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Communicative reason and the idea of substantive justice in contract law. Regarding the control of content of non-negotiated clauses

Razón comunicativa e idea de justicia sustantiva en el Derecho de contratos. A propósito del control de contenido de cláusulas no negociadas

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Abstract

In light of the communicative action theory and discourse ethics, an attempt is made to show that the maxim consisting of taking unrestricted responsibility for the consequences derived from an agreement reached in conditions of procedural justice has been thematized and that it is probable, if not a fact, that its claim of normative correctness is rejected or at least rectified in the practical discourse of jurists. The study takes as a reference the content control of non-negotiated clauses, reviewing the existing panorama in various legal systems, its hold on rules and principles of civil law and the resignification that this has caused regarding the rules of default law. It is postulated that the rules of default law protect a minimum of substantive justice and that the parties cannot move away from them without a reasonable justification.

Keywords: *Communicative reason; discourse; justice; law of contracts; content control of non-negotiated clauses.*

Resumen

A la luz de la teoría de la acción comunicativa y de la ética del discurso, se intenta demostrar que la máxima consistente en asumir irrestrictamente las consecuencias derivadas de un acuerdo alcanzado en condiciones de justicia procedimental ha sido tematizada y que es probable, si no ya un hecho, que su pretensión de rectitud normativa sea rechazada o cuanto menos rectificada en el discurso práctico de los juristas. El trabajo toma como referencia el control de contenido de cláusulas no negociadas, reseñando el panorama existente en diversos sistemas jurídicos, su asidero en reglas y principios de Derecho civil y la resignificación que este ha provocado respecto de las reglas de derecho dispositivo. Se postula que las reglas de derecho dispositivo resguardan un mínimo de justicia sustantiva y que las partes no pueden alejarse de ellas sin una justificación razonable.

Palabras clave: *Razón comunicativa; discurso; justicia; derecho de contratos; control de contenido de cláusulas no negociadas.*

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I. INTRODUCTION

According to HABERMAS, the complexity of a society produces plural forms of life, reducing the areas of overlap or convergence of the underlying convictions that characterize the world of life, which facilitate intersubjective understanding of the various issues of the objective world, the social world and the subjective individual world. In turn, the sacralized convictions (under the idea of an authority, divine or not), are disenchanted, their contents are thematized and they decompose under the different aspects of validity. Progressive social differentiation especially contributes to this, as it imposes a multiplication of functionally specified tasks, social roles and a constellation of interests. In short, the more complex a society becomes, the risk of dissent increases, and communicative action – which aims precisely at intersubjective understanding – is freed from close institutional ties, becoming autonomous and situated in a broader horizon of options.[1]

However, in this horizon there is also a type of action guided by interests and oriented by one's own individual success, which is even necessary for socio-structural reasons. In this way, within the framework of a constant and varied thematization of the ideas and convictions that characterize the world of life, individuals are faced with the dilemma of orienting their action towards mutual understanding or towards their own success.[2]

Thus, the problem of modern societies is to stabilize the validity of a social order in which there is a clear difference between communicative action and strategic interactions. Given that such stability constitutes too heavy a burden for communicative action and given that, moreover, strategic interactions, by themselves, cannot form stable orders either, an alternative to maintaining social integration is for positive law to regulate such interactions normatively.[3] In this regard, modern law, far from trying to placate the aforementioned interactions - which, as I have mentioned, are essential - has chosen to recognize and regulate various private subjective rights, which define areas of individual freedom of action, and which are cut to the measure of a strategic pursuit (although subject to limits) of private interests.[4]

In this order of ideas, although it is not the area that seems to interest HABERMAS the most, contract law may be understood as a normative order that regulates those interactions in which two or more subjects, pursuing the satisfaction of their own interests, agree on a legally binding benefit program.[5]

From a liberal perspective, developed especially from the nineteenth century onwards, the main function of contract law would be to establish the general conditions for the exercise of private autonomy, giving individuals a wide space of discretion so that, through specific

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[1] HABERMAS (2005), pp. 86-87. On the world of life and how it relates to the objective, social and subjective individual worlds, HABERMAS (1987), pp. 170-179. In general terms, the world of life is composed of underlying unproblematic convictions that serve as the horizon of speech situations and, at the same time, as a source of interpretative operations. Thus, the world of life is the basis from which speaker and listener understand each other about something in the objective world, in the social world, or in the individual subjective world.

[2] HABERMAS (2005), pp. 87-90. Regarding the distinction between success-oriented actions and understanding-oriented actions, HABERMAS (1999), pp. 24-43.

[3] HABERMAS (2005), pp. 99-100.

[4] HABERMAS (2005), pp. 88-89.

[5] A very general notion of contract is deliberately adopted here. For a study of the main – and distinct – notions of contract in the *common law* and in the most influential legal systems of continental tradition, BEALE *et al* (2019), pp. 93-120.

agreements, they can achieve the satisfaction of their private interests.[6] Thus, once these general conditions are fulfilled, which would only safeguard the procedural justice of the agreement, individuals would have total freedom to behave strategically or act oriented towards mutual understanding. Then, the content of the agreements would be binding on the parties insofar as they must assume the consequences derived from the exercise of their autonomy.[7]

In this study, my objective is to show how the aforementioned conception of contract law, very liberal and permissive of strategic interactions, has undergone a kind of correction, in the sense that the conditions established by such a normative order not only safeguard procedural justice, but also a certain measure of substantive justice, expressed in certain margins of normative balance that the parties cannot transgress. The aforementioned correction can be understood as a work of communicative reason, which has allowed the thematization of the axiom or meta-legal duty that the parties must unreservedly assume the consequences that derive from the will manifested in conditions of procedural justice. As we will see, within the framework of the practical discourse linked to Law, one can notice the development and progressive prevalence of new ideas that, highlighting the excesses derived

