COMMENTED TRANSLATION OF AN OPINION OF THE STATE OF NEW YORK COURT OF APPEALS

A thesis presented by

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COURT OF APPEALS

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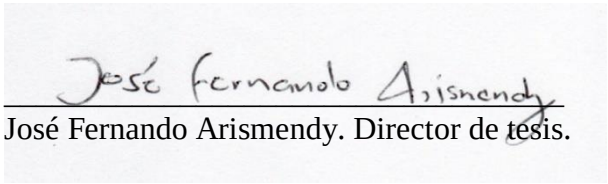

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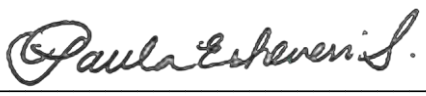

Paula Andrea Echeverri Sucerquia,
Directora Escuela de Idiomas

DEDICATION

To my baby and my husband who have been the source of my inspiration and gave me the motivational support and the strength that I needed when I thought of giving up.

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My deepest gratitude to my family, whose love and guidance are always with me in whatever I pursue and for providing me with enough courage to succeed in everything that I set out to do.

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ABSTRACT

COMMENTED TRANSLATION OF AN OPINION OF THE STATE OF NEW YORK COURT OF APPEALS

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This master's graduation project compiles the analysis of the translation process of a legal document from English of the United States English into Colombian Spanish entitled: "No. 26 159 MP Corp v. Redbridge Bedford", a judicial opinion that contains information about an appeal process in a New York Court of Appeals regarding a commercial lease. The translator illustrates the problems faced during the translation process due to the issues implicit in legal translation, particularly when the source and the target texts belong to different legal systems: the common law and the civil law. In view of this, a specific methodology proposed by Prieto (2011) and based on an integrative process-oriented approach was adopted to overcome those problems, and demonstrate the usefulness of the theory of the functional legal equivalent developed by Šarčević (1997) to solve terminological incongruences. This work also includes a bilingual glossary of legal terms based on the terms found in the source text and a recommendation of several resources for translators that undertake legal translation projects. The analysis conducted in the process provides a starting point for those translators who see themselves involved in the field of

legal translation and pretend to be highly committed with this delightful but challenging work.

Keywords: Legal Translation, Common Law, Civil Law, Freedom of Contract, Declaratory Judgement Action, Commercial Lease, Yellowstone Injunction, Breach of Contract, Waiver Clause, Declaratory Relief, Summary Proceeding.

Palabras clave: traducción jurídica, derecho de *common law*, derecho civil, libertad contractual, acción declarativa, contrato de arrendamiento comercial, recurso Yellowstone, incumplimiento de contrato, cláusula de renuncia, reparación judicial declarativa, proceso sumario.

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"While lawyers cannot expect translators to produce parallel texts which are equal in meaning, they do expect them to produce parallel texts which are equal in legal effect. Thus the translator's main task is to produce a text that will lead to the same legal effects in practice."

Šarčević

Acronyms

Acronym	Use in English	Meaning
CAT	Computer Assisted Translation	Traducción Asistida por Computador
CPLR	Civil Practice Law and Rules	La Ley y las Normas de Procedimiento Civil
LLC	Limited Liability Company	Compañía de responsabilidad limitada
POS	Part of speech	Categoría gramatical
RPAPL	Real Property Actions and Proceedings Law	Ley de Acciones y Procedimientos de Bienes Inmuebles

Introduction

Foreign languages represent a great motivation in my life and have led me to important academic and professional achievements as well as the determination to acquire more. Even though I first started my studies of law at the University of Medellin I always knew that I wanted to combine that specific knowledge with foreign languages either as a teacher or as a translator. As a consequence, while I pursue a bachelor degree in law I also was enrolled in foreign languages teaching program at the University of Antioquia and then I started my master in translation. On the one hand, law studies have brought me a vast knowledge in this field: the appropriation of a specialized language, the comprehension of several national and international laws, and the ability to analyze different social phenomena from a legal point of view. On the other hand, foreign language learning studies gave me multicultural and open thinking and allowed me to improve language skills in English and French. In this regard, since I started my master's degree I knew that I was going to work on a project combining law and languages, particularly something related to civil law because it is a branch of law that I master fairly well. Besides, I decided to work on the pair of languages English-Spanish because according to Bestué (2016), these are two languages coming from different linguistic branches and legal systems, with diverse historical developments that have also created concepts and legal institutions that are divergent and therefore generate considerable conceptual incongruences (p.1). Accordingly, comparative law becomes an essential instrument for the translation of legal texts.

My master's degree project is a commented translation that comprises the translation of the legal text: "No. 26 159 MP Corp v. Redbridge Bedford", an opinion that contains information about an appeal process in a New York Court of Appeals regarding a commercial lease, from the United States English into the Colombian Spanish and the analysis of the translation process. To correctly choose a source text to work on I had to read different documents related to civil law, especially contract law. Two main reasons were taken into account to choose the source text: first, the degree of difficulty that an opinion represents when translating due to the structure in which this type of texts are written, the structure of the sentences, the vocabulary and all legal concepts that are involved; second, the fact that the opinion was produced in a common law environment while the target text was produced in a civil law system.

Subsequently, I will describe the research process that I carried out intending to construct a theoretical framework with key concepts that justify a research in this field of legal translation. Authors such as Šarčević (1997), Gémar (1998), Borja (2000), Cao (2007), among others helped me to understand legal translation from a conceptual point of view by analyzing what legal translation implies, difficulties when translating legal documents, types of legal documents, different legal systems and their challenges and the usefulness of comparative law for translation. Those concepts represent a basis for the analysis that is made before, during and after the translation process.

This work also includes a bilingual glossary of legal terminology based on the terms found in the source text, and a recommendation of several resources for translators that undertake legal translation projects. The use of this glossary makes the process of translation more efficient, eliminating ambiguity among terms and ensuring that all terms

are translated accurately and consistently every time they are used, thus guaranteeing translation quality.

Furthermore, before starting with the translation of the source text, the methodology to carry out the translation of the legal text proposed will be explained. This specific methodology was proposed by Prieto (2011) and is based on an integrative process-oriented approach that I will combine with the theory of functional equivalence applied to legal texts suggested by Šarčević (1997) to solve the problems of incongruency.

During and after the translation process, I will identify and illustrate the difficulties due to the issues implicit in legal translation, particularly because the source and the target texts belong to different legal systems: the common law and the civil law. Besides, I will propose different possibilities to overcome those difficulties taking into account the methodology already chosen.

Finally, this commented translation will allow me to draw conclusions and recommendations regarding legal translation, providing a starting point for those translators who see themselves involved in the field of legal translation and pretend to be highly committed with this delightful but challenging work.

Objectives

General Objective

From a specific methodology based on an integrative process-oriented approach, to translate an opinion of the State of New York Court of Appeals from English into Colombian variety of Spanish by writing a commented translation that reflects an in-depth analysis of the translation process in the field of legal translation and particularly in contract law, with the purpose of identifying main difficulties involved in legal translation and propose an appropriate methodology to overcome them.

Specific Objectives

To describe the main characteristics and structure of an opinion of the State of New York Court of Appeals and compare them with the opinions in the legal system of Colombia.

To apply my knowledge of law to the analysis of a piece of legal translation that will contribute not only a starting point that facilitates legal translators the interaction between the Colombian and American legal systems, but also to future research in this field of legal translation.

To construct a bilingual glossary of legal terms based on the terms found in the source text.

Theoretical Framework

In the following theoretical framework, different concepts will be analyzed with the aim to expose essential notions about legal translation that had to be considered at the time of translating and analyzing an opinion of the State of New York Court of Appeals.

Legal translation

Legal translation is part of a specific branch of translation known as specialized translation whose main purpose is to render legal texts from the source language into the target language which implies a difficult process. In this sense, Cao (2007) states that "legal translation is generally recognized as the most complex and demanding of all areas of specialized translation" (p. 85). It is widely accepted that the language of legal texts carries a high degree of complexity and technicity that implies a challenge for translators requiring them to possess adequate language proficiency and also a vast knowledge of law in order to produce accurate translations.

