THE USE OF 'PRINCIPLES' IN CIVIL LAW SYSTEMS AS A TOOL FOR INTERNATIONAL UNIFORMIZATION OF MARITIME LAW: CASE STUDY FROM THE BRAZILIAN PERSPECTIVE

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The search for uniformization has been a natural feature of the maritime law since its inception. However, the adoption of international conventions and treaties do not appear to have been effective in achieving this goal. Beside the lengthy and complex process of creating a convention, the need of a minimum number of signatures to enter into force, the lack of flexibility, the lack of complexity, and the proliferation of drafts in the same field of law, effective uniformization seem to be restrained by the lack of uniform interpretation of international treaties by local courts. Although Lex Maritima may be a useful tool as well, it should not be referred to as a path for spontaneous standardization without formal law playing a role of shaping it by effecting pressure. Lex Maritima can only find fertile ground to the extent that state law allows its development and application. The role of internal legislation is not only to fill the gaps of international treaties but also, and more importantly, to grant its enforceability.

In this scenario, principles as conceived by Latin American systems – namely the uniformity, continuation of the maritime expedition, and the guarantee principles – are identified as supplementary tools to achieve uniformization. "Principles" have a peculiar nature in Civil Law jurisdictions, not as a customary core-rule, but as meta rule designed as guidance both to the legislator and in the interpretation of any rules. Afterall, maritime law does not seek for static uniformization, with all countries having the same text law – but of a dynamic one, meaning that regardless of wording, interpretation and enforceability are achieved everywhere as similar as possible. A principle will not ensure the best interpretation for a concrete situation, but it will very likely avoid a gross misinterpretation that could jeopardize the core value that should be protected in such situation. In this article, I will analyze concrete situations in the Brazilian jurisdiction where principles were applied by courts resulting in an uniformizing interpretation of national law and, in contrast, where the wrongful use of a principle resulted in holding void an international convention in force.

1. The search for uniformization in maritime law: A difficult path

The search for uniformization across different jurisdictions dates back to the enactment of maritime law itself[1]. As summarized by Mateesco, maritime law "*is destined, as seas and oceans, to unite people, not to separate, and, equally reflecting the interests of all, maritime law on each country is ruled with the same uniform spirit, compatible with the relations that unite all people, all the time and everywhere*".[2]

Indeed, international organizations (IMO, UNCITRAL, UNCTAD, CMI, etc.) have made substantial efforts to achieve uniformization through international conventions and treaties. Such efforts, however, have obtained insufficient success due to several circumstances before, during and even after an international rule is adopted internally in any given country. Briefly, the following general difficulties can be highlighted: the lengthy and complex process of creating a convention; the need of a minimum number

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[1] See William Tetley, 'The General Marine Law – The Lex Maritima' (1994) 20 *Syracuse Journal of International Law and Commerce* 105, 109: "The general maritime law is a ius commune, is part of the lex mercatoria and is composed of the maritime customs, codes, conventions and practices from earliest times to the present, which have had no international boundaries and which exist in any particular jurisdiction unless limited or excluded by a particular statute. ... The lex maritima (the ius commune of maritime law) was quite uniform throughout Western Europe, until about the sixteenth century. The principal source of early maritime law in Europe was an oral, customary lex maritima, applicable to commercial transport of goods by sea, which came to be accepted by European merchants between the ninth and twelfth centuries".

[2] Mircea Mateesco, 'Le droit maritime soviétique face au droit occidental [Soviet maritime law versus Western law]' in J.C. Sampaio de Lacerda (ed), *Curso de Direito Comercial Marítimo e Aeronáutico (Direito Privado da Navegação) [Maritime and Aeronautical Commercial Law Course (Private Navigation Law)]* (2nd ed., 1954).

of signatures to enter into force; the lack of flexibility; the lack of complexity and the proliferation of drafts in the same field of law; and the lack of uniform interpretation of international treaties by local courts[3].