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[6] KÖTZ (2017), p. 6. According to GORDLEY, this conception of contract law, which gave consent a decisive role in the creation of obligations, was developed especially during the nineteenth century. Previously, in both Roman and medieval law, although an important role was given to consent, it was understood that a large part of the content of contracts and, therefore, of the obligations created by them, is imposed by law, unless the parties choose to move away from it and agree on some special autonomous rule. Moreover, in both Roman and medieval law, significantly unfair terms, even if they were based on an agreement, were not legally binding. Strictly speaking, the idea of the contract as an agreement of wills aimed at the creation of obligations does not rely so much on a technical reason, but rather on a conception focused solely on consent (GORDLEY (2002), pp. 16 and 17).
From the philosophy of morality, KANT, in "*Groundwork of the Metaphysics of Morals*", suggests that the justification of the binding nature of the promise made in a contract would lie not only in the categorical imperative to assume the consequences of one's own acts, but also in the impossibility of wanting as a universal maxim that a promise be sometimes respected and sometimes ignored. Since the promisor expects others to observe his promises, the aforementioned maxim would contradict itself and, therefore, could not be elevated to a universal law, unlike what happens with the maxim of observing a promise (KANT (1998), pp. 14-16, 31-34).
From a supposedly Kantian perspective (although more focused on the principle of trust than on personal autonomy), FRIED has argued that the one who promises imposes a moral duty on himself and the contract would be nothing more than a kind of promise (FRIED (1981), pp. 20-21). For a sharp critique, see ATIYAH (1981), pp. 509-528.

[7] From a Rawlsian approach, we can say that, once the two basic principles of social justice have been fulfilled – a) each person must have an equal right to the most extensive scheme of basic freedoms that is compatible with a similar scheme of freedoms for others; and (b) social and economic inequalities must be shaped in such a way that, while reasonably expected to be advantageous to all, they are linked to jobs and positions that are affordable to all, individuals must take responsibility for the decisions they make and, among them, for the contracts they enter into. Thus, if contract law complies with both principles, the justice of the content of contracts would not depend on rules or criteria independent of the will of the parties, but on the mere circumstance of having strictly observed the procedure provided for by contract law itself (purely procedural justice). RAWLS (1975), pp. 88-93. Analyzing contract law from a partly Rawlsian and partly Kantian approach, especially in the light of the division of responsibility between society and individuals, HEVIA (2014), pp. 15-47. For a critique of such a procedure, PAPAYANNIS (2014), pp. 101-144.
From a more radical, right-wing libertarian approach, NOZICK rejects that basic principles of social justice must be complied with, arguing that the justice of belongings should only be based on three principles: the principle of legitimate acquisition, the principle of transference and the principle of rectification (NOZICK (1974), pp. 149-153). From this approach one could also speak of a purely procedural justice, although the underlying conditions would be even more permissive and general.

from an orthodox liberalism, have been reflected in resignifications of the rules of dispositive law.[8]

Throughout this study, I will take the phenomenon of contracting by adherence to non-negotiated clauses as reference, and I will explain how, in various legal systems, contract law has progressively provided answers that safeguard a certain measure of normative balance in the content of contracts. In addition, in order to reinforce my thesis that a maxim of substantive justice is being installed as a fundamental conviction in the practical discourse related to contract law, I will show that the control of normative balance has also reached, in recent times, contracts that are totally or partially controversial.

I anticipate that by normative balance I refer, specifically, to the balance between the rights, obligations, burdens and risks that the contract imposes. Such a balance, which is safeguarded by dispositive law itself,[9] is conceptually distinguished from economic equilibrium, relating to the proportion that should exist between the sacrifices incurred by the parties and the economic benefits that the performance of the contract brings them.[10] In effect, the so-called "balance between benefits", if it refers to the essential services of the contract and is measured according to the amount of these, is more related to economic balance than to regulatory balance.

Certainly, the rules of contract law aimed at the protection of economic equilibrium – such as those relating to injury and excessive arising onerousness – which are very present in the current state of that regulatory order,[11] may also be considered indicative of a transition from a conception focused on mere procedural justice to another in which, in addition, a minimum of substantive justice must prevail.[12] However, my intention in this paper is to review this transition with regards to the control of the normative content of contracts, so I will not deal with said norms.

II. COMMUNICATIVE REASON, ARGUMENTATION AND DISCOURSE

[8] According to a liberal conception of contract law, dispositive law refers to that set of rules that, in relation to the generality of contracts or in relation to particular types of contracts, are integrated into the content of contracts, unless the parties decide to dispense with them or agree on special incompatible rules. Dispositive rules are opposed to imperative and prohibitive rules, which, limiting the discretion of the parties, are unavailable (DE CASTRO (1982), pp. 1059-1060).

[9] DE CASTRO (1982), pp. 1061-1062; MIQUEL (2002), p. 432.

[10] Economic equilibrium is fundamentally protected through adaptation or termination due to injury – which specifically ensures that there is a certain measure of original equilibrium – and review or resolution due to excessive supervening onerousness – which specifically cautions that the equilibrium measure existing at the time of contracting is not breached by supervening and unforeseeable circumstances (PEÑAILILLO (2000), p. 212; CAPRILE (2007), pp. 195-196; LÓPEZ (2015), pp. 133-136, 141-143; CAMPOS (2020a), pp. 93-195).

[11] With reference to various and influential legal systems and harmonization instruments, see BEALE *et al* (2019), pp. 629-657, 1209-1232. With regards to the excessive onerousness that has arisen, see also CAMPOS (2020a), pp. 100-107.

[12] PAPAYANNIS (2014), pp. 133-135. In relation to English *common law*, referring to extraordinary limits of substantive justice related (totally or partially) to economic equilibrium, such as usury and *substantive unconscionability*, ATIYAH (1985), pp. 2-3. This author, however, suggests that procedural justice is also a way (although not the only one) to safeguard the substantive justice of the agreement, so that it would not make much sense to defend a radical distinction between the two types of justice (ATIYAH (1985), pp. 5-6). In national doctrine, referring to how some private law institutions safeguard a certain measure of economic balance and, with it, substantive justice, BERNER and GUTIÉRREZ (2022), pp. 242-245.

As HABERMAS puts it, in current thought, it seems that the normative contents of practical reason cannot be based on the theology of history, nor on the natural constitution of the human being, nor on philosophical traditions that, albeit fortunate and successful, can be considered contingent results of history.[13] Proof of this is that some of the normative contents of practical reason founded on liberal philosophical traditions, and despite the fact that they seemed to reveal some axioms at the dawn of modernity, over time, as the material conditions of existence changed, saw their pretensions of normative rectitude tarnished. This is what has happened in contract law, with its blind faith in private autonomy, which, although it has allowed freedom to individuals who enter into contracts, has also served as an excuse to legitimize abuses and imbalances of various sorts.[14]

However, instead of abandoning or denying the use of reason to explain "normative contents" (resorting, for example, to sociological functionalism), it is possible to follow another path: to replace practical reason with communicative reason.