According to Šarčević (2012), legal translation is an interdisciplinary field that involves three important elements that vary in each society: languages, law, and culture. (p. 1). Those elements are the ones that render legal translation a very complex process. In my experience, the mere reading and understanding of a legal text requires a knowledge in which those three elements are involved. For this reason, the source text entails an added difficulty to understand it, this without properly mentioning the translation process itself. A similar idea is pointed out by White about the difficulties of translating legal texts: "legal

translation is the art of facing the impossible, of confronting unbridgeable discontinuities between texts, between languages and between people" (as cited by Šarčević, 2012, p.1). In this vein, Šarčević refers to the ideas of different authors such as Várady (2006), Pommer (2006) and Sandrini (1999) which consider that today the cultural aspects of legal translation deserve greater attention considering that the main purpose of a legal translator is to achieve cross-cultural transfer. As a consequence, the difficulty of translating a legal text will depend inasmuch as the source and target legal systems, culture and languages are related, as well as the language skills and legal expertise that a translator must have. In this sense, Šarčević (2012) suggests that "the greater the legal expertise, the higher the chances are the translator will succeed in bridging differences between legal systems, culture, and languages (p. 199).

To sum up, in order to render quality legal translations and to facilitate this process, a translator must be aware of the following characteristics of legal translation texts:

- Prescriptive nature of legal discourse: this nature gives rise to legal effects.
- A system-bound discipline: lack of a common knowledge base or universal operative referents such as the laws of mathematics.
- Fidelity: this is essential to preserve the correspondence between source and target text by achieving an equivalent impact on the target reader.
- Ambiguity and interpretation: the problem of translating ambiguity leads to the question of interpretation. (Harvey, 2002, pp. 179-181)

These characteristics will be taken into account for the analysis of the translation. First, the prescriptive nature of legal discourse because the source text has legal effects given by a judicial body that owns authority over other courts. Second, since law is not a general science, I have to consider that it is a system-bound discipline that is permeated by the culture where it belongs, in this case the American culture. Third, fidelity represents an important characteristic to keep when translating because there must be an accurate

correspondence between the source and the target text. Finally, I have to make use of interpretation with the purpose of finding correct equivalents to solve ambiguity problems.

Legal language

According to Muñoz (2017): "legal language is the variety of language that is used in legal, judicial, administrative, notarial and other texts concerning the application and implementation of law such as those produced by lawyers and collaborators of justice" (p. 2). Similarly, Garzone, cited by Wolff (2011) argues that legal language is different from ordinary language because it has a special quality, for example sentence constructions are lengthy, abstract, and complex; therefore, it is seen in the field of specialized language (p. 6).

Hence, translating legal texts is usually a challenging endeavor because if the translator has no expertise in law, then the translation process will be more difficult, time-consuming and less accurate. As a consequence, it is mandatory for a legal translator to understand and recognize the main characteristics of legal language to properly overcome difficulties when translating. Theron, Cao (2007) mentions the following about legal language: "it is archaic, complex, formulaic, and obscure. Legal writing is subject to strict stylistic conventions in register and diction, contains stock phrases that are uncommon in general text practice, and is invariably intricate, verbose and pompous" (p. 4).

Considering that this study is based on a commented translation from English into Spanish it is necessary to understand the main features of legal English exposed by Veretina-Chiriac (2012):

Lexical features:

- Archaisms: the inclusion of archaic or rarely used words or expressions, but archaic words are being used less frequently than other terms. For example,

adverbial expressions such as *hereinafter*, verbs such as *to darraign*, adjectives such as *aforesaid*, and so on.

- Technical terms: pure legal terms that are usually only known by lawyers. For instance: tort, execution.
- Foreign words and expressions: which are mainly from *Latin* and *French*.
- Synonymy: this is due to French and Latin influence.
- Repetition of words: absence of anaphoric reference. Repetition is used to avoid ambiguity.

Syntactic features:

- Sentence length: sentences include a great deal of information.
- Nominalization: nouns derived from verbs are often used instead of verbs, such as: *to give consideration* instead of *consider*.
- Impersonal style: in order to reduce the agent in his identity while emphasizing the action. The use of passive voice and peculiar use of pronouns are characteristics of a highly impersonal style of writing. (pp. 104-106)

Main difficulties when translating legal texts

As stated by Cao (2007) "sources of legal translation difficulty include the systemic differences in law, linguistic as well as cultural differences" (p. 23). All these are closely related.

Legal systems incongruences. Legal language is a specialized language that is not universal, which means that it varies according to different national legal systems developed and adopted by each society. In this regard, Šarčević (1997) states that law remains a national phenomenon. Each national law constitutes an independent legal system with its own terminological apparatus, underlying conceptual structure, rules of classification, sources of law, methodological approaches, and socio-economic principles (p. 13). Additionally, language is a social and cultural invention that human beings have created with particular structures that are not global. Those aspects involve implications for legal translation, especially because communication is often across languages developed in

different cultures and not always reflecting the same legal system. Thus, the incongruence of legal systems seems to be the main challenge for a legal translator.

Linguistic differences. In accordance with Cao (2007), the differences of legal systems and the consequent differences in the language used in civil and common law have an impact on legal translation because law and languages are closely related (p. 31). In fact, legal language has developed its characteristics intending to meet the needs of the legal system in which it is expressed (Cao, 2007, p. 28). As a result, the more linguistic differences due to the legal systems, the more challenging it will be for the translator, hence, a very common linguistic difficulty in legal translation is the absence of equivalent terminology across different languages. The lack of equivalence will certainly be a challenge for the translation of the source text because it was drafted in a common law country and will be translated for a civil law public. In this regard, David and Brierley (1985) state:

> The absence of an exact correspondence between legal concepts and categories in different legal systems is one of the greatest difficulties encountered in comparative legal analysis. It is of course to be expected that one will meet rules with different content; but it may be disconcerting to discover that in some foreign law there is not even that system for classifying the rules with which we are familiar. (p. 16)

Furthermore, Smith (1995) explains that in terms of legal style, legal language is a specialized language with its own style, meaning that languages of common and civil law differ from each other, particularly in the way law is written. As a consequence, written legal language reproduces the main elements of a legal culture and challenges the translator with its multi-faceted implications (pp. 190-191). All those characteristics of legal language are observed in the source text which is highly specialized and requires from the translator

a vast knowledge of law to make an adequate and understandable translation for the target text audience.

Regarding linguistic differences, Gémar (1998) argues that the polysemy of words implies one of the main challenges for legal translation because polysemy is inherent to language. To his respect, Nadelman (1966) states that "even in the same language the meaning of a legal term may differ from system to system. Thus, 'domicile' has one meaning in English law and quite different meanings in American jurisdictions" (p. 195). Furthermore, the use of technical terms differs in each legal system resulting in a problem of correspondence and equivalence between languages. Consequently, in the source text were found several cases of polysemy that will be carefully translated taking into account an adequate equivalent in the target legal system, thus maintaining the fidelity of the source text.

Forasmuch as the source text is a judicial opinion, it is mandatory to understand specific features of legal language and the structure in that kind of judicial text with the intention of reformulating the translation according to the structure of judicial opinions in the target legal system. To this respect, Cao (2007) explains that "common law judicial opinions are usually long and contain elaborate reasoning, whereas the legal opinions in civil law countries are usually short and more formal in nature and style" (p. 29). Under those circumstances, in civil law countries judges usually cite on legislation, not on prior case law as the judges do in common law countries, besides judgments are generally divided into reasons and orders. In Colombia, judicial opinions include five parts: a heading with information about the case, reasons in fact with the claims of the plaintiffs, proven facts, legal bases, and decision. In contrast, common law judgments extensively expose the

facts and compare them from the facts of previous cases to identify the specific legal rule relevant to the facts (Cao, 2007, p. 29).