It is of general knowledge that the creation of a new international convention, even at the drafting stage, is a lengthy process. It requires the convocation of diplomatic conferences by an international entity and complex discussions between States-Parties before the final draft is achieved and submitted to signature and it enters into force only when a certain number of signatures is obtained. However, far from international eyes, some countries with dualist systems[4] then face an even more lengthy and complex procedure for signature according to its internal legal systems. That is the case, for example, in the Brazilian Law: after international negotiation, a convention follows through sixteen (16) steps in different organs of the Federal Government bureaucracy before it enters into force. And many of such bureaus are entitled to issuing a new (and perhaps contradictory) analysis "on the merits" of the convention.

In the same scenario, the amendment of treaties is considerably more difficult than those of other legal instruments, with the need of international conferences and long discussions. Although the IMO has adopted a "tacit acceptance procedure" as an attempt to solve this problem, such system does not seem to be enough – since it is applicable only to technical issues and raises the undesirable risk of non-recognition by internal legal systems.

As a result of the lengthy procedure before a convention has entered into force and to avoid the need of several amendments, treaties tend to be of little complexity and, therefore, result in limited innovation for internal legal systems. On the other hand, is it not uncommon that old conventions remain in force even after being "replaced" by new ones, since, from a political view, the repudiation could be seen in international law as an hostile act against international comity.

Finally, after a final draft is approved and internalized by a State-Party with relevant changes to its internal legal system, there remains the risk of an internal interpretation by local courts that differ from the expected one and will jeopardize the intent of achieving international uniformization. This seems to be an even higher risk in jurisdictions where arbitration is not broadly chosen by parties.

Together with (but differing from) principles contained in *lex mercatoria*, the approach of principles in the *civil law* systems tend to be an effective tool to assist in solving some of the above-mentioned matters, particularly the last one.

2. The use of Lex Maritima as an uniformization tool

The *lex maritima* can be defined as uncodified customs and usages on which the pillars of codified maritime law were (or should have been) built, firstly identified in the Rôles of Oléron (1190 A.D.), the Consolato del Mare (late 1300s) and the Laws of Wisbuy (or Visby). As a strand of the *lex mercatoria* and with fertile ground specially in arbitration verdicts, the *lex maritima* is being referred to not only as a source of universally accepted basic core rules, but also as a tool for uniformization by the means of jurisprudence.[5]

Some scholars also see it as a path for spontaneous standardization with formal law playing a role of shaping it by effecting pressure. From this perspective, *lex maritima* would be elevated to a paramount source of rules by contracts between international players and the internal legal system would be effected by such force.[6]

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[3] See, for example, Massimiliano Rimaboschi, *The Reformulation of the General Principles of the Lex Maritima* (Lawtext Publishing Limited, 2016).

[4] This is the case, for example of United Kingdom and Denmark and, in some aspects, of Germany, Italy and Brazil.

[5] See, for example, Vincenzo Battistell, 'Maritime Law Court and Judiciary Creation of Law: Effects on Civil Law Courts' (Web Page, no date) 12 <https://ddd.uab.cat/pub/poncom/2017/179895/Vincenzo_Battistella_Maritime_Law_Courts_and_Judiciary_creation_of_Law..pdf> : "*Moreover the increasing number of awards in maritime law is the result that globalization in contemporary international maritime trade requires today more than ever a uniform source of law which goes beyond national borders. The "New" Lex mercatoria and more specifically the Lex Maritima principles included in the arbitration awards constitute a current example of the judge made law principle that contribute to a flourishing dialogue between judges just as demonstrated in the Italian case law mentioned in the present article*".

[6] As the remarkable article of Bryan H Druzin that concludes: "*On a macro level, however, network effect pressures are reliably present and so levy a significant influence, inducing degrees ofspontaneous standardization. Ultimately, the question of whether common legal standards may emerge in the absence of a central legislative authority is like asking who designed the rules of English grammar-it is the product of a decentralized system exhibiting network effects. Legal standards can emerge, and indeed often do emerge through a similar process*": Bryan H Druzin, 'Spontaneous Standardization and the New Lex Maritima'in Miriam Goldby and Loukas Mistelis, *The Role of Abritration in Shipping Law* (Oxford University Press, 2016).