As HABERMAS explains, communicative reason only refers to ideas and convictions, that is, manifestations susceptible to criticism or substantiation and accessible to argumentative clarification.[15] Consequently, the goal of communicative reason is not the motivation and direction of the will (as is the case with practical reason in its modern conception, centered on the moral autonomy of the individual), but intersubjective understanding.[16] Such intersubjective understanding, which is achieved through communicative practice, must refer to something in the objective world,[17] in the social world,[18] or in the individual subjective world.[19] In its case, intersubjective understanding may also refer to generative rules which serve to explain operations such as speaking, classifying, calculating, deducing, judging, etc.[20]

The rationality immanent in communicative practice refers, in turn, to the practice of argumentation and the development of opinion-forming discourses.[21]

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[13] HABERMAS (2005), pp. 64-65.

[14] See, among others, DE CASTRO (1982), pp. 987-1085. In any case, it has been argued that personal autonomy, properly understood, would continue to have justifying value for the binding effect of contracts (In this regard, PEREIRA (2022), pp. 301-303, 313-317. In a similar vein, ACCATINO (2015), pp. 48-49). The practical discourse of jurists would have highlighted the role of the expressed will so much that, paradoxically, the very value of personal autonomy would have ended up being undermined (PEREIRA (2022), pp. 295-303).

[15] In this regard, HABERMAS (1999), pp. 24-43.

[16] HABERMAS (2005), pp. 65-67.

[17] This is the case when an act of speech involves a claim to propositional truth or a claim to efficiency (HABERMAS (1999), p. 31). The objective world refers to the "totality of entities about which true statements are possible" (HABERMAS (1987), p. 171).

[18] This is the case when the speech act involves a claim to normative rectitude or adequacy with regards to a standard of value (HABERMAS (1999), pp. 34, 64). The social world refers to the "totality of legitimately regulated interpersonal relations" (HABERMAS (1987), p. 171).

[19] This is the case when the speech act involves a claim to subjective veracity (HABERMAS (1999), pp. 34-36). The individual subjective world alludes to the "totality of one's own experiences to which each one has privileged access and which the speaker can truthfully manifest before an audience" (HABERMAS (1987), p. 171). It should be added that a claim of subjective veracity may not be made or rejected based on reasons formulated in the context of an argumentative practice. Strictly speaking, truthfulness cannot be founded, but shown or revealed when the speaker acts accordingly (HABERMAS (1999), p. 67).

[20] In this case, the speech act involves a claim to intelligibility or formal correctness (HABERMAS (1999), pp. 64-65).

[21] HABERMAS (1999), pp. 36-47. However, as HABERMAS himself clarifies, "(only) the truth of propositions, the rectitude of moral norms, and the intelligibility or correct formation of symbolic expressions are, by their very sense, universal claims of validity that can be subjected to examination in discourse" (HABERMAS (1999), p. 69).

The practice of argumentation may be seen from three perspectives. Considered as a process, it consists of an ideal situation of speech that presupposes that the structure of communication, by virtue of properties that can be described in a purely formal way, excludes any form of coercion other than that of the best argument; seen as a procedure, it is a form of interaction subject to special regulation, by virtue of which the participants thematize a claim to validity that has become problematic, adopt a hypothetical attitude about it and examine with reasons, and only with reasons, whether or not it is appropriate to recognize the claim of validity in question. Finally, considered as a means of producing arguments, it is a form of interaction aimed at producing arguments that, by virtue of their intrinsic properties, make or break the claims to validity in question.[22] In turn, discourses may be understood as forms of argumentation in which the claims of validity that have become problematic are thematized.[23] In this framework, the risk of dissent, which allows the thematization of the various convictions that are part of the world of life, serves as a catalyst for the practice of argumentation and the development and evolution of discourses, allowing the correction of ideas and opinions, as well as the transition from some opinions to others.[24] Consequently, the practice of argumentation allows us to identify and learn from mistakes, which presents a form of rationality of its own.[25] The form of argumentation in which the ideas or convictions underlying claims of normative rectitude (whether moral or legal) are thematized, is called practical discourse.[26] The other two types of discourse are the theoretical (in which they are thematized and perform or reject claims of propositional truth) and the explanatory (in which they are thematized and perform or reject claims of intelligibility).[27]

III. THEMATIZATION OF THE MAXIM OF UNRESTRICTED ASSUMPTION OF THE CONSEQUENCES OF WILL EXPRESSED IN CONDITIONS OF PROCEDURAL JUSTICE

3.1 Contextualization

In the order of ideas just outlined, the maxims of contract law may be seen as unproblematic ideas or convictions that are part of the world of life of jurists.[28] To the extent that these maxims are thematized, being subjected to criticism and the burden of a rational foundation, jurists find themselves in the need to take charge of the pretensions of normative rectitude that they envelop.[29] In particular, jurists are forced to answer whether or not the aforementioned maxims

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It is not possible to speak properly of the practice of argumentation and discourse when the claims of validity involved in certain communicative practices are of subjective veracity or of adequacy of standards of value. In these cases, at most, one could allude, respectively, to a therapeutic critique and an aesthetic critique (HABERMAS (1999), pp. 67-69).

[22] HABERMAS (1999), pp. 46-47

[23] HABERMAS (1999), p. 38.

[24] The practice of argumentation, seen as a procedure, presents an eminently dialectical logic (HABERMAS (1999), p. 48).

[25] HABERMAS (1999), p. 43.

[26] HABERMAS (1999), p. 38.

[27] HABERMAS (1999), p. 69.

[28] The world of life of jurists may be seen as a functional specification of the world of life, that is, a functional specification of the general horizon of speech situations (HABERMAS (2005), pp. 119-120).