Cultural differences. Language is part of a culture and a legal culture is conditioned by its historical background taking into account the legal system that is present in each society. Goodrich (1987), cited by Cao (2007) argues that law is an expression of the culture, it is expressed through legal language that is a social practice and legal texts necessarily bear the imprint of such practice or organizational background (p. 2). Accordingly, Šarčević (1985) argues that "each country has its own legal language representing the social reality of its specific legal order" (p. 27). As a consequence, I consider that the main task of a legal translator is to overcome those cultural barriers by finding and adopting translation strategies that adapt to the communicative purpose (also known as *skopos*, as will be described later on) of the translation and take into account this type of cultural barriers.

Given these issues, the point of view of Cao (2007) is relevant for this study considering that: "it is essential that the legal translator have a basic understanding of the nature of law and legal language and the impact it has on legal translation" (p. 7). For example, thanks to my undergraduate studies in law I have a point in favor to carry out this translation project, especially knowledge about civil law and the fundamental basis for the understanding of any legal document. However, since I am not an expert in all fields of law I need to study common law more deeply to better understand comparative law and render more appropriate translations.

As far as legal texts are concerned, not only being a lawyer facilitates the translation of all kind of legal texts, it is also expected that the translator specialize in a branch of law and therefore develop more competence to translate certain type of legal texts. In my case,

civil law represents my highest level of expertise and hence I have decided to choose as a source text for my translation project a judicial opinion that belongs to civil law.

Legal texts and text typology

Borja (2000) suggests that in legal translation, the translator's knowledge of text typology of his field of expertise facilitates the translation process by allowing him to make comparisons in the textual, functional and practical application of law (p. 79). In this regard, Alcaraz Varó and Hughes (2002) suggest that when advocating a more systematic awareness of text typology, "the translator who has taken the trouble to recognize the formal and stylistic conventions of a particular original has already done much to translate the text successfully" (p. 103). Consequently, Borja (2000) concludes that understanding text typology has several advantages for the translator: first, translation quality improves to a great extent; second, the use of parallel texts enhances terminological precision and adaptation to the different specialties of law; third, text typologies within a specialized language facilitate the systematization of translation through the analysis of corpus and thus create specialized databases; finally, text typologies might be useful for specialized translation teaching, providing students with authentic documents that offer them a relatively complete view of possible realizations of the specialized language on which they work (p. 80).

Classification of legal texts

Large numbers of authors such as Varo and Hughes (2002), Hernando (2003), Berukstiene (2016), Borja (2016), Muñoz (2017) among others have proposed a variety of

forms of classifying legal texts; nevertheless, there is no consensus of an all-encompassing classification. In this respect, Berukstiene (2016) argues that "some scholars have classified legal texts into genres according to their function or the situation of use, while other classifications are based on branches of law or groups of lawyers" (p. 105). The review of these criteria of classification is given below.

Classification based on the branches of law. Varo and Hughes (2002) propose that the genres of legal texts may be found in each of the areas in which the law is divided (p. 102). The authors suggest three classes of genres: the first group includes statue law, public law, and judicial decisions; the second group comprises private law; and the third group encompasses academic writing on the law. In my opinion, identifying the branch of law to which a text belongs is a starting point to define the parameters to use in the translation of a specific text, e.g. translating a will comprises different terminology than an indictment.

Classification based on the text function. This classification was introduced by Šarčević (2000), "her classification is based on two primary functions of language: regulatory (prescriptive) and informative (descriptive)" (p. 11). Furthermore, Berukstiene (2016) said that according to their function legal texts can be divided into: primarily prescriptive (normative texts, they usually contain rules and norms), primarily descriptive (judicial decisions, actions, appeals, etc.) and purely descriptive (doctrine, in other words, documents written with an academic or diffusion purpose). In accordance with this classification, the chosen source text for this study is primarily descriptive because it is a judicial opinion and this kind of legal text includes a wide description of facts of the case and only a prescriptive part at the end with the resolution of the issues. Understanding this

classification is relevant because the translator may use more appropriate terminology depending on the part of the judicial opinion that is being translated.

Classification based on the situation of use. Maley (1994) cited by Berukstiene (2016) proposed the classification below according to the situation in which spoken and written legal texts are used:

1. Sources of law and originating points of legal process (legislature, regulations, by-laws, precedents, wills, contracts, etc.) – written texts.
2. Pre-trial processes (police/video interview, pleadings, consultations, jury summons) – spoken and written texts.
3. Trial processes (court proceedings examination, cross-examination, intervention, rules and procedures, jury summation, decision) – spoken texts.
4. Recording of judgment in law reports – written texts. (p. 108)

From this classification, the chosen source text can be classified as trial process text considering that it was rendered by a court of appeals. This classification is relevant because it is a starting point for the translator when looking for parallel texts that can be useful for understanding and translating the text.

Classification based on the genre. Borja (2000) analyzed an extensive corpus of legal texts to categorize them in the following classification:

1. Normative texts: legislative provisions such as laws, decrees, regulations, etc.
2. Judicial texts: all those texts that regulate relations between individuals or administration and the judicial organs, for example, orders, writs, sentences, opinions, among others.
3. Case law: reported decisions of appeals courts and other courts which make new interpretations of the law and, therefore, can be cited as precedents.
4. Reference works: jurists and non-jurists make use of this works to solve specific questions about particular aspects of law, e.g. specialized dictionaries and encyclopedias.
5. Doctrinal texts: handbooks of law, works of scholars on philosophy, history and explanation of law, thesis and articles of specialized publications, among others.

6. Law enforcement texts: this category includes all private and public documents that are not part of the above categories and that include a large number of legal genres such as agreements, underwritings, deeds, legal letters, legal briefs, power of attorney, insurance policy, wills, etc. (pp. 84-125)[1]

In my opinion, understanding the classification of legal texts is a prime factor before starting with the translation process. In this way, the translator can better understand the wide variety of legal texts that exists and also find an accurate methodology to render a high quality translation.

Opinion as a text

The text chosen for this commented translation is: "No. 26 159 MP Corp v. Redbridge Bedford", a judicial opinion of the State of New York Court of Appeals. In one hand, because it includes a variety of discursive types and refers to fragments of other texts, in the other hand because from a linguistic point of view, an opinion is one of the most complex legal texts considering that even if there is a structure to write opinions, each judge writes according to different and individual criteria (Durán, 2012, p. 10-12).

The main purpose of any judicial opinion is to resolve a legal dispute, however, the structure of opinions varies from one legal system to another. For instance, in Colombia for writing an opinion the justices usually indicate the applicable law, instead, in the United States the justices make reference to the case law due to the importance of the judicial precedent and they reflect in the opinions their personal interpretation of the case. In the United States, a judicial opinion should identify the issues presented, set out the relevant facts, and apply the governing law to produce a clear, well-reasoned decision on the issues

[1] My translation

that must be resolved to decide the case (Rubin et al., 1991, p. 13). In sum, opinions are more important in common law because they represent the basis of the case law. In this respect, Borja (2000) states that in common law justices usually respect decisions previously made by other justices, therefore, they base their decisions on their interpretation of previous cases and on their personal view of what the law means (p. 111). Understanding the structure of opinions in American and Colombian legal systems helps to establish a parameter for the translation process, that is, the source text must be sufficiently adapted taking into account the structure of judicial opinions in the target culture.

Regarding the structure, the guidelines that follow are intended to help judges write opinions that will meet those tests. A full-dress opinion should contain five elements:

> (1) an introductory statement of the nature and procedural posture of the case; (2) a statement of the issues to be decided; (3) a description of the material facts; (4) a discussion of the governing legal principles and the resolution of the issues; and (5) the disposition and necessary instructions. (Rubin et al., 1991, p. 25)

Nevertheless, in common law opinions no specific sections are dividing those five elements, instead, they are described according to their communicative function. Accordingly, an explicit identification of the parts of an opinion is not seen as in civil law opinions, but a series of descriptors that help to define how the information is normally distributed.