In contrast, however, it is interesting to note that the most consistent efforts in establishing *lex maritima* as an uniformization tool do not aim to change, but to stress and highlight the common dispositions in internal systems as general rules. This is, for example, the scope of the working group established by the Comite Maritime International (**CMI**): "*Perhaps the main difference between the proposed restatement of principles and previous unification efforts is that the former will have to explore and focus on common ground, rather than tackle issues of disagreement and divergence that require resolution. Such a restatement of the general principles of maritime law could promote the satisfactory functioning of maritime law*".[7]

The CMI´s approach on principles as a tool for uniformization seems to be complementary (and yet necessary) to the expectation that *lex maritima* would automatically produce such result solely by the enactment of case law in Latin systems. This seems to be an unavoidable conclusion in view of one key aspect: principles in civil law systems have a particular nature different to their common law counterparts.

Clearly *lex maritima* can only find fertile ground to the extent that state law allows its development and application. The role of internal legislation is not only to fill the gaps of international treaties but also, and more importantly, to grant its enforceability.[8] Overall, *lex maritma* is a very useful tool for the choice of applicable law – which can be complemented by the principles of civil law systems.[9]And, as rules of interpretation, these same principles cannot be used against express text law.

3. The nature of "principles" in civil law jurisdiction: the Brazilian perspective

"Principles" in civil law jurisdictions, particularly in Brazil, differ from "principles" established by the *lex maritima* in *common law* systems. From the Latin American perspective, *principles* are general rules that establish precedent conditions and allow the comprehension of the legal system, and the application, integration and even the enactment of new laws.

They are *basic common senses* that are fundamental to a system, admitted as such for being obvious, for being proved and also for practical reasons. At the same time, a principle contains the fundamental propositions on the enactment of a given matter, it has informing, constructive, ruling and interpretative functions. Beside inspiring law making and guiding it, a principle is a supplementary source of law in view of the law's gaps and omissions and assists in the interpretation and application of legal or contractual rules in a concrete situation.[10]

A *principle* in a Latin American jurisdiction, therefore, can be defined as a *meta-rule* or a *rule of rules* designed for two subjects: (1) The legislator himself, which will be guided and limited when enacting new rules; and (2) To anyone (party, judge, public sector, etc.) intending to interpret and apply a law.

In contrast with the principles derived from *lex maritima*, a principle in the Brazilian system will also contain a basic core rule, however, usually much broader and more general. Considering that a *principle* in Brazil is always enacted by express or implicit text law, it is possible that such rule consists in an option of the legislator in order to establish the "*way ahead*" for the legal system – and not necessarily to ratify a generally accepted existing rule.

Principles can be apparently contradictory, but in fact this is the characteristic that makes them useful tools for the choice of the applicable law and, as a consequence, to achieve uniform interpretation in decisions. For instance, "strict compliance" is a principle of Brazilian public law, meaning that the State cannot act differently than as strictly established by a formal law. It is in contrast with the principle of "free initiative" of the private sector – by which anyone can do anything unless forbidden by a formal law. As a consequence, no rule can be created that allows the State to act differently and any rule related to the public sector must be interpreted as prohibiting the public sector to act differently than that which has been strictly

[7] Comite Maritime International, 'CMI International Working Group on the Lex Maritima', *Restatement of the Lex Maritima*, (Web Page, 2018) <https://comitemaritime.org/work/lex-maritima/>.
[8] As defended by Andrea la Mattina, 'Decision Making and Maritime Law: The Role of the Lex Maritima' (2017) 119 *Rivista Trimestrale Di Dottrina, Giurisprudenza, Legislaziona Italiana e Estreniera [Quarterly Journal Of Doctrine, Jurisprudence, Italian and Foreign Legislation]*.
[9] Ibid: "*The general tendency to an international legal uniformity – that differentiates and characterizes this subject with respect to all other areas of international commerce – makes clear that within maritime matters, the question of what regulation applies to a single case gives rise not only to a choice-of-law issue, but also (and, perhaps, rather) to the need to reconstruct the most appropriate legal rule to decide the case at issue, by interpreting conventions and/or state laws as a 'uniform' system, taking into account the relevance of the practices of international maritime operators. In this sense, maritime law only accentuates something that is true for all international commercial law, namely the inadequacy of the traditional choice-oflaw method to solve problems concerning the identification of the law governing a specific legal relationship*".
[10] Miguel Reale,*Lições Preliminares de Direito [Preliminary Lessons in Law]*(Saraiva, 27th ed., 2003).

