISSO, NÃO CAUSA DANOS MORAIS. (...)" (RESP 604.620/PR, REL. MINISTRO CARLOS ALBERTO MENEZES DIREITO, REL. P/ ACÓRDÃO MINISTRA NANCY ANDRIGHI, TERCEIRA TURMA, JULGADO EM 01/09/2005, DJ 13/03/2006 P. 315) RECURSO PARCIALMENTE PROVIDO. Zago Imobiliária e Fomento Mercantil Ltda e Escoelectric Ltda versus A. J. Fernandes Equipamentos Ltda e outro Décima terceira Câmara Cível. Des. Gamaliel Seme Scaff. Julgado em 19 de agosto de 2009.

PARANA, Tribunal de Justiça. Apelação Cível n.558314-6. APELAÇÃO CÍVEL. AÇÃO DECLARATÓRIA DE NULIDADE COMBINADA COM REVISIONAL DE CONTRATO. AÇÃO JULGADA IMPROCEDENTE. RECURSO DOS AUTORES. 1. CAPITALIZAÇÃO DE JUROS. IMPOSSIBILIDADE. INCONSTITUCIONALIDADE DO ARTIGO 5º DA MEDIDA PROVISÓRIA 2170-36/01 RECONHECIDA PELA CORTE ESPECIAL DO EXTINTO TRIBUNAL DE ALÇADA DO PARANÁ, NO JULGAMENTO DO INCIDENTE DE INCONSTITUCIONALIDADE Nº 264940-7/01. 2. JUROS REMUNERATÓRIOS. CONTRATO JUNTADO AOS AUTOS QUE NÃO PREVÊ A TAXA DE JUROS INCIDENTE. DEMAIS CONTRATOS NÃO JUNTADOS AOS AUTOS PELA INSTITUIÇÃO FINANCEIRA. LIMITAÇÃO DOS JUROS A 12% (DOZE POR CENTO) AO MÊS. JUROS LEGAIS. 2.1. IMPOSSIBILIDADE DE UTILIZAÇÃO DA SÚMULA 596 DO SUPREMO TRIBUNAL FEDERAL COM O INTUITO DE IMPEDIR A LIMITAÇÃO DOS JUROS REMUNERATÓRIOS, MESMO PORQUE ESTA LIMITAÇÃO NÃO OCORRE COM AMPARO NO DECRETO 22.626/33, MAS SIM COM ESCOPO NO ARTIGO 591 DO CÓDIGO CIVIL. SUPERIOR TRIBUNAL DE JUSTIÇA VEM ENTENDENDO QUE AS INSTITUIÇÕES FINANCEIRAS NÃO SE SUBMETEM AO PATAMAR LEGAL EM VIRTUDE DE NÃO ESTAREM SUJEITAS ÀS REGRAS DO DECRETO 22.626/33 EM VIRTUDE DA EDIÇÃO LEI 4.594/64, TODAVIA ESTE DIPLOMA LEGISLATIVO NÃO FIXA QUALQUER TAXA DE JUROS, APENAS PREVÊ A POSSIBILIDADE DE COBRANÇA ACIMA DO FIXADO EM LEI, DESDE QUE AUTORIZADO PELO CONSELHO MONETÁRIO NACIONAL. 2.2. CIRCUNSTÂNCIA DE PRÁTICAS ABUSIVAS SEREM REITERADAMENTE PRATICADAS POR INSTITUIÇÕES FINANCEIRAS QUE NÃO AS TORNA USO E COSTUME. COSTUMES SÃO PRÁTICAS USUAIS TORNADAS REGRAS NO MEIO SOCIAL, PORÉM A POSSIBILIDADE DE COBRANÇA DE JUROS NÃO FIXADOS EM CONTRATOS PELAS INSTITUIÇÕES FINANCEIRAS NÃO SE ENCAIXA NESTE CONCEITO, SÓ SENDO PERMITIDO EM VIRTUDE DO VETUSTO ENTENDIMENTO ADOTADO PELO SUPERIOR TRIBUNAL DE JUSTIÇA. 2.3. AFIRMAÇÃO DE QUE O CONTRATANTE NÃO TEM O DIREITO INFORMADO, NO ATO DA CONTRATAÇÃO, ACERCA DE TODOS OS ASPECTOS DO CONTRATO, OBVIAMENTE QUE NÃO RESPEITA AO PRINCÍPIO DE BOA-FÉ. SITUAÇÃO QUE TORNA MAIS SINGULAR ESTE ENTENDIMENTO É AUTORIZAR A COBRANÇA DA TAXA MÉDIA DE MERCADO MESMO NAS HIPÓTESES EM QUE A INSTITUIÇÃO FINANCEIRA NÃO APRESENTA OS CONTRATOS, QUANDO TEM O ÔNUS DE FAZÊ-LO. ORIENTAÇÃO DO SUPERIOR TRIBUNAL DE JUSTIÇA AUTORIZA QUE A INSTITUIÇÃO FINANCEIRA AJA DE ACORDO COM SUA CONVENIÊNCIA, POIS SE O CONTRATO PREVÊ JUROS MENORES QUE OS DE MERCADO PODE DEIXAR DE APRESENTÁ-LO E, DESTA FORMA,