[29] As HABERMAS points out, "insofar as cultural systems of action such as science, law and morality are differentiated, the arguments to which the institutionalization of these systems gives continuity, arguments made by experts, refer to those claims of validity of a higher level that are no longer linked to loose communicative

really express expectations of behavior which, in order to safeguard a generalizable and equitable interest, may be accepted, without coercion, by all those affected.[30] Such an argumentative practice of jurists tends, then, to the achievement, maintenance and renewal of a consensus that rests on the intersubjective recognition of claims of normative rectitude susceptible to criticism and rational foundation.[31]

At this point, the central question in this paper is to ask whether, within the framework of the practical discourse developed by jurists and non-jurists,[32] the claim of normative rectitude wrapped in the meta-legal duty to assume without restriction the consequences of the will expressed in conditions of procedural justice must be fulfilled or rejected. A rationally reasoned agreement in this regard presupposes a minimum of consistency and context, without ignoring the material conditions in which legal traffic takes place and disciplinary dogmatic developments as well.[33] Certainly, the consideration of the material conditions in which legal traffic develops does not imply that the practical judgment that is made responds to an empiricist ethics. The performance of a claim to normative rectitude implies an understanding of something proper to the social world and it is this, and not practical judgment, that is impregnated with historicity.[34]

3.2 The thematization of the maxim from the perspective of the material conditions in which legal traffic takes place

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manifestations, but to cultural objectifications such as works of art, moral and legal norms or scientific theories" (HABERMAS (1999), pp. 66-67).

[30] HABERMAS says that "(t)he rules of action are presented within their sphere of validity with the intention of expressing, in relation to the matter in need of regulation, an interest common to all those affected and of deserving general recognition for it; hence, valid norms, in conditions that neutralize any motive other than that of the cooperative search for truth, must in principle also be able to find the rationally motivated assent of all those affected" (HABERMAS (1999), p. 38). In relation to contract law, HESSELINK (2015), pp. 101, 109.

[31] *Cf.*, HABERMAS (1999), p. 36.

[32] Although the claims of normative rectitude of axioms and norms of law are claims of validity of a higher level (HABERMAS (1999), pp. 66-67), it should be borne in mind that, insofar as the consequences derived from a conception of contract law affect all individuals exposed to the need to enter into contracts, the thematization and consequent argumentative practice can also occur between non-jurist subjects (HABERMAS (1999), p. 67; HABERMAS (2005), p. 119). Strictly speaking, within the framework of HABERMAS's approach, practical questions must be thematized and resolved with a view of what all those affected, without exception, might want. In this sense, morality is defined as the scope of questions regarding the justice of norms (GIL (2005), p. 8).

[33] The agreement, according to HABERMAS, must have a rational basis and must be based on common convictions (HABERMAS (1999), pp. 368-369).

[34] The claims of normative rectitude, to a large extent, lead to judgments regarding the justice of the norms that exist in the social world. The intrinsic historicity of interpersonal relations is implied in the thematization and performance or rejection of claims of normative rectitude that, based on an intersubjective recognition, we consider just or legitimate (HABERMAS (2000), pp. 149-150; GIL (2005), p. 24). This does not imply, however, that practical judgments are merely empirical or made from a specific ethics, but that the understanding of moral norms and their interpretation when applying them to unforeseeable cases are subject to variation (HABERMAS (2000), p. 150). In any case, according to HABERMAS, there is an internal connection between norms and the reasons that justify them that can only be appreciated from a cognitivist and constructivist ethics (HABERMAS (2000), pp. 152-153). Certainly, the *truth* that is reached in a practical discourse concerns, according to HABERMAS, the correctness of the claim of validity and not properly a correspondence of the norm with a certain order of things (HABERMAS (2002), p. 263). In this regard, reviewing the criticisms that have been made of HABERMAS' approach and questioning his vision of the notions of truth and reality, see PEÑA (2009), pp. 585-591.

In practice, a large part of contracts are concluded by adherence to non-negotiated clauses. In this regard, it is relatively common ground that the use of non-negotiated clauses, although it finds justification in the rationalization and reduction of transaction costs, especially when the clauses are predisposed with a view to their general use,[35] makes it easier for companies to take advantage of the existence of information asymmetries,[36] of the limited rationality of the adherents[37] and the urgency that underlies the satisfaction of personal, family and professional needs.[38]

Strictly speaking, from the perspective of an adherent of ordinary diligence, the knowledge and understanding of the content of the non-negotiated clauses, as well as a possible negotiation for their modification, imply costs that, in most cases, are higher than the benefits that can be expected from the execution of the contract, so that their usual – and even rational – inclination is not to waste time and resources in this task. Then, given the decision not to read, a scenario is created that is conducive, for the success-oriented entrepreneur, towards the use of non-negotiated clauses that introduce serious regulatory imbalances to the content of the contracts he enters into with his clients.[39]

On the other hand, as far as consumer contracts are concerned, it is well known that the structural vulnerability and limited rationality of consumers allow companies to obtain greater benefits. The act of consumption constitutes the last link in the chain of circulation of goods, since consumers, unlike other economic agents, do not seek to transform use values into exchange values, but to take advantage of them as final recipients. This circumstance puts consumers in a situation of structural vulnerability, as they are passive recipients and receptive of the competitive actions of companies.[40] In turn, companies, in order to attract more customers, use marketing techniques oriented, above all, to exploit the cognitive biases of consumers and encourage them to the thoughtless acquisition of products and services.[41] This last point must be especially considered when setting – or specifying – a protection policy, since, according to authoritative studies of behavioral economics, consumers have limited rationality.[42]

In addition, within the framework of a consumer society, there are personal, family and professional needs whose satisfaction is urgent, with the companies who offer the relevant products and services while being in a dominant contractual position that allows them to abuse and obtain greater benefit for themselves.[43]

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[35] ZWEIGERT and KÖTZ (2002), pp. 348-349; KÖTZ (2017), p. 132; GARCÍA (1969), p. 24. In the same vein, among others, ALFARO (1991), pp. 28-32; PATTI and PATTI (1993), pp. 312-317; PAGADOR (1999), pp. 31-35; BALLESTEROS (1999), pp. 29-32; PAZOS (2017), pp. 97-99.

[36] ZIMMERMANN (2008), p. 203. In the same vein, ALBANESE (2013), pp. 670-671. Among us, DE LA MAZA (2003), pp. 126-135. From an eminently economic perspective, SIMON (1955), p. 99; BEN-SHAHAR (2008), p. 17. For a more detailed analysis of the issue, see ALFARO (1991), pp. 69-76.

[37] With regards to the limited rationality of consumers, SIMON (1955), pp. 99-118; SUNSTEIN and THALER (2003), pp. 1159-1202; LOEWENSTEIN and O'DONOGHUE (2006), pp. 183-206.