established by a formal law. In a specific case, therefore, interpretation will be obtained by identifying which principle was elected by the relevant legislation. This information may be express or implicit in the text law or on its traveaux preparatoires or shall be defined by a Superior Court.

The pedagogical concern of establishing a practical, simple, yet mandatory, rule for interpretation and for the enactment of new laws is particularly relevant in the Brazilian scenario of not less than 34,000 existing rules in force. It is unavoidable that many of them are in conflict and could be applied or ignored by a given court. In this context, a *principle* will not grant the best interpretation of a rule on a concrete case (this remains as a burden for jurisprudence and scholars), but it leaves less room for a gross misinterpretation that jeopardizes the core values that justified the creation of the law itself.

The *principles* enacted from *lex maritima* seem to have a paramount role in the text law of the Brazilian system, but need necessarily to be complemented by formal law, establishing rules and meta-rules (principles from local perspective). Their importance seem to be even more remarkable in maritime law, due to the customary origin of the majority of its rules[11] and the specific principles identified in Brazilian maritime law.

4. Maritime law principles in Brazilian jurisdiction

The Argentinean scholar Jorge Bengolea Zapata was one of the firsts to identify common principles in South American systems and to examine them as a faster path to uniformization than conventions and formal law. He verified three main principles in most jurisdictions: (i) the continuation of the maritime expedition principle; (ii) the warranty principle; and (iii) especially, the uniformity principle.[12] These are the main maritime law principles in Brazilian jurisdiction.

4.1 The Uniformity Principle

The Uniformity Principle establishes that law shall be enacted and interpreted, whenever possible, aiming uniformization with international rules. As said, such *principle* is both applicable to: the legislator himself, which will be guided and limited when enacting new rules; and to anyone (party, judge, public sector, etc.) intending to interpret and apply a maritime law.

It is a *relative*, not an *absolute* principle, meaning that the legislator or the interpreter may waive it and sustain a non-uniformizing interpretation, provided, however, that a clear and relevant motivation is dully declined. This is possible, for example, when there is a national sovereignty reason that justifies a particular interpretation apart from such used in other systems. Clearly, avoiding the uniformity principle is an exception and must be followed by reasonable and verifiable motivation[13].

In Brazil, the Uniformity Principle arises implicitly from the Federal Constitution itself, which also establishes the need of observing international treaties when new law is enacted or interpreted: "*Article 178: Law will rule about the air, water and land transport and shall, regarding international transport ruling, comply with international agreements executed by the federal government, with attendance to the principle of international reciprocity*".

It is relevant to note that the rule establishes another possible exception for the *principle*: to reestablish reciprocity with another country. Thus, with principles acting in an apparently contradictory way, the interpreter shall establish in a concrete situation which one of them should prevail. And in case of a maritime law rule that is being interpreted regardless of the Uniformity Principle, the exceptional situation (to answer

[11] The relevance of customs and usages in the enactment of Brazilian law is highlighted by the classic maritime law author Sampaio de Lacerda: "*In fact, who studies the historical development of maritime law may notice that both navigation and maritime exchange had on its usages and practices the applicable rules, being such usages a result of a sponteaneously enacted practice. And arising from identical facts, such usages were adopted by anyone related to maritime navigation, not only by European maritime cities, of the Mediterranean or Atlantic costs, but also by the Eastern cities, with wich european shipowners and merchats kept commercial relation. There was not, however, a scientific product nor even the concern in codifying by the intervention of State authorities. Its compilations were a mere gathering of "good practices at sea*": JC Sampaio de Lacerda, *Curso de Direito Comercial Marítimo e Aeronáutico (Direito Privado da Navegação)* [*Maritime and Aeronautical Commercial Law Course (Private Navigation Law)*(Freitas Bastos Editors, 2nd ed., 1954).