Legal systems or families

Legal language is a technical language that is culturally specific since it is the result of a national legal system of each society. A legal system "refers to the nature and content of the law generally, and the structures and methods whereby it is legislated upon,

adjudicated upon and administered, within a given jurisdiction" (Tetley, 2000, as cited in Cao, 2007, p. 24). Such systems are also known as legal families.

According to David and Brierley's (1985) each legal system or family has its own characteristics and "a vocabulary used to express concepts, it has techniques for expressing rules and interpreting them, it is linked to a view of the social order itself which determines the way in which the law is applied in a society" (p. 19). There are the following world legal systems: "the Romano-Germanic Law (Continental Civil Law), the Common Law, Socialist Law, Hindu Law, Islamic Law, African Law, and Far East Law" (David & Brierley's, 1985 pp. 20-31). One set of criteria used by Zweigert and Kötz (1992) to compare legal systems or families includes the following: "(1) the historical development of a legal system; (2) the distinctive mode of legal thinking; (3) the distinctive legal institutions; (4) the sources of law and their treatment; and (5) the ideology" (pp. 68-73). As a result, this work will be based only on the two most influential legal systems considering that the source text is a document in English written in the United States, where there is a tradition of common law and that it will be translated into the Colombian variety of Spanish.

Due to the differences in historical and cultural development, the elements of the source legal system cannot be simply transposed into the target legal system (Šarčević, 1997, p. 13). Thus, the main challenge to the legal translator is the incongruence of legal systems in the source and target languages. As a consequence, the systemic differences that a translator will face when translating between different legal families represent a significant source of difficulty in translation.

Civil Law. This legal system emerged from Europe, particularly from the Roman Empire when its law was codified by Justinian in the Corpus Iuris Civilis (AD 528-534). Consequently, under this influence the civil law continued developing in Continental Europe as well as around the world, thus becoming the oldest tradition in the Western world. Most of the codes were adopted in the 19th and 20th centuries, i.e. the French Code Civil (1804), German Biirgerliches Gesetzbuch (1896), Swiss Zivilgesetzbuch (1907), Italian Codice Civile, (1942), etc. These codes contain similar features that make them part of civil law, however, each one possesses specific ideas that set them apart due to socio-cultural elements (Pejovic, 2001, p. 819). "Civil law countries include France, Germany, Italy, Switzerland, Austria, Latin American countries, Turkey, some Arab states, North African countries, Japan and South Korea, etc." (Cao, 2007, p. 24).

Common Law. "This legal system evolved since around the 11th century and was later adopted in the USA, Canada, Australia, New Zealand and other countries of the British Commonwealth" (Pejovic, 2000, p. 9). As stated by Alcaraz (2000), common law is not codified and is mainly based on case law, that is, on the precedent. (p. 5). As a result, before deciding a case, common law judges have to look at previously decided cases of a similar nature by their own court or by a superior court and extract, from those particular cases, general rules that they can apply to the new case before them.

In the map below, it is possible to appreciate how legal systems have spread around the world. This is relevant for this study because the map allows to contextualize geographically where the source text comes from and the country to which it will be translated.

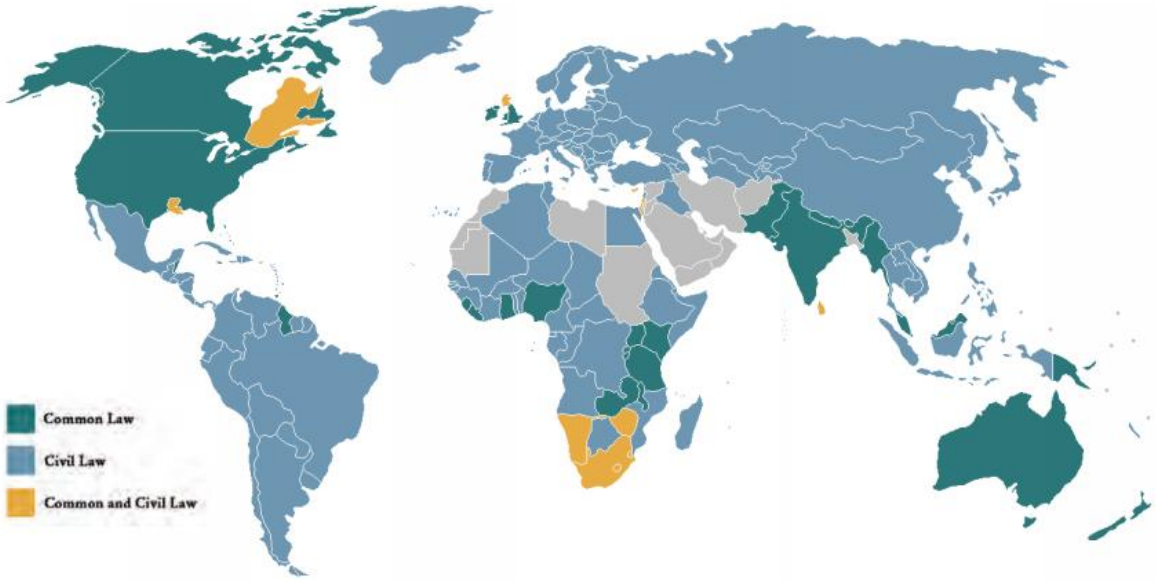

*Figure 1***.** An image of a world map showing countries today that have a civil law system (light blue), a common law system (green) and those that have both (orange). Retrieved from: https://www.law.berkeley.edu Copyright 2010.

Main differences between civil law and common law. There are several differences between both legal systems and the most relevant ones that a translator should be aware of will be exposed below:

- In civil law, the main principles and rules are contained in codes and statutes, which are applied by the court codes. Hence, codes and statutes prevail, while case law constitutes only a secondary source of law. On the other hand, in the common law system, the law has been dominantly created by judicial decisions, while a conceptual structure is often lacking.

- A civil lawyer usually starts from a legal norm contained in a legislation, and by means of deduction makes conclusions regarding the actual case. On the other hand, a lawyer in common law starts with the actual case and compares it with the same or similar legal issues that have been dealt with by courts in previously decided cases, and from these relevant precedents the binding legal rule is determined by means of induction.
- In contrast to common law, the case law in civil law systems does not have binding force. In civil law the courts have the task to interpret the law as contained in a legislation, without being bound by the interpretation of the same legislation given by higher courts; this means that under civil law the courts do not create the law, but only apply and interpret it. (Pejovic, 2000, pp. 10-11)

In addition to the above differences between Civil Law and Common Law, Cao (2007) identifies the following:

- In common law, there is no substantive or structural public/private law distinction as that which exists in the Civil Law system.
- In terms of legal institutions, typical legal institutions of the common law include trust, tort law, estoppel, and agency, and these are unique to the common law. The common law also has categories of law such as contract and tort as separate branches of law and two main bodies of law: common law and equity. In contrast to the common law, the civil law has such unique legal institutions as the cause, the abuse of right, the direct action, the oblique action, the action de in rem verso, the extent of strict liability in tort, and negotio rumgestio, among others. (pp. 26-27)

Something that needs to be clarified is that despite the differences between common law and civil law, they are not incompatible, which means that for translators it is not impossible to translate texts from one system to another. However, it is highly recommended that the translator be aware of all particularities of each legal system and be trained enough to overcome the difficulties in the most accurate way.

Colombian Legal System

Colombia is a country with a Civil Law tradition whose legal system is mainly based on codes and laws rather than jurisprudence. As a consequence, the Colombian legal

system does not recognize court decisions as part of case law, meaning that those decisions are only binding for the parties involved. However, as mentioned by Vega (2018), in Colombia as in other civil law countries, the high courts' decisions have become more powerful, giving as a result that in certain controversial cases a court's interpretation of the law is just as important as the written law itself.

The Colombian National Constitution of 1991 states in Article 1 that "Colombia is a social state of law, organized in the form of a unitary, decentralized republic, with autonomy of its territorial entities, democratic, participatory, and pluralist" (p. 4).