[38] CAMPOS (2019a), pp. 51-52.

[39] ZWEIGERT and KÖTZ (2002), p. 350; EBERS (2016), p. 141; ALBANESE (2013), pp. 670-671; ZIMMERMANN (2008), p. 203; KÖTZ (2017), p. 133.

[40] REICH (1985), pp. 158-176.

[41] ROJAS (2015), pp. 416-423, 426-427.

[42] SIMÓN (1955), pp. 99-118; SUNSTEIN and THALER (2003), pp. 1159-1202; LOEWENSTEIN and O'DONOGHUE (2006), pp. 183-206.

[43] CAMPOS (2019a), pp. 51-52.

In short, bearing in mind that the claims of normative rectitude must only be fulfilled if they express expectations of behavior which, in order to safeguard a generalizable and equitable interest, may be accepted by all those affected,[44] without coercion, it is not consistent to assume that under the material conditions in which the contracting by adherence to non-negotiated clauses takes place, there can be such a consensus on an alleged duty to take charge of the consequences of the will expressed in conditions of procedural justice. In reality, there is no generalizable and equitable interest. On the contrary, the generalizable and equitable interest is that there is a minimum of substantive justice in the content of contracts and this minimum is what dispositive law provides.

3.3 Thematization of the maxim from the perspective of disciplinary dogmatic developments

When weighing disciplinary dogmatic developments, it is key to pay attention to the evolution that content control has undergone in various legal systems, as well as the significance that jurists currently give to the rules of dispositive law.

In comparative law, from various approaches, content control has been extending its subjective scope of application, protecting the interests of any party that is an adherent, whether consumer, non-professional or entrepreneur.[45]

According to a first model, inspired by the so-called "transaction cost theory", the control of the content of non-negotiated clauses seeks to correct the use of information asymmetries and, thus, contribute to a more efficient functioning of markets.[46] Without prejudice to the existence of special rules that confer enhanced protection on consumers, control is usually reserved for predisposed clauses for general use - that is, general terms and conditions of contract - regardless of whether the subscriber is a consumer, non-professional or entrepreneur. The aforementioned model informs, for example, German,[47] Dutch[48] and Austrian regulations.[49]

According to a second model, based on the so-called "abuse theory", content control seeks to correct any abuse of a dominant contractual position, regardless of its impact on the

[44] HABERMAS (1999), p. 38.

[45] In this regard, CAMPOS (2019a) pp. 9-28; CAMPOS (2022) pp. 139-143.

[46] Among others, ZIMMERMANN (2008) p. 203; FUCHS (2016) pp. 489-490; ALBANESE (2013) pp. 670-671; EBERS (2016) pp. 140-141.

[47] § 307 BGB contains the general unfairness clause, which applies to any contract to which the general terms and conditions of contract have been incorporated in compliance with the requirements of paragraphs 305 and 305a. Paragraphs 308 and 309 provide for a grey list and a blacklist, respectively, which, under § 301, apply only to contracts in which the parties are consumers. However, it should be noted that German case law tends to subsume the cases referred to in paragraphs 308 and 309 in the general clause referred to in § 307, extending protection to those adherents who have the status of non-professionals, liberal professionals or entrepreneurs. In this regard, among others, ZIMMERMANN (2008) p. 204; ZWEIGERT and KÖTZ (2002) p. 353; EBERS (2016) p. 145.

[48] Article 6:233 of the Dutch Civil Code provides for the general unfairness clause in letter a), applicable to any contract to which general contracting conditions have been incorporated – in compliance with the requirements set out in Article 6:234. Articles 6:236 and 6:237 provide for a blacklist and a grey list that in principle operates only in contracts entered into between entrepreneurs (companies) and consumers.

[49] § 879 (3) of the Austrian Civil Code contains the general unfairness clause, which applies to any contract to which general terms and conditions of contract have been incorporated in compliance with the relevant legal requirements.

functioning of markets.[50] Protection is provided to all adherents (consumer, non-professional or entrepreneur), regardless of whether the clause has been predisposed with a view to its general use or to be incorporated into a particular contract. Even in the case of consumer contracts, control can be applied to negotiated clauses. This model is prevalent in France[51] and, even more decisively, in the Nordic countries.[52]

In the common law, there is case law which tends towards a generalized application of content control. In the case of U.S. law, the issue of unfair terms has been approached fundamentally from the perspective of the unconscionability doctrine.[53] By virtue of this doctrine, reflected in paragraphs 2-302[54] of the Uniform Commercial Code and 208[55] of the Restatement (Second) of Contract, if a court considers that a clause is "unconscionable", regardless of the contract in which it is contained – whether or not by adhesion – and regardless of the quality of the parties, it can order the execution of the rest of the contract or limit its application in order to avoid an unfair result.

In English law, the current regulation is found in the Consumer Rights Act (hereinafter CRA), of 26 March 2015, which totally repealed the Unfair Terms in Consumer Contracts Regulations 1999 and partially the Unfair Contract Terms Act of 1977.[56] According to section 61 of the CRA, content control (structured by a general clause,[57] a blacklist[58] and a gray list),[59] is applicable to all consumer contracts, whether or not they are adherence or by non-negotiated

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[50] In accordance with the postulates of the theory of abuse, which is predominantly French-inspired, all clauses that may reflect an imbalance of power between the parties, even if they have been negotiated separately, are subject to content control (EBERS (2008), p. 204; EBERS (2016), pp. 141-142; JANSEN (2018), p. 922).

[51] See, in particular, Articles 1171 of the *Civil Code* and L 212-1 of the *Code of Composition*. For a review of legislative and jurisprudential developments, among others, CABRILLAC (2016), pp. 97-98; RAYMOND (2019), p. 373.

[52] The control of non-negotiated clauses finds positivization in section 36 of the *Contracts Act* (the section was added to the *Contracts Act* in Sweden by *Act 1976:185*, in Finland by *Act 956/1982* and in Norway by *Act 160/1983*). The first paragraph of the section empowers the courts to exclude or alter any clause, negotiated or not, that is considered unfair in relation to the content of the contract, the circumstances concurrent with its conclusion, the supervening circumstances or other circumstances. Indeed, when examining the terms of a contract, special consideration must be given to the need for protection of those who, as consumers or otherwise, are in a position of weakness in the contractual relationship. In this regard, WILHELMSSON (2000a), p. 26; WILHELMSSON (2000b), p. 94; EBERS (2016), p. 144; ALBANESE (2013), p. 681; JANSEN (2018), p. 923.