[12] Jorge Bengolea Zapata, *Teoria General del Derecho de la Navegación* [General Theory of the Right of Navigation] (Plus Ultra Editors, 1st ed., 1976).

[13] Although it could be inferred that the exceptional avoidance of the Universality Principle would necessarely lead to a defensive position in favor of local merchants and shipowners, this is not always the case. One of the most clear examples is the wording of Article 482 of Brazilian 1850´s Commercial Code (still in force). As the first national private law code, it was enacted as a safe credential in favor of British vessels, aiming to make Brazilian ports more attractive to it and by this mean increase international trade at that time. In this scenario, Article 482 establishes that foreign vessels cannot be arrested nor detained even without cargo onboard for debts other than those incurred in Brazilian territory and in favor of the same vessel or cargo.

to another country´s act with reciprocity), the clear background for that exception must be established for a fair avoidance of the principle´s effect.

As it can be seen, the Uniformity Principle *tends* to operate together with the *principles* of *lex maritima* and, unless there is an exceptional circumstance to waive uniformization, it will be exactly the tool to allow *lex maritima* to act.

4.2 The "continuation of the maritime expedition" and the "guarantee" principles

The other two main principles of Brazilian maritime law seem to be contradictory, but actually complement each other, allowing the choice of the core value that should prevail in a concrete situation. Those are the *continuation of the maritime expedition* and the *guarantee* principles.

Several maritime law rules are influenced by the concept that the maritime expedition implies that its risks are shared between carrier and shippers. Perhaps the clearest – but not the only – example of that is the general average. Such joint interests justified the identification of the *continuation of the maritime expedition* principle. According to it, the interpretation of a certain rule should protect the continuation of the voyage, avoiding the vessel's retention.

As with the *uniformity* principle, the *continuation of the maritime expedition* is, at the same time, result of the formation of maritime law by common uses during history and a guideline for interpretation and enactment of new rules. Articles 613 and 614 of the Brazilian Commercial Code[14] are examples of the *material* influence of such principle. Such rules allow cargo owners to perform cargo transshipment in order to proceed with voyage and impose to the captain chartering another vessel to proceed with carriage. The *procedural* influence of such principle, on the other hand, can be identified on articles 479 and 483 of the Brazilian Commercial Code, which establish: (a) that a vessel can only be arrested with less than ¼ (one fourth) of its cargo onboard or, if it is ready to sail with more cargo, for other debts than those related to supplies provided at the same port and for the same voyage (article 479); and (b) No vessel shall be detained or arrested for particular debts of one of its owners provided that the other owners provide guarantee.[15]

The scholar Jorge Bengola Zapata has identified a general influence of such principle in several countries on rules regarding the captain, contract of vessel's joint exploration, co-owners of vessels, ship arrests and full or partial chartering.[16] The core of such principle in rules that allow vessel to be subject to mortgage and possessory claims confirm its influence mainly against carrier's assets. However, others have verified that such principle is also effective against cargo interests: "*The guarantee principle justifies maritime law precepts such as that which says that vessel shall is bound by obligations with cargo, as cargo is bound to obligations with vessel*".[17]

This is the principle that justifies an arrested vessel to be released against proper guarantee or the captain to enter into contracts to obtain essential goods or services to proceed with voyage. Although it may seem to be a principle in favor of the carrier, the *continuation of the maritime expedition* also acts in favor of cargo interests, preventing loading, unloading and carriage operations from non-performance or delay.

In contrast with such principle, the *guarantee* principle also arises from the joint interests of carrier and cargo, as a result of the risks of the maritime expedition – not only related to the perils of the sea, but especially to the furtive nature of the vessel and the cargo. Such volatility demands law making and interpretation to search for rules and interpretation that confer security and enforceability to the relation between parties.