> This means that the central government has the authority to make the most important political decisions. Colombia only has a legislative authority, which is responsible for making the laws for the entire territory. The country is divided into territorial entities called departments (equivalent to states in the U.S.) that are separated into districts and local municipalities. These entities do not have legislative or judicial authority. However, as the executive branch of Colombia is administratively decentralized, there are representatives in the departmental, district, and municipal department levels. The representatives in these three levels have certain limited powers that are independent of the central authority. (Vega, 2018)

According to article 113 of the Constitution, Colombia is a republic in which political power is divided into three branches: executive, legislative and judicial. Each branch is independent and has specific tasks, nevertheless, they are intended to work harmoniously for the benefit of the country (Colombia's Constitution of 1991, 2015, p. 31).

Based on article 114 of the Constitution, the Legislative branch is in charge of making the laws, amending the constitution and exercising political control over the government and the administration. Congress is the head of this branch and it is made up of the Senate and the House of Representatives. (Colombia's Constitution of 1991, 2015, p. 31).

As stated in article 115 of the Constitution, the executive branch is managed by the President of the Republic, the Cabinet ministers, and the directors of administrative

departments. The governorates and mayoralties, as well as the superintendencies, public establishments, and industrial or commercial enterprises of the State, are part of the executive branch (Colombia's Constitution of 1991, 2015, p. 31)

Following article 116 of the Constitution, the judicial branch administers justice. The judicial branch in Colombia has four higher courts, which are the last instance for the three most important jurisdictions: ordinary, administrative and constitutional (Colombia's Constitution of 1991, 2015, pp. 31-32)

Vega (2018) summarizes the higher courts of the judicial branch as follows:

- The Supreme Court of Justice: the highest court of the ordinary jurisdiction that hears claims against the president and investigates the members of the Congress (Colombia's Constitution of 1991, arts. 234-235).
- The Constitutional Court: decides on constitutional claims and studies the constitutionality of the laws (Colombia's Constitution of 1991, arts. 239-241).
- The Superior Council of the Judiciary: investigates the conduct of the judicial officials (Colombia's Constitution of 1991, art. 257).
- The State Council: the highest body of the administrative jurisdiction. It advises the government on administrative matters. (Colombia's Constitution of 1991, arts 236-238).
- The Constitutional Court: decides among others on claims that involve controversial matters such as abortion, same-sex marriage, adoption among others. Congress' main duty is to "make the laws of the Nation," but it has shown itself reluctant to rule when it comes to legislating on the current most controversial topics. As a result of this passivity, the Constitutional Court has had to rule in the absence of Congress in these crucial matters through judicial decisions. This gives the Colombian court's decisions a similar scope to the high court decisions in common law countries.

American Legal System

The United States has a federal system of government, a written constitution, and it is based mainly on common law.

> There is a legal system for the federal government, and there is a separate system for each of the fifty states, for the District of Columbia (the nation's capital), and for each of the American territories and other overseas possessions. For the most part, these systems fall within the common law tradition, though there are significant

> civil law influences in some of the jurisdictions (most notably, Louisiana) that are located in territory that was once under French, Spanish or Mexican rule. The federal government was established by, and its powers are defined by, the United States Constitution. The individual states have their own constitutions, but the organization of the state governments tends to follow the same general pattern as that of the federal government.
>
> Judicial power is exercised by both federal and state courts. In very general terms, the courts in each jurisdiction are the primary forums for decisions on the law of that jurisdiction, but there is considerable overlap. It should be noted that when, for procedural reasons, federal courts decide cases that arise under state law, they apply the substantive law of the particular state, including any relevant case law. The highest court of a state remains the ultimate authority on the law of that state, though the federal courts will overrule state law if it is inconsistent with federal law. (Oxford Libguides, 2015).

New York State Unified Court System. Having a general understanding of this concept is quite important considering that the source text is an opinion that was written by the State of New York Court of Appeals.

Difiore (2016), a Chief Judge of the Court of Appeals and the State of New York explains the structure of the New York State Unified Court System as follows:

> Both the federal government and each of the 50 states have their own court systems. The Constitution and laws of each state establish the state courts. The New York State Unified Court System is made up of various levels of trial and appellate courts; the highest court is the Court of Appeals. Most legal issues are resolved in the state courts. New York's state court system handles nearly four million cases a year, heard throughout the State's 62 counties. Matters brought before the State's judges, hearing officers, support magistrates, and attorney-referees span the gamut from criminal cases to personal injury claims to commercial disputes to landlord-tenant issues. (p. 1)

Commonly, cases start and are decided in the trial courts. Nevertheless, occasionally parties do not agree with the decision made by the trial court and decide to appellate, that is, to ask to a higher court to reconsider the case. Most appeals are first heard in the intermediate appellate courts, which review the decisions of lower courts to make certain

that the law was properly applied (Difiore and Marks, 2016, p. 1). Below is a brief description of the trial courts and appellate courts of New York:

> ***Trial courts operating in and outside New York City.***
>
> *The Supreme Court.* Hears cases outside the authority of the lower courts, such as civil matters involving higher dollar amounts; divorce, separation and annulment proceedings; and criminal prosecutions of felonies. (Outside New York City, Supreme Courts hear civil matters while the County Courts hear criminal matters.)
>
> *The Family Court.* Hears matters involving children and families including adoption; guardianship; foster care approval and review; juvenile delinquency; family violence; child abuse and neglect; and child support, custody, and visitation.
> *The Surrogate's Court.* Hears cases relating to individuals who have passed away, including the validity of wills and the administration of estates. These courts are also authorized to handle adoptions.
>
> *The Court of Claims.* It has exclusive authority over lawsuits seeking money damages against the State of New York.
>
> ***Appellate courts.*** They are divided into Intermediate Appellate Courts and Highest Appellate Court.
>
> *Intermediate Appellate Courts.* Appellate Terms of the Supreme Court in the First and Second Departments hear appeals of decisions in cases starting in the New York City Civil and Criminal Courts. In the Second Department, the Appellate Terms also hear appeals of decisions in cases that started in the District, City or Town and Village Courts. The County Courts in the Third and Fourth Departments, while primarily trial courts, hear appeals of decisions in cases starting in the City Courts and Town and Village Courts.
>
> *Highest Appellate Court.* The Court of Appeals, New York's highest court, hears civil and criminal appeals from the State's intermediate appellate courts, and in some instances from the trial courts. The Court of Appeals also hears appeals of decisions reached by the State Commission on Judicial Conduct, which is responsible for reviewing allegations of misconduct brought against judges. In addition, the Court of Appeals makes rules governing the admission of attorneys to the New York State bar. (Difiore & Marks, 2016, pp. 2-3)

In conclusion, since the source text is an opinion of the State of New York Court of Appeals, it means that the case had already started and had been resolved in a trial court,

that is, in the Supreme Court[2], however, the negatively affected party decided to appellate in a superior court looking for a favorable decision. For translating a source text like the chosen one, it is recommended that the legal translator understands how the legal system of the source text works in order to understand where it comes from and the place it occupies in it with the aim to find the accurate equivalences of legal entities and translate accordingly in the target text.

Comparative Law

After a first analysis of the source text, I identified that it contains numerous conceptual incongruences with regard to the Colombian legal system, not in the writing of the text, that make the process of translation not only a challenging but also a difficult task for a legal translator as a consequence of constraints such as understanding and reformulating a variety of segments. According to Šarčević (1997) "a terminological incongruency can be defined as a complex problem in legal translation" (p. 229). In this vein, I considered that it was useful to make use of the branch of law that offers possibilities to solve that kind of problems or incongruences, that is, the comparative law.

Comparative law is a subdiscipline of the study of law whose main purpose is to compare different legal systems by identifying the incongruence in structure among legal systems and interpret them, in this case through translation and the search for equivalence. Thus, comparative law has become the basis of translating legal texts.