PODERÁ COBRAR JUROS MAIS ELEVADOS. 2.4. ENTENDIMENTO DO SUPERIOR TRIBUNAL DE JUSTIÇA IMPORTA NA NÃO APLICAÇÃO DO INCISO II DO ARTIGO 52 DO CÓDIGO DE DEFESA DO CONSUMIDOR. DECISÃO QUE NÃO PODERIA SER PROFERIDA POR ÓRGÃO FRACIONÁRIO CONFORME ENTENDIMENTO CONSIGNADO NA SÚMULA VINCULANTE Nº 10 DO SUPREMO TRIBUNAL FEDERAL. 2.5. EM VIRTUDE DE COSTUME NÃO REVOGAR A LEI IMPOSSÍVEL QUE UM SUPOSTO COSTUME AFASTE A APLICAÇÃO DO INCISO II DO ARTIGO 52 DO CÓDIGO DE DEFESA DO CONSUMIDOR. 3. COBRANÇA DE COMISSÃO DE PERMANÊNCIA DE FORMA CUMULADA. AUSÊNCIA DE COMPROVAÇÃO. LAUDO PERICIAL QUE NÃO VERIFICOU SUA COBRANÇA DE FORMA CUMULADA COM OUTROS ENCARGOS MORATÓRIOS. 4. REPETIÇÃO EM DOBRO DOS VALORES COBRADOS. RESPONSABILIDADE OBJETIVA DO BANCO. NEXO CAUSAL CONFIGURADO. MÁ-FÉ DA INSTITUIÇÃO QUE TEM CONDIÇÕES DE SABER SE COBRADOS VALORES A MAIOR. 5. NECESSIDADE DE DISTRIBUIÇÃO DOS ÔNUS DA SUCUMBÊNCIA EM VIRTUDE DO PARCIAL PROVIMENTO DO PRESENTE RECURSO DE APELAÇÃO. 6. RECURSO PARCIALMENTE PROVIDO. Antonio Cesar Assunção – ME versus HSBC Bank Brasil SA - Banco Múltiplo. Décima Terceira Câmara Cível. Relator Des. Rosana Andriguetto de Carvalho. Julgado em 12 de agosto de 2009.

PARANA, Tribunal de Justiça. Apelação Cível nº 601820-8. PROCESSUAL CIVIL. RECURSO. APELAÇÃO. EMBARGOS À EXECUÇÃO. TÍTULO EXECUTIVO EXTRAJUDICIAL. DUPLICATA MERCANTIL. DUPLICATA. TÍTULO CAUSAL. CAUSA SUBJACENTE COMPROVADA. COMPRA E VENDA MERCANTIL. NOTA FISCAL E COMPROVANTE DE ENTREGA DE MERCADORIA. REQUISITOS ESSENCIAIS PRESENTES. EXIGIBILIDADE CAMBIÁRIA. EFEITO SUSPENSIVO. EMBARGOS. PRECLUSÃO. MATÉRIA JÁ DECIDIDA EM SEDE DE AGRAVO DE INSTRUMENTO. EXEGESE DOS ARTIGOS 471 E 473 DO CÓDIGO DE PROCESSO CIVIL. TEORIA DA APARÊNCIA. ENTREGA DA MERCADORIA NA SEDE DA EMPRESA. ASSINATURA LANÇADA NO COMPROVANTE PELO PREPOSTO DA DEVEDORA. BOA-FÉ DO CREDOR. EXIGIBILIDADE DO TÍTULO. EXCESSO DE EXECUÇÃO. CORREÇÃO MONETÁRIA. INPC. ÍNDICE OFICIAL. INCIDÊNCIA. PRINCÍPIO DA SUCUMBÊNCIA. EQUIDADE E PROPORCIONALIDADE. EXEGESE DO ART. 21, PARÁGRAFO ÚNICO DO CPC. Recurso parcialmente provido 1. Duplicata. Causa subjacente. A duplicata é um título de crédito causal, e sua emissão somente poderá ocorrer para documentar crédito com origem em compra e venda mercantil. Isto significa que, para se extrair uma duplicata mercantil, necessária a existência de negócio comercial subjacente, aperfeiçoado através da emissão de uma fatura (onde se discriminam os produtos) e do comprovante de entrega de mercadorias (comprovação da transferência do domínio dos bens e da efetivação do negócio), a teor do disposto no art. 10. da Lei 5.474/68. 2. Efeito Suspensivo. Embargos. Inadmissível a rediscussão de matéria que já fora decidida por ocasião do julgamento de agravo de instrumento. Nos termos dos artigos 471 e 473 do Código de Processo Civil, "nenhum juiz decidirá novamente as questões já decididas, relativas à mesma lide". 3. Teoria da Aparência. O reconhecimento da obrigação constante da duplicata se dá no momento em que o sacado, ou seu representante, opõe sua assinatura no comprovante de entrega da mercadoria, reconhecendo líquida a obrigação ali constante. Tendo em vista as circunstâncias