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[14] Article 613: If the captain needs to arrange repairment for the ship during the Voyage and charterers, shipers or consignees do not intend to wait for it, they may unload all of their cargo and pay full freight, demurrage, general average – if any, and unload and stowage expenses.
Article 614: If the vessel cannot be repaired, the captain must charter at its account one or more vessels to carrier the cargo to its destination and cannot ask for extra freight. If the captain is not able to charter one ore more vessels within 60 (sixty) days from the date When vessel was held unseaworthy, and if it cannot be repaired, he must proceed with deposit of the cargo before the local court and serve protests to the interested parties; In this case the contract of carriage will be terminated and only past due shall be paid. If, however, charterers or shippers prove that the vessel was unseaworthy on commencement of the Voyage, they will be released from paying any freight and shall be indemnified by the carrier. This proof is admited even if against the ship cerficicates.

[15] Luís Felipe Galante, Chaopter 28.5 (Processo Empresarial Marítimo) *[Commercial Maritime Procedures]* ' in Fábio Ulhoa Coelho, *Tratado de Direito Comercial [Commerical Law Treaty]* (Saraiva, 1st ed., 2015).

[16] Jorge Bengola Zapata, *Teoria General del Derecho de la Navegación* [General Theory of the Right of Navigation] (Plus Ultra Editors, 1st ed., 1976).

[17] Luís Felipe Galante, Chaopter 28.5 (Processo Empresarial Marítimo) *[Commercial Maritime Procedures]*' in Fábio Ulhoa Coelho, *Tratado de Direito Comercial [Commerical Law Treaty]* (Saraiva, 1st Edition. 2015), 459.

The influence of such principle shall be identified, for example, in maritime liens and other rules that allow enforcement of debts against the vessel. In the Brazilian system, as well as in others, there are clear examples of it on articles 527, 609 and 619 of the Brazilian Commercial Code, which allow the carrier to retain cargo for unpaid freight and general average contribution, and, under specific circumstances, detention and demurrage. Unsurprisingly, it can also be identified on the above-mentioned articles 479 and 483.

It is not a coincidence that both principles may be identified on the same specific rules, since the contradiction between the *continuation of the maritime expedition* and the *guarantee* principles is always latent. Firstly, any new law should be enacted with adequate balance between such principles, so that *universality* is pursued. The interpreter, on the other hand, should calibrate both of them in a concrete situation. Those principles are usually compared with the two sides of a coin, that operate by continuously limiting and being limited by each other.

Such reciprocal forces can be identified in several principles of *lex maritima* itself when applied to a concrete situation. As an example, it seems to be of common sense that a vessel shall be arrested for maritime privilege credits. However, when an arrest is obtained against a *trump* foreign vessel there is clearly a higher risk of default in comparison with a national flag *liner* vessel that operates only in cabotage along the coast. Although the core rule of granting an arrest is the same, on the hypothesis both legislator and interpreter should amplify the influence of the *guarantee principle*, establishing stricter requirements for bail and to release the vessel. In the second example, in contrary, the *continuation of the maritime expedition* should prevail, by establishing reasonable (and less strict) requests to release the vessel – which has far less chance to evade.

As it can be noticed, while the uniformity principle acts before *lex maritima* and assisting on its choice, the continuation of the maritime expedition and the guarantee principles are meant to be applied after it, providing balance when a national law is enacted or interpreted in a concrete case.

5. Case study on the use maritime law principles in Brazilian jurisdiction

As said, lex maritima and international treaties only find fertile ground where internal law allows it and grant its enforceability. In Latin American – and particularly in the Brazilian – systems, this is the key role played by *principles*. They do not grant the best interpretation of a rule on a concrete case, but leave less room for a gross misinterpretation. And there were cases in which the good and the bad application of *principles* were paramount in the correct or incorrect interpretation of a rule that should be generally accepted. For the purpose of this text, two of them will be analyzed.