[53] On this doctrine, its scope and the requirements of *procedural unconscionability* and *substantive unconscionability*, KOROBKIN (2003) pp. 1203-1295 and STEMPEL (2004), pp. 757-860.

[54] *§ 2-302. Unconscionable contract or Term.*
(1) If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.
(2) If it is claimed or appears to the court that the contract or any term thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

[55] *§208. Unconscionable contract or term*
If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

[56] In this regard, BEALE *et al* (2019), p. 838; TREITEL (2003), p. 246; MORALES (2018), pp. 153-164.

[57] Section 62, paragraph 4.

[58] Sections 65 and 66.

[59] Annex 2, Part 1, paragraphs 5, 12 and 14.

clauses.[60] In the case of contracts entered into between entrepreneurs (companies) or non-professionals, the Unfair Contract Terms Act remains in force, which, in general, allows exemption or restriction of liability clauses to be annulled.[61]

As far as instruments for the harmonization of contract law are concerned, the control of the content of non-negotiated clauses, applicable regardless of the status of the signatory, is recognized in the Principles of European Contract Law,[62] in the Acquis Principles[63] and in the Draft Common Frame of Reference.[64] The Latin American Principles of Contract Law, on the other hand, are silent on the matter.[65]

In South America, the subjective scope of application of control has also become widespread. This is the case of the Civil and Commercial Code of the Nation,[66] the Peruvian Civil Code[67] and, to a lesser extent, the Codes of Brazil[68] and Paraguay.[69] From a less ambitious perspective, in Chile, control is regulated by Law No. 19.496, of March 7, which establishes rules on the protection of consumer rights, is not only applied to all adhesion contracts entered into between a supplier and a consumer, but also, by virtue of Article Nine No. 2 of Law No. 20.416, to any standard form contract entered into between a supplier and a micro or small company.[70]

For the sake of completeness, we should recall that, in various legal systems, positive control of the content of non-negotiated clauses has been preceded by very significant doctrinal and case law developments. In general, normative standards of indeterminate content have been used, such as good faith, public order and good customs.[71]

Strictly speaking, public order and good customs constitute limits to private autonomy and, more properly, to the content of declarations of will. In turn, the requirements of good faith are part of both public order and good customs,[72] so that they also serve as a limit to private autonomy. In this scheme, we must bear in mind that dispositive law, insofar as it protects an effective satisfaction of the typical interests of the parties in the execution of the contract, safeguards a certain measure of normative balance. For the same reason, those clauses or

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[60] BEALE *et al* (2019), p. 889; MORALES (2018), pp. 167-168.
[61] BEALE *et al* (2019), pp. 884-887; MORALES (2018), pp. 155-156.
[62] Article 4:110.
[63] Article 6:301.
[64] Articles II.-9:403, II.-9:404 and II.-9:405.
[65] For constructive criticism of this silence, CAMPOS (2020b).
[66] Article 988 contains two general unfairness clauses (letters a) and b) and a general surprise clause (letter c)). With specific reference to unfair terms contained in contracts concluded between entrepreneurs (companies) and consumers, Article 1119 provides for a general abuse clause, extending the control of content even to the terms that have been negotiated individually.
[67] Articles 1398 and 1399.
[68] Article 424 establishes that "clauses that stipulate the anticipated waiver of a right by the adherent, resulting from the nature of the business are null and void."
[69] Article 691.
[70] In this regard, CAMPOS (2022), pp. 149-150.
[71] This is a point usually highlighted by the specialized contract law doctrine. See, for example, BEALE *et al* (2019), p. 889. The category of the cause has been used for the same purpose, although this path presents some technical problems that are difficult to solve (in this regard, CAMPOS (2019a), pp. 210-216).
[72] CLAVERÍA (1979), pp. 678-679; BOETSH (2015), pp. 100-101. DÍEZ-PICAZO, on the other hand, includes good faith in the notion of economic public order (DÍEZ-PICAZO (1996), pp. 42-54).

stipulations that, without sufficient justification, deviate ostensibly from dispositive law, will contravene the requirements of good faith and will have an unlawful object.[73]

Thus, for example, the seller's obligation to warrant that the buyer will enjoy undisturbed legal possession of purchased property, which is of the nature of the sale contract, is aimed at safeguarding the satisfaction of two typical interests of the buyer, such as becoming the owner of the object (or at least acquiring peaceful possession) and that the thing serves its natural purpose or for the purpose specified in the contract. Departure from dispositive law, by means of a clause that removes the aforementioned obligation from the sale contract, puts the satisfaction of the typical interests of the buyer at risk and may, in certain instances, be indicative of a situation of abuse.[74]

In short, in the order of ideas that I have outlined, the rules of dispositive law have undergone an important resignification. According to a liberal orthodox conception of contract law, dispositive law refers to a set of rules of positive law which, with regards to the generality of contracts or with regards to particular types of contracts, are integrated into the content of contracts, unless the parties decide to dispense with them or agree on special incompatible rules. According to this idea, dispositive rules, unlike mandatory and prohibitive rules, do not limit the discretion of the parties and are, therefore, absolutely disposable.[75] On the contrary, in the current state of the art, it is considered that the rules of dispositive law, by safeguarding the satisfaction of the typical interests of the parties, convey a measure of substantive justice from which the parties can only depart with a reasonable justification.[76] This should not be surprising if one pays attention to the fact that the rules of dispositive law transcend those rules that "reasonable and fair-minded parties would consider as appropriate in the light of the nature and purpose of their contract."[77]

IV. THE IDEA OF SUBSTANTIVE JUSTICE AND ITS RELATIONSHIP WITH COMMUNICATIVE REASON

The aforementioned resignification of the rules of dispositive law, despite the fact that it may be understood as the concretization of a requirement of practical reasonableness[78] or a mere autopoiesis of a self-referentially regulated system,[79] constitutes, in my opinion, a corollary of

[73] CAMPOS (2019a), pp. 197-210, 303-319; CAMPOS (2019b), pp. 82-86.