For example, De Groot (1987) states that "comparative law points out to us, among other things, the difference in structure between legal systems" (p. 798). Similarly, Gémar

[2] In the State of New York, the Supreme Court is a trial court, not the highest appellate court as it might seem due to its name.

(1995) affirms that "the greatest obstacle to uniform interpretation and application is undoubtedly the incongruity of legal systems" (p. 150). Šarčević (2003) argues that the differences among legal systems are due to the fact that each society has its own terminological and conceptual structure, sources of law, principles, and practices (p. 5) which makes interpretation a quite challenging task for the translator. Given this, an exceptional characteristic that a legal translator must have is the ability to compare and interpret legal content of terms in the source language with the legal content of terms in the target language, considering that those terms are not always from the same legal system, which implies a higher degree of difficulty when translating.

I will focus on a very important method developed for comparing law. According to Brand (2007), this method has had different names such as functionalism, equivalence functionalism, functional method, or problem-solution approach (p. 408). Bestué (2016) defines a functional equivalent in comparative law as a "legal institution that fulfills an equivalent function in its own legal system regarding the same problem" (p. 9). This method is taken into consideration since it has been found as the most often used method in comparative law and also because it aims at identifying functional equivalents (Brand, 2007). To this respect, Šarčević (2000) explains how a functional equivalent should be determined and identifies the criteria of acceptability for a given term:

The process that leads to the choice of an adequate functional equivalent has at least three stages:

1. Conceptual analysis that aims at identifying essential and accidental features, first of the source concept and then of the target concept;
2. Comparison of the conceptual features in order to classify the equivalence as near equivalence, partial equivalence or non-equivalence. Near equivalence is always acceptable, whereas non-equivalence is never acceptable. When partial equivalence is determined, the functional equivalent can be

considered acceptable only if it corresponds with the source term in terms of structure/classification, the scope of application, and legal effects;

3. Determination of the acceptability of functional equivalents. (pp. 237-241)

It is important to remark that the acceptability of a functional equivalent will depend on the particular context, text type, and *skopos* of a given translation. (Šarčević, 2012, pp. 196-197). For the translation of the source text this method results very valuable considering that a literal translation is not exactly the most accurate solution to the translation problems because there are terms that if translated literally have a different legal effect in the target culture. In this way, faced with the impossibility of using literal translation, the functional equivalent method is not only more accurate but also allows finding a term in the target culture with the same legal effects. As a consequence, understanding law in the source and target culture becomes essential to avoid translation errors and make successful translation decisions.

Methodology

This section will be focused on explaining all the steps I followed to carry out my translation project. Initially, a general overview of the translation process will be exposed, and subsequently, the methodology implemented for translating a legal text, specifically an opinion of the State of New York Court of Appeals.

According to some authors like Didier (1991) and Gémar (2000), at the time of translating one must be aware and take into account a variety of translation techniques, strategies, and methods to render a quality translation. In addition, Hurtado (2015) explains that a good translator needs to be trained in six competences:

- Methodological and strategic competences: applying the methodological principles and strategies necessary to work through the translation process appropriately;
- Contrastive competences: differentiating between the two languages involved;
- Extralinguistic competences: mobilizing encyclopedic, bicultural and thematic knowledge to solve translation problems. This is important in specialized translation;
- Occupational competences: operating appropriately in the translation labor market;
- Instrumental competences: managing documentary resources and an array of tools to solve translation problems. (p. 262)

Nord (1991) and Neubert (2000) summarize those competences as follows: (1) language competence, (2) textual competence, (3) subject or thematic competence, (4) cultural competence, (5) research competence, (6) transfer competence (as cited in Prieto, 2011, p. 8). However, for translating legal texts more than those competences are essential. The methodology requires not only a textual but a legal approach, that is, understand the legal system of the source text, be aware of the function of the text, explain the target legal system and try to find equivalences regarding terminology with the purpose to understand

the legal consequences of the terms that will be used in the translation. In respect thereof, Prieto (2011) argues that "the integral development of legal translation competence requires specific interdisciplinary methodologies for practical problem solving" (p. 7), as a consequence he proposes an integrative process-oriented approach to work on legal translation.

An integrative process-oriented approach

Prieto (2011) proposed an integrative process-oriented approach as methodology to translate legal texts that I have found extraordinarily useful to apply in my commented translation project. This method contains the following steps: analysis of the skopos and macro-contextualization, source text analysis, transfer and target text production, and revision.

1. **Analysis of skopos and macro-contextualization.** As stated by Pommer (2006), "the degree of accuracy and reliability required for a given legal translation is determined by its skopos" (as cited in Šarčević p. 190). As a result, the skopos will always be the starting point in any translation project because there must be a purpose in mind, usually given by a client before translating that determines the translation strategies that will be used to achieve the adequate result in the target language. To have a more realistic experience when translating the source text the following skopos was fixed: the source text is a judicial text from the United States that will be translated and addressed to a civil law class of a master's program in Medellín - Colombia. This means that the public whose skopos is addressed has a basic civil law knowledge, but a limited knowledge of common

law. Having this in mind, most of the translation choices will be contextualized and justified as previously defined in that communicative purpose.

After the skopos was established and understood, I researched extensively with the aim of finding an appropriate methodology to apply in legal translation. According to Prieto (2009) when translating a legal text it is quite important that the translator bear in mind a methodology that has as a basis the classification of each translation project according to legal characteristics and text typology (p. 5). Furthermore, the translator must constantly take into account the communicative situation and purpose (skopos) of both source and target texts, as well as their contextualization based on three parameters, from more general to more specific (Prieto, 2009):

1. Identify the source and the target legal system: this step delimits geographical, legal and linguistic coordinates of jurisdictions.
2. Specify the branch of law: this implies the determination of main sources and main legal concepts involved which usually differ in each branch of law.
3. Identify the text typology: in accordance with Borja (2000), Prieto (2009) considers that it is extremely useful to establish a general classification of text typology based on the discursive situation (legislative, judicial, administrative, etc.), and more specifically, the legal genre (instructive, expositive, argumentative, etc.) (p. 6)[3].

The following conclusions can be drawn when applying the parameters outlined above to the chosen source text: first, the source text is drafted in the framework of the common law while the translation was carried out into the variety of Spanish of Colombia,

[3] My translation

where the civil law system prevails. Second, the branch of law associated is civil law because this law is specialized in resolving any dispute on contractual agreements, and precisely the text is an opinion of a judge on a lease agreement case. Third, based on the discursive situation and taking into account that the opinion was written by a court of appeals it must be classified as a judicial text involving a trial process and whose genre is multifunctional because on the one hand, it has an expository part in which the reasons are written, on the other hand, it has an argumentative part in which the legal foundations are exposed, and finally it has an instructive part that contains the decision of the case.

2. Source text analysis. Prieto (2011) argues that "apart from verifying the key features of the source text in terms of coherence, cohesion, and style, the translator must perfectly understand the legal function of the text, and identify any comprehension problems" (p. 15). Moreover, it is recommended to rely on legal sources and legal experts if possible, rather than dictionaries or another type of sources, which means that translators must be familiar with legal reasoning and hermeneutics. Due to my training as a lawyer and translator, I had the necessary elements suggested by Prieto not only when choosing the appropriate source text for my translation project, but also for understanding the text and identifying potential translation problems.

Several reasons were taken into account to choose a judicial opinion of the State of New York Court of Appeals as a source text. The first reason was the legal system where it comes from and the branches of law involved. The source text comes from common law which according to the skopos of this project, differs from civil law that is the legal system of the target text. Having this disparity of legal systems is itself a huge challenge when

translating. For example, there are situations in which the same legal term has different meanings, or where different legal terms have the same legal effect. To solve this problem, it is mandatory that the translator possesses a deep approach to both legal systems and be able to understand the legal effects of certain translation decisions. In addition, I considered important to find a current source text with enough challenges of understanding and interpretation and, therefore, related to contract law and tort law because they are part of civil law.