5.1 Recognition of a Mortgage Registered Abroad

The recognition of a mortgage registered abroad was submitted to the Brazilian Superior Court on the case "RESP 1705222/SP, between NORDIC TRUSTEE ASA, a foreign company, and BANCO BTG PACTUAL SA, a Brazilian investment bank. In summary, the first and second instances court did not recognize the enforceability of a mortgage registered by the Nordic Trustee against a Liberian flag vessel, registered abroad. The need of recognition arose from the fact that Banco BTG Pactual is the creditor of a relevant amount and has obtained vessel´s seizure – jeopardizing Nordic Trustee´s rights of first creditors as per the mortgage. It was known that such vessel was acquired by the means of a Bond Agreement granted by such mortgage, reason why Nordic Trustee could be considered as a fiduciary creditor.

When analyzing the case, both the first and second instance courts found against Nordic Trustee based on the circumstance that Liberia was not part of any international convention that Brazil had signed which could possibly allow the recognition of a mortgage registered abroad. In addition, as per national legislation, the application foreign law (Dutch or Liberian) would not be possible due to the nature of the vessel as a mobile good. Such courts, therefore, applied general civil law and did not allow any principle to produce effects on the case.

The Brazilian Superior Court, however, concluded in contrary, recognizing such mortgage. Applying the Brazilian Supreme Court´s understanding that international treaties and conventions have the same force of national legislation, it allowed the interpretation as to common uses and aiming international uniformization. In view of the wide use of mortgages to allow funds used for construction and maintenance of large vessels, it recognized that the risks attached to the ordinary operation and foreign chartering of a FPSO should be balanced and compensated by the stability of a mortgage in the port of registry.

Therefore, based on article 278 of the Bustamante Code, it found that the mortgage duly registered as per the port of registry´s law have extraterritorial effects in countries of which legislation does not recognize

nor establishes rules about such mortgage. In conclusion, being the registry of mortgage a sovereign act of the flag State – which has administrative rules under its jurisdiction, such registry must be recognized by Brazilian internal law.

It is not difficult to notice the *uniformity*, the *continuation of the maritime expedition* and the *guarantee* principles on such case, being expressly applied by the Brazilian Superior Court in order to: (1) assist in the choice of the applicable law; and (2) fulfill gaps in national law. With eyes on the uniformization, the court has correctly held that the *guarantee* principle should prevail. This is a clear example in which principles were a useful tool to allow uniformization (and the effects or *lex maritima* itself) even in the absence of an international treaty specific for international recognition of foreign mortgages.

5.2 The use of the *full indemnity* principle of the Consumer´s Code

On the other hand, a wrongful use of principles may lead to misinterpretation that jeopardizes the core values of *lex maritima* against text law even in situations where there are specific treaties in force. Although this seems unlikely in arbitration courts, it is not uncommon to find decisions that stand against basic and generally accepted maritime law institutes, such us the limitation of liability.

Perhaps the most harmful misinterpretation that has spread over Brazilian jurisprudence lately was the wrongful use of the *full indemnity* principle of Consumer´s Code in maritime law and Air Transport cases.

Needless to say that the Brazilian Consumer´s Code applies only to consumer´s relations, e. g. those in which a natural person or entity acquires a service or good for final consumption – not as a supply for an economical chain. In this scenario, a consumer is considered vulnerable and the law protects him, for example, granting the right of obtaining full indemnity and holding void any attempt to limit liability. This should have little or no applicability at all in contracts of carriage by sea.

However, partners of a law firm whose clients were mainly cargo insurers started to publish studies with a broader interpretation of the scope of application of the Consumers Code and defending its influence in contracts of carriage by sea. The intention was clear: Hold void any attempt to limit carrier´s liability to the cargo value declared (if any) by the insured (shipper) and escape from the Hague and Hague-Visby Rules, under the allegation that such rules – and any international treaty entered to by Brazil – could not overcome the principle of full indemnity.

After some time, such authors started to quote each other and decisions with the same conclusion began to be verified at the Sao Paulo Court of Justice. Soon this became a major understanding applied by courts all over Brazil to sea and air carriage contracts. This wrongful application of the principle of *full indemnity* has resulted in several final binding verdicts in favor of shippers (and cargo insurers) that would benefit from cheap freight by not declaring cargo´s value, but, on the other hand, were awarded with high indemnities.