[74] In any case, even under a liberal conception of contract law, the clauses that release the seller from the obligation to ensure that the buyer will enjoy undisturbed legal possession of purchased property, are subject to the limit of bad faith. In this respect, regarding the clauses that remove from the content of the purchase contract the aforementioned obligation, MATO (2017), pp. 285-292.

[75] DE CASTRO (1982), pp. 1059-1060.

[76] BEALE *et al* (2019), p. 811; DE CASTRO (1982), pp. 1061 and 1062; MIQUEL (2002), p. 432. RÖDL (2013), pp. 63-65, is particularly clear in this regard.

[77] KÖTZ (2017), p. 8. From a different perspective, albeit stating that the rules of dispositive law reflect a measure of substantive justice, RÖDL (2013), pp. 63-64.

[78] This is suggested, for example, by GORDLEY, who, ascribing to the Aristotelian tradition of moral philosophy, assumes that there is a substantive notion of good and that requirements of commutative justice derive from it (GORDLEY (2002), pp. 20-23). FINNIS also, although he does not refer specifically to the control of non-negotiated clauses, affirms that the duties of commutative justice contribute to the common good and therefore constitute requirements of practical reasonableness (FINNIS (2011), p. 184).

[79] Following LUHMANN closely, contract law may be understood as an operationally closed system of self-referential reproduction, which produces its own units or component elements and, with it, its own structure. Each decision would be supported and linked to other previous decisions, all of them forming the horizon and field of possibilities for future decisions (LUHMANN (2005), pp. 105-106; LUHMANN (2003), pp. 3-84). In general

communicative reason and the progressive prevalence of an idea of substantive justice within the dogmatics of contract law.

Basically, in view of the risks underlying the use of non-negotiated clauses, communicative reason raises the need for a renewed intersubjective understanding regarding the conditions under which a contract by adhesion is binding on the adherent.[80] This implies the thematization of the claim of normative rectitude wrapped in the meta-legal duty to assume without restriction the consequences of the will expressed in conditions of procedural justice and, in the face of its partial rejection, the progressive installation of an idea of substantive justice within contract law.

It is important to specify that communicative reason, by itself, does not provide an immutable criteria of substantive justice.[81] Strictly speaking, there is no such thing as a specific form of substantive justice that, can be "discovered" by communicative reason, because it is real. Communicative reason, by pointing to an intersubjective understanding of certain aspects of the social world, leads to the thematization of a maxim and then, due to material circumstances and disciplinary dogmatic developments, the idea is installed in practical discourse that a certain measure of substantive justice constitutes a necessary basis for the binding nature of non-negotiated clauses. This measure of substantive justice, according to an opinion shared in the specialized literature, is reflected in the rules of dispositive law, which contain a model of fair balance of interests.[82]

The resignification of the rules of dispositive law even has the potential to lead to the conclusion that contract law, in general, safeguards a certain measure of substantive justice,[83] whether this is intended to be seen as a requirement of corrective justice[84] or as a background

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terms, a criticism that can be made of the theory of autopoietic closed systems is that LUHMANN's recognition of assumptions of penetration or interpenetration of systems – which, in his view, would not hinder the closed and autopoietic character of each system – implies nothing more than a sophism to cover up areas of communication and reciprocal influence between systems and, in particular, to cover up the fact that there is a common background in which they operate (which is nothing more than the world of life). In this regard, HABERMAS (2005), 115-119.

[80] In HABERMAS's system, it is a question of the need for an intersubjective understanding of an aspect of the social world. HABERMAS (2005), pp. 65-67.

[81] In a similar vein, HESSELINK (2015), pp. 101, 105, 114-118.

[82] Among the precursors of this idea, RAISER (1935), p. 293.

[83] This, according to some authors, is applicable even with respect to contracts entered into between parties with similar bargaining power (RÖDL (2013), pp. 63-65). Moreover, the incorporation of the rules of dispositive law into the content of the contract (so the aspects which are not expressly agreed upon by the parties are also regulated) has its ultimate justification in the fact that these rules reflect a measure of substantive justice (RÖDL (2013), pp. 63-64).

[84] Corrective justice -sometimes called commutative-, at least in one of its usual approaches, is conceived as a type of justice aimed at rectifying or repairing the injury caused to another. It is justice applicable to voluntary or involuntary actions that bind two subjects. Corrective justice, focused on the correlativity of the subjects' positions, seeks to re-establish the relationship of equality (*initial equality*) that exists between them before the conclusion of a contract or the commission of an unlawful act (ARISTOTLE (1985), pp. 245-248, THOMAS (1990), pp. 512-514 (question 61, Articles 2 and 3, solutions), FINNIS (2011), pp. 178-179, WEINRIB (2002), pp. 349-351). Corrective justice, in a complementary function to distributive justice, is aimed at preserving what corresponds to each subject by rectifying or repairing grievances that upset this correspondence (GORDLEY (2002), pp. 1-4). Therefore, as far as this study is concerned, we may say that the rules of dispositive law safeguard a minimum of corrective justice, since, considering only the parties to the contract, they protect the satisfaction of the expectations that they pursue in the execution of the agreement and establish, consequently, a baseline (*initial equality*) for the private legal relationship that will exist between them (BRIDGEMAN (2003), p. 253, GORDLEY (2002), p. 20). In

basis of distributive justice.[85] After all, the idea that the rules of substantive justice contemplated by dispositive law cannot be excluded from the contract without reasonable justification is in line with a generalizable and equitable interest and can therefore be accepted, without coercion, by all those affected.[86] This, by the way, does not imply a rejection of the principle of responsibility, but a rejection or relativization of the meta-legal duty to assume without restriction the consequences of the will manifested in conditions of purely procedural justice.[87]

Indeed, content control has shown that, at least in the case of contracting by adherence to non-negotiated clauses, the binding nature of the agreements does not seem to be based on the mere fulfilment of conditions of procedural justice. The parties can no longer transgress certain margins of regulatory balance. There is no freedom in this aspect, but substantive justice.[88]

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short, the minimum of substantive justice would establish the initial relationship of equality from which the parties can validly bind themselves and take responsibility for their breaches (WEINRIB (2002), p. 353. In a similar vein, BENSON (2001), pp. 192, 200).

[85] In the Aristotelian tradition, distributive justice is oriented towards obtaining proportional equality through the distribution of the benefits and burdens existing in a given political community according to some criterion that allows the relative merit of its members to be compared (ARISTOTLE (1985), pp. 243-245, FINNIS (2011), pp. 165-177, THOMAS (1990), p. 512 (question 61, article 2, solution)).