do caso; o costume e o hábito, há que incidir a Teoria da Aparência, a fim de conferir validade aos negócios jurídicos realizados por pessoas aparentemente autorizadas para representação, em benefício e interesse do representado. 4. Índice de correção monetária. Não havendo pactuação expressa acerca do índice de correção monetária a ser aplicado, impõe-se a aplicação do índice oficial, que é o INPC. 5. Princípio da sucumbência. Na questão da sucumbência, o insucesso mede-se tanto no aspecto quantitativo quanto no jurídico da pretensão em debate na ação, fixando-a o Juiz com observância ao critério da equidade. Serrarias Campos de Palmas S/A. versus Liquigás Distribuidora S/A. Décima Quinta Câmara Cível. Relator Des. Jurandyr Souza Junior. Julgado em 30 de setembro de 2009.

PARANA, Tribunal de Justiça. Apelação Cível nº 637305-9. APELAÇÃO CÍVEL. AÇÃO DE REPETIÇÃO DE INDÉBITO C/C INDENIZAÇÃO POR DANOS MORAIS. LANÇAMENTOS EFETUADOS EM CONTA CORRENTE. EMPRÉSTIMOS. SEGURO. AÇÕES. JUROS. IOF. SUPOSTA IRREGULARIDADE. AUSÊNCIA DE QUESTIONAMENTOS QUANTO À EXISTÊNCIA E CONTRATAÇÃO DOS SERVIÇOS. DIREITO DE AÇÃO EXERCIDO SETE ANOS DEPOIS DAS COBRANÇAS. TRANSGRESSÃO AO PRINCÍPIO DA BOA-FÉ OBJETIVA. RELAÇÃO DURADOURA. LEALDADE E CONFIANÇA. 1. Do princípio da boa-fé objetiva decorrem deveres anexos, como a confiança e a lealdade, a serem observados por todos os contratantes desde a fase pré- contratual até a fase pós-contratual. 2. Viola o princípio da boa-fé objetiva e seus deveres anexos a conduta do contratante que usufrui de relação de confiança e lealdade quando lhe é conveniente e, posteriormente, se insurge contra o 'costume' Apelação Cível nº 637.305-9 estabelecido entre as partes alegando a falta de prova acerca das negociações entabuladas. 3. Apelação conhecida e não provida. Oswaldo Leal e Paulo Sérgio de Marco Leal versus Banco Itaú S/A. Décima Quinta Câmara Cível. Relator Des. Luiz Carlos Gabardo. Julgado em 27 de janeiro de 2010.

PARANA, Tribunal de Justiça. Apelação Cível nº 641552-7. APELAÇÃO CÍVEL AÇÃO DE RESSARCIMENTO TRANSAÇÃO COMERCIAL EFETUADA ENTRE PECUARISTAS E FRIGÓRIFICO COSTUME LOCAL INTERMEDIADOR INDEPENDENTE E NÃO PREPOSTO AUSÊNCIA DO DEVER DE INDENIZAR ATO ILÍCITO NÃO CONFIGURADO FRIGORÍFICO ISENTO PAGAMENTO MEDIANTE CHEQUE NOMINAL RECEBIMENTO POR TERCEIRO MEDIANTE ENDOSSO RUBRICADO RESPONSABILIDADE DA INSTITUIÇÃO FINANCEIRA INTELIGÊNCIA DO ARTIGO 39, DA LEI N 7.357/85 PRECEDENTES DESTA CORTE - REFORMA DA DECISÃO REDISTRIBUIÇÃO DOS ÔNUS SUCUMBENCIAIS RECURSO 1 DESPROVIDO E APELO 2 PROVIDO. Alceu Silverio de Almeida versus Lagoano Frigorífico e Comércio de Carnes Ltda e Banco Bradesco S/A. Nona Câmara Cível. Relator Des. Renato Braga Bettega. Julgado em 26 de agosto de 2010.