It was necessary nothing less than a decision of Brazilian´s Supreme Court to put an end to such tendency: The Recurso Extraordinário 636.331/RJ. The first and second instance courts had applied the spread understanding that air carrier was not entitled to limiting its liability as per the airway bill and the Warsaw Convention – in force in Brazil.

The Supreme court, however, has put an end to this gross misinterpretation and ruled that article 178 of Brazilian Federal Constitution establish that rules and international treaties limiting carrier´s liability – particularly the Warsaw and Montreal Conventions – shall prevail over the Consumer´s Code. Not only because such article establishes that the country will comply with international agreements executed by the federal government, with attendance to the principle of international reciprocity, but also because it is a specific rule – while the Consumer´s Code is a general one.

Considering that the Supreme Court has allowed limitation of liability against a passenger under a contract of air carriage, the effect of such decision in airway contracts was immediate: If limitation under law and contract is valid against a passenger in air transport, it is valid *a fortiori* against a company that is a shipper under a contract of carriage by sea.

This decision, however, was awarded only in 2017 – after almost a decade of judgements applying full indemnity. Harm was irremediably suffered by several shipping companies and, afterall, to the legal system´s image abroad. As it can be seen, the wrongful use of a general principle from the Consumer´s Code and the lack of use of the maritime law principles have not only led to misinterpretation and non-application of core values of *lex maritima*, but also to the ineffectiveness of two conventions in force. And this misinterpretation was only ceased by the correct use of specific principles.

6. Conclusion

It does not seem possible to believe that the ratification of a convention by any given State-part is the end in the path of uniformization of a certain maritime law matter. Whether it is a convention or a national law, a rule is what the judiciary says it is. In the same sense, one should not conclude that *lex maritima* will be an enough tool to ascertain uniform interpretation if there is no room left for that in national legislation.

What ensures essentially similar interpretations even when text-law wording differ between jurisdictions is that maritime law is a "*jus commune mercatorum*" that originates from custom and is largely include not only in international conventions but also in national laws. Therefore "*the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole*"[18].

And the uniformization *of interpretation* is much more than a mere choice of the applicable law, but rather the need to reconstruct a given legal rule as per international practices. Furthermore, on the bottom of it, maritime law does not seek for a *static* uniformization, with all countries having the same text law – but of a *dynamic* one, meaning that regardless of wording, interpretation and enforceability are achieved everywhere as similar as possible.

We are not questioning international treaties and conventions as an effective and necessary tool to obtain uniformization. Although some countries are adopting the approach of enacting national law in line with international conventions, the legislative procedure may also be lengthy and subject to political and ideological interferences in the final draft. What we do argue, however, is that conventions have proven to be not enough to obtain the *dynamic* uniformization as desired.

In this scenario, *principles* as conceived by Latin American systems – namely the *uniformity*, *continuation of the maritime expedition* and the *guarantee* principles – seem to be a tool supplementary to the *lex maritima*.

Those should not be approached as international principles acting from outside to inside a given legal system – like a self-standardization caused by massive use of forms and international rules obtained by intense commercial relations, but as a national rule allowing the interpreter to fill gaps. As said, national principles will not grant the best interpretation of a rule on a concrete case, but it leaves less room for a gross misinterpretation that jeopardizes the core values that justified the creation of the law itself. And that is already a lot.

Although the ratification of an international Convention may result in greater stability than a rule of interpretation, the use of principles in common law systems are a promptly available alternative for uniformization with much lower risks of political and ideological interferences. They seem to operate in a deeper tissue of the legal system, building pillars on which other unification tools can be added – not only international treaties and conventions but even national law or *lex maritima* itself.

It seems clear at this point that the use of *principles* in civil law systems may facilitate the path for uniformization as well as, in contrast, the wrongful use of them may jeopardize a convention in force. They should not, therefore, be ignored.

[18] Andrea la Mattina, 'Decision Making and Maritime Law: The Role of the Lex Maritima' (2017) 119 *Rivista Trimestrale Di Dottrina, Giurisprudenza, Legislaziona Italiana e Estreniera [Quarterly Journal Of Doctrine, Jurisprudence, Italian and Foreign Legislation]*.