The second reason is related to the text typology, which allows the use of multiple legal sources such as jurisprudence, laws, legal interpretation, doctrine, among others. The use of those sources implies a wide variety of comprehension and interpretation problems that are not only related to the legal issues but also to the interpretation of the text that may convey legal effects.

Finally, the last reason has to do with the language, the structure of the sentences and vocabulary used by judges when writing a judicial opinion. English is a language that differs substantially from Spanish, as a result of this, judges from the United States write considerably different than the judges from Colombia. This is also due to the legal systems to which each language belongs. Although opinions are supposed to be written according to some specific criteria, the reality is that following the common law tradition of the United States, judicial opinions are usually written according to the personality of the judge. To this respect, Leubsdorf (2001) argues that "a judge is free to write an opinion in her own style, and thus to express to some extent her own personality. Indeed, some such self-expression is essential if the opinion is to establish its author's reliability" (p. 486). As a consequence, it is possible to find comments including sarcasm, irony and colloquial

expressions with the aim of reducing the severity of the law to make the judge's opinion more human.

3. Transfer and target text production. For the translation stage I used the technological tools below:

CAT tools. One of the most remarkable things that I have learned throughout my master is that the use of a CAT tool (Computer Assisted Translation) is truly significant for optimizing the translation process and increasing the quality of translations.

> A common feature of CAT tools is that they allow the user to store the previous translations into a database, together with the original texts. CAT tool program then checks if there are previously translated segments in the source text. If the repetition occurs, the software automatically reuses the stored translation. The database that contains stored translation is called translation memory. CAT tools are useful for large projects, especially technical texts because the turnaround time becomes much faster. (Scuk, 2016)

OmegaT. For the translation of the source text, I decided to use OmegaT, a free CAT tool that is quite simple but still very useful for translation projects.

> OmegaT is a free and open-source CAT tool that keeps track of similar segments and provides support in form of dictionary and glossary. It's a downloadable program, available for Windows, Linux and Mac users. When you first open the program, you'll see the welcome screen with some guidance on how to use it. When the document is imported, the translation area is on the left side, and the right side serves for helpers and tools which come handy during the translation process. A glossary appears on the lower right side. One of the most useful characteristics of this program is the option to mark the untranslated segments, which colors the untranslated text blue. All translated phrases turn green. Saving the document creates a new directory containing the source document, target folder, glossary – basically everything that belongs to the current project. (Scuk, 2016)

File converter. The use of a file converter is important in translation because most of the CAT tools require an editable file to extract the content of the document and process it.

Abbyy FineReader 15. Since the source text was originally in pdf format, I had to convert it into Word because OmegaT does not recognize pdf. For doing this I downloaded a free trial of Abbyy FineReader 15 because it converts pdf documents into editable documents.

Terminological tool. Terminology is a key element for understanding specialized texts such as the legal ones. As a consequence, I created a bilingual glossary of legal terms in the field of civil law that helped me to translate more appropriately the source text.

Glossary of legal terms. **"**Terminology aims at collecting specialized terms to compile them and produce terminological resources such as glossaries, dictionaries, vocabularies or databases intended to be readily accessible and useful to translation experts, among other professionals" (Cabré, 2010, p. 357). Therefore, I decided to create a bilingual glossary of legal terms because the use of this tool makes the process of translation more efficient, eliminating ambiguity among terms and ensuring that all terms are translated accurately and consistently every time they are used, thus guaranteeing translation quality.

For the construction of the bilingual glossary of legal terms, I extracted some term candidates from the source text and wrote them in Excel. After that, the source text was converted to plain text format to be run in TermoStat, an online term extractor to identify candidate terms. Then, I made a conceptual analysis of the terms by comparing the results shown by TermoStat with the words that I had already chosen and written in Excel as terms. To carry out that conceptual analysis I also analyzed the meaning of each term in the source and the target system with the aim to establish correspondence between the terms and deleting words that were not terms or adding new ones. Finally, I continued filtering

the terms with the help of an expert in the field of legal translation. The chosen terms were organized in a table using Excel in which I added the pertinent information for each term such as source language, target language, number of tokens and parts of speech. The minimum criteria for choosing the terms were the following: legal relevance, difficulty of interpretation and terms of repeated use in the field. It is important to clarify that the chosen terms were not only the legal ones but also other terms and expressions in Latin and French.

Resources. For any type of translation, documentation is one of the most important steps to follow before and during the translation process. According to Monzó (2008), identifying the existing documentary resources and its possibilities determines the efficiency of the queries made by the translator and the quality of his translation (p. 2). Below there is a description of the resources used for the construction of the bilingual glossary of legal terms and the process of translation.

Printed resources.

- Monolingual dictionaries.
- Bilingual dictionaries
- Parallel texts.
- Handbooks of legal translation.

Digital resources. For the translation of this project, I used more digital than printed resources because digital resources made my translation faster and more efficiently and more material to work is available. On the internet I have found the following resources:

- Bilingual dictionaries and glossaries: such as Glossary of Legal Terminology – English to Spanish of the State of Connecticut Judicial Branch Superior Court Operations Division, and Legal Glossaries and Dictionaries of the National Center for State Courts.
- Monolingual specialized dictionaries: explain the meaning of words in a legal context. The following were some of the online monolingual specialized dictionaries that I used: https://www.law.cornell.edu/, https://www.merriam-webster.com/, https://dictionary.law.com/, and https://definitions.uslegal.com/.
- Handbooks of legal translation: such as the Oxford Handbook of Translation Studies (in the section of legal translation), Translating Law, The Ashgate Handbook of Legal Translation, among others.
- Specialized documents: a wide variety of documents written by academic experts in the field of legal translation that serve as inspiration to have better concepts and bases when making translation decisions.
- Websites with specific information about law: for example bibliography and resources from the website https://traduccionjuridica.es/, a website created by Ruth Gámez and Fernando Cuñado, two experts in the field of legal translation; among other websites that are mentioned in the references.
- Terminology databases: the IATE Database, UNTERM – The United Nations Terminology Database and UNESCOTERM.
- Parallel texts: judicial decisions in Colombia about lease agreements. For instance, *sentencia T-150/07*, *sentencia C-670/04*, and *sentencia T-427/14*.

Translation. After having finished the glossary of legal terms I started with the translation phase of this project, which took about a month to be done. The translation was made using OmegaT, a CAT tool that allowed me to translate more efficiently because I kept consistency of terminology and it was time saving.

At this stage, I had to deal with interrelated terminological, procedural and discursive difficulties to produce the target text (Prieto, 2009, p. 16).

In respect of terminological problems, they were mainly posed by the differing levels of equivalence between legal concepts in the source and target legal system. To solve those problems, it was necessary to undertake an exercise of comparative law. In accordance with de Groot (2006) "translators of legal terminology are obliged to practice comparative law because this allows the translator to find an equivalent in the target language legal system for the term of the source language legal system" (p. 424).

As suggested by Šarčević (1997), once the degree of equivalence between legal concepts is established, problems of terminological congruency arise and are solved by applying translation procedures adequate to the skopos (pp. 229-269).

Other problems that I had to face were those related to stylistic rather than semantic aspects of reformulation, for instance, problems with established formulas, syntactic complexities, and structural features. A helpful strategy to overcome those problems was to apply comparative legal linguistics using parallel texts and sources previously identified.

4. Revision. This is the final phase of the translation project in which the verification of the overall adequacy of the target text to its skopos is essential. According to Prieto (2009) "quality control in legal translation requires a particular emphasis on accuracy

and effectiveness of legal communication when assuring the macrotextual coherence of solutions to the semantic, procedural and reformulation problems encountered" (p. 17).

Different authors such as Horguelin and Brunette (1998), Mossop (2001), among others, have talked about the importance of revision principles to assure quality translations and improve translators' competences (as cited in Parra, 2016, p. 41). Therefore, Parra (2016) proposes a translation revision methodology that includes three parts: the revision type, the revision mode and the revision procedure (p. 43).