PARANÁ. Tribunal de Justiça. Agravo de Instrumento nº 97233-4. AGRAVO DE INSTRUMENTO - EXCEÇÃO DE INCOMPETÊNCIA - FORO DE ELEIÇÃO - CONTRATO DE ADESÃO - MITIGAÇÃO DO PRINCÍPIO DA LIBERDADE DE CONTRATAR - APLICABILIDADE DO ART. 100, IV, "b" DO C.P.CIVIL - RECURSO DESPROVIDO. Em se tratando de contrato de adesão, onde o princípio da liberdade de contratar é mitigado, ineficaz é a cláusula de eleição de foro em

detrimento do aderente, cabendo, portanto, a aplicação do disposto no art. 100, IV, "b" do C.P.Civil. Volkswagen do Brasil Ltda. versus Comercial Princesa de Automóveis Ltda. Quinta Câmara Cível. Relator Des. Antônio Gomes da Silva. Julgado em 17 de outubro de 2000.

RIO DE JANEIRO. Tribunal de Justiça. Apelação Cível. Processual Civil. Contratos. Prova. Contrato marítimo internacional de importação. Apelação Cível n. 16249, MID America Overseas do Brasil Ltda versus COP Editora Ltda, Rel. Des. Orlando Secco. Acórdão de 24 de abril de 2007.

USA. U.S District Court, S.D., New York. 98 Civ. 861, 99 Civ. 3607.CONTRACT FORMATION AND INTERPRETATION - LIBERAL APPROACH BY CISG IN APPLICATION OF GENERAL PRINCIPLE OF GOOD FAITH IN INTERNATIONAL TRADE (ART.7 (1)). USAGES AND PRACTICES - INDUSTRY PRACTICE AUTROMATICALLY INCORPORATED INTO ANY AGREEMENT UNLESS EXPLICITLY EXCLUDED (ART. 9). CONTRACT FOR FUTURE SUPPLY OF "COMMERCIAL QUANTITIES" OF GOODS -SUFFICIENTLY DEFINITE (ART. 14 CISG). ACCEPTANCE - PROVISION OF REFERENCE LETTER TO GOVERNMENT AGENCY MAY CONSTITUTE ASSENT TO CONTRACT (ART. 18(3) CISG). IRREVOCABLE OFFER ACCORDING TO ART. 16(2)(B)-PROMISSORY ESTOPPEL DOCTRINE UNDER US LAW – DIFFERENCES. CLAIM BASED ON PROMISSORY ESTOPPEL DOCTRINE UNDER US LAW TO DENY EXISTENCE OF FIRM OFFER – PREEMPTED. SCOPE OF CISG - MATTERS EXCLUDED - CONSIDERATION - QUESTION OF VALIDITY TO BE DECIDED UNDER DOMESTIC LAW (ART. 4(A) CISG). SCOPE OF CISG - TORT CLAIMS GENERALLY NOT PREEMPTED UNDER CONVENTION Geneva Pharmaceuticals Technology Corp. versus Barr Laboratories, Inc., et al. 10.05. 2002. Available: www.unilex.info/case.cfm?pid=1&do=case&id=739&step=FullText.

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DOES NOT AMOUNT TO IMPLIED EXCLUSION. EXCLUSION OF CONVENTION (ART. 6 CISG) - NEED OF CLEAR LANGUAGE EXPRESSLY STATING THAT CONVENTION DOES NOT APPLY AND WHAT LAW SHOULD GOVERN THE CONTRACT. EXCLUSION OF CONVENTION (ART. 6 CISG) - AFFIRMATIVE OPT-OUT REQUIREMENT PROMOTES UNIFORMITY AND OBSERVANCE OF GOOD FAITH IN INTERNATIONAL TRADE (ART. 7(1) CISG). INCOTERMS - INCORPORATED INTO CONVENTION AS USAGES, THOUGH NOT GLOBAL, WELL KNOWN IN INTERNATIONAL TRADE (ART. 9(2) CISG) BP Oil International and BP Exploration & Oil Inc. versus Empresa Estatal Petroleos de Ecuador. 11.06.2003. Available on: www.unilex.info/case.cfm?pid=1&do=case&id=924&step=FullText.

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