Among those who suggest that content control is a sign that contract law safeguards a minimum of distributive justice, see, for example, KRONMAN (1980), pp. 478-493, PAPAYANNIS (2014), pp. 132-137. These authors assume that corrective justice can only rest on the will and formal equality of the parties. Therefore, all the rules of contract law that safeguard some measure of substantive justice (whether related to economic equilibrium or normative equilibrium) would be norms that convey a requirement of distributive justice, since their content would escape the will of the parties and would be part of the background of social justice in which interactions are permitted (PAPAYANNIS (2014), p. 135). In short, what would characterize this idea is the conviction that consent only has justifying value if certain conditions of distributive justice are satisfied.

KRONMAN, radicalizing the point, argues that the basic rule of distributive justice that should permeate contract law is that no one benefits at the expense of another, unless such exploitation, in the long term, improves the position of the exploited (KRONMAN (1980), pp. 472-511).

[86] Applying HABERMAS's scheme, it is an idea that can find the rationally motivated assent of all those affected (HABERMAS (1999), p. 38).

[87] *Cf.*, KÖTZ (2017), pp. 7 and 8.

An alternative reading could be that the rules of substantive justice contribute to making intelligible the very idea of autonomy (which, in its true deployment, must respect the institutional framework within which it operates), facilitating a better justification of contract law and, also, a better normative justification of the binding force of the contract (along these lines, BERNER and GUTIÉRREZ (2022), pp. 245-253). Previously, in an approach that leads to similar results, DE LA MAZA (2003), pp. 140-143; PEREIRA (2016), pp. 97-123. See also, PEREIRA (2022), pp. 301-303, 313-317.

Another reading could be that the rules of substantive justice that to some extent limit interactions of a purely strategic type are requirements derived from an ideal of relational equality, which imposes the need for neither party to be subject to the arbitrariness of the other. Such relational equality should lead to both parties being able to satisfy their typical interests. On the contributions that the idea of relational equality can make to the political philosophy of private law, JIMÉNEZ (2016), pp. 48-55.

[88] In this regard, we get a glimpse into how private law has a public dimension. As PAPAYANNIS states, "(if we are to apply the force of the state to enforce the terms agreed upon by the parties, we must ensure that those terms satisfy a minimum of justice. Therefore, whatever form of justice is implemented in private law, it has a public dimension" (PAPAYANNIS (2014), p. 126). From another perspective, it has been suggested that content control would restore the value and respect for personal autonomy in those cases where, due to the material conditions in which the contract is carried out, the will of one of the parties (the adherent) cannot be determined autonomously (PEREIRA (2022), pp. 301, 314-315).

However, it may be considered that the transition to a conception of contract law that safeguards a minimum of substantive justice is only effective with regards to contracting by adherence to non-negotiated clauses. This would allow us to conclude that, beyond the aforementioned scope of contracting, the claim of normative rectitude that underlies the maxim of unrestricted assumption of the consequences derived from an agreement reached in conditions of procedural justice may be fulfilled. However, even this last conclusion is not unproblematic.

In Nordic contract law, Article 36 of the Nordic Contracts Act extends the control of content to any clause (negotiated or not) in order to verify whether one of the parties has abused the position of weakness of the other.[89] Another paradigmatic case occurs in English law, where the Unfair Contract Terms Act allows for the annulment, either in contracts of negotiated or predisposed content, mainly clauses of exemption or restriction of liability.[90] On the other hand, with regards to contracts concluded between companies (entrepreneurs) and consumers, some systems, in the understanding that consumers do not have the same knowledge as entrepreneurs regarding the technical scope of the business or the same bargaining power,[91] extend content control to the negotiated clauses; this is the case of France, where article L 212-1 of the Code de la Consommation does not limit the control of content to the negotiated clauses,[92] of Argentina, where Article 1118 of the Civil and Commercial Code of the Nation expressly states that "the clauses incorporated into a consumer contract may be declared unfair even when they are individually negotiated or expressly approved by the consumer"[93] and England, where section 61 of the CRA allows content control of any consumer contract, whether or not by adherence to predisposed general clauses.[94] In fact, with regards to German law, RÖDL has gone so far as to state that individually negotiated terms incorporated into joint contracts are subject to the requirements of good faith and, therefore, to a review of substantive justice.[95]

In short, the requirement of a minimum of substantive justice in the normative content of contracts is an idea that, if not already predominant in legal dogma, is at least installed in the practical discourse relating to contract law.

V. CONCLUSIONS

1. In the current state of contract law, it would seem that the binding nature of contracts cannot be based solely on an alleged exercise of private autonomy in conditions of procedural justice. At least in the case of adhesion contracts, and regardless of the quality of the adherent, the binding nature of the non-negotiated clauses also presupposes that there is a minimum of substantive justice, which is protected by the rules of dispositive law. The same can be said in relation to the generality of consumer contracts, even when they are freely negotiated, since the

[89] EBERS (2016), p. 144, ALBANESE (2013), p. 681.
[90] BEALE *et al* (2019), p. 889; MORALES (2018), pp. 155-156.
[91] It should be noted that, according to the original postulates of the theory of abuse, the existence of controversy regarding the content of a clause does not prevent it from being controlled, since it may well reflect an imbalance of power between the parties (EBERS (2016), p. 142).
[92] RAYMOND (2019), p. 373.
[93] With some vagueness – although not incorrectly – Stiglitz justifies the extension in the public interest involved (STIGLITZ (2015), p. 516).
[94] BEALE *et al* (2019), p. 889; MORALES (2018), pp. 167-168.
[95] RÖDL (2013), pp. 64-65.

control of normative balance, at least in some modern legal systems, is also justified and operative in this regard.

2. The progressive transition towards a conception of contract law in which the binding nature of the latter – and of its clauses – presupposes a minimum of substantive justice may be understood as the work of communicative reason, which has allowed the thematization of the maxim that the parties to a contract must unreservedly assume the consequences derived from the will expressed in conditions of procedural justice. If perhaps this maxim is still predominant in practical discourse, at least the force and the practical consequences of an idea that tends to rectify it are already noticeable. It remains to be seen how the practice of argumentation will reject this last idea or lead to be the new predominant one.

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