> Taking into account the interaction between the above mentioned factors, the most appropriate revision type should be chosen for each translation project, from the following: a bilingual revision: comparing the entire target text with the source text; a monolingual revision: a reading of the entire target text and comparison with the source text only if necessary, that is, when the reviser detects quality problems in the translation; a sample revision: reading parts or samples of the target text (usually 10%) and comparing only those samples with the source text. (Parra, 2016, p. 44)

In the revision type, bilingual and monolingual revision were used. I started the bilingual revision with the comparison of the entire target text with the source text, then, the text was divided in four parts of approximately 3,500 words each for its revision that was made by an expert in the field of legal translation. After each revision, I corrected all mistakes and inconsistences showed by the expert. Subsequently, I made a monolingual revision of the whole text with the aim of analyzing consistency and accuracy of the translation.

For the revision mode, the following aspects were checked:

> 1. Revision of the content (logic, facts, specialized language);
> 2. Linguistic revision (specialized language, correct use of target language, target audience appropriateness);
> 3. Revision of the presentation (completeness, layout and typos). (Parra, 2016, p. 44)

Finally, Parra (2015) points out that "the revision procedure refers to the specific way in which the reviser sequences, orders and distributes the different activities to verify and assure translation quality during the revision process" (p. 45). This is related to the daily working practice of revisers, hence, it is personal and varies according to each translator and reviser. In the particular case of this commented translation, the reviser checked the translation before each advice and after that, I corrected the translation taking into account the reviser's comments. Then, the corrected version was sent back to the reviser and he checked again that the corrections were appropriate.

The guidelines my reviser and I established for the correction of my commented are based on general difficulties when translating from English into Spanish and also on the specific difficulties that I faced in my translation:

General recommendations

- Identify false friends and be aware of their real meaning (see pp. 64 and 65).
- Take into account that the use of gerunds in English differs from its use in Spanish (see pp. 75-76).
- As it is well known, texts translated into Spanish tend to be more extensive than English texts, therefore, it was important to analyze the extension of the segments and the paragraphs.
- Currently, emerging trends advocate a simple writing of legal texts using plain English. Riera (2015) states that "the aim of this is to encourage legal professionals to write clearly, avoiding awkward and complex language, and taking into consideration the lay reader" (p. 148). Part of this strategy includes avoiding overly long sentences that can lead to missing the referents of the sentences. Thus, it is advisable to segment this type of

sentences using anaphoric and cataphoric elements that allow the reader to have a greater clarity of the sentence and facilitate its reading. For instance, in the following sentence: "*los demandantes solicitaron ante un tribunal de primera instancia que mediante un juicio declarativo se declarara que ellos no habían incurrido en incumplimiento*", an anaphoric element was used to avoid the repetition of "*los demandantes*".

- Punctuation must be according to the target language. For example, in English the use of the Oxford comma, that is, the final comma in a list of things (Grammarly, 2020) is allowed, while in Spanish it is not possible to have a comma before "and" in a list of things, except in some specific cases (see p. 80).
- Punctuation of numbers and decimals in the target language (see pp. 80-81).
- Compare the format of the source text with the target text and make sure that both have the same format (boldface, italics, font size, margins, style, distribution of paragraphs, etc.).
- Spell check in Word to identify mistakes and typos, nevertheless, there are terms or Spanish accents that the spell check does not identify, such as the diacritical marks (for example, *si* and sí, *que* and *qué*, etc.), or that are self-corrected to be according to a specific Spanish variation.
- Check that abbreviations are correctly written and respecting punctuation, for example, *p. ej*. *n.*°, ordinal numbers such as *1.*°, *2.*°.

Specific difficulties

- I had trouble when translating sentences in the past because in multiple cases I was not sure if I should use the preterit or the imperfect tense (see p. 77).

- The excessive use of passive voice sentences was challenging because in Spanish the active voice is preferred. Therefore, I limited the use of passive voice to strictly necessary cases in Spanish, that is, when the purpose was to emphasize the object over the subject. Hence, I adopted the following solutions to avoid the use of passive voice in the target text: change passive voice sentences into active voice sentences, change the passive voice using passive "*se*", and reformulate passive voice sentences expressing ideas in a different way (see pp. 77-78).

- Use of capital letters in Spanish, which differs quite a lot in English. For example, in Spanish job titles, days, months, nationalities, among others, are not capitalized, with only a few exceptions (see pp. 74-75).

- Double-spacing because when changing from one segment to the other in the CAT tool I did not realize that I was making this mistake. Then I corrected this using Word spell check.

An important step of the revision stage was the self-revision, which is an ability that I have developed in the translation of the source text, learning to identify my mistakes and finding the best way to solve them. Besides, most of the corrections were done taking into account Muñoz's book (2017): *Libro de estilo de la justicia*, which was conceived with the purpose of contributing to the correct use of Spanish in all areas where the law is created and applied.

Analysis of the translation

Summary of the source text

A general description of the source text is provided below to contextualize the reader of this work with the legal situation involved and offer a wider perspective of the problems faced when translating.

The text is a case that is related to contract law, specifically to commercial leases. The plaintiffs 159 MP Corp. and 240 Bedford Ave Realty Holding Corp. executed two commercial leases with Redbridge Bedford LLC, the defendant. In those leases, several additions and deletions were initialed and executed by the parties. In one of the clauses, the tenant waived its right to bring a declaratory judgment action because the parties agreed that their disputes were adjudicated via summary proceedings. However, in March 2014, the defendant sent notices to the plaintiffs alleging various defaults and giving a limit of 15 days to cure the defaults and avoid termination of the contracts. Before that cure period expired, the plaintiffs commenced an action in Supreme Court seeking a declaratory judgment that they were not in default. Besides, the plaintiffs also sought a Yellowstone injunction to avoid termination of the contract or a summary proceeding. The defendant answered and cross-moved for summary judgment, arguing that the action and the Yellowstone injunction were barred by the waiver clause in the leases. In response, plaintiffs alleged that the waiver clause was a mutual mistake.

The Supreme Court denied the plaintiffs' motion for a Yellowstone injunction, granted the defendant's cross-motion for summary judgment and dismissed the action on the basis that the parties effectively waived the right to bring a declaratory judgment action

and this is not against public policy. As the plaintiffs did not agree with the decision, they decided to appellate, but the Appellate Division confirmed the decision for the same reasons as the Supreme Court and also argued that despite the waiver clause, the plaintiffs still had other available legal remedies. Nevertheless, in the Appellate Division, there was a justice dissenting, concluding that the waiver clause was void, against public policy and, thus, unenforceable.

Difficulties encountered in the source text

As stated by Cao (2007) the main difficulties when translating legal texts are related to different legal systems of the source and target texts, linguistic and cultural differences. I will explain one by one in a detailed manner.

Legal systems difficulties

The legal systems involved in this translation process are common and civil law. Hence, there are some legal concepts from common law that are difficult to translate because they do not exist in civil law or because they have a different meaning, equivalent or the scope is not the same as in Colombia. For illustrating this I will show some examples and the solutions that I adopted.

1. **LLC.** This is an abbreviation that means Limited Liability Company. Although in Colombia there is a similar legal entity to call some type of companies, I have decided not to translate it because in terms of responsibility and number of shareholders the concept of the English term does not correspond fully to the concept provided by the candidate term in Spanish.

2. Predecessor-in-interest. This concept has been defined as "person or entity who previously held the rights or interests that are now held by another. In a trial the term refers to anyone who had a similar motive and opportunity to develop the testimony, at the time it was given, as the opponent would have at the current trial" (USLegal, 2019). In Colombian legal Spanish an equivalent for this term was not found. As a consequence, I decided to translate it as "*antecesor en derecho*."

3. Supreme Court. For translating this term it is mandatory that the translator not only undertakes an in-depth research, but also possesses a good knowledge of the American legal system because in this case, literal translation does not offer an accurate solution. Here the problem is not a lack of equivalent but that literal translation would render an incorrect equivalent. I have found that only for the state of New York, Supreme Court must be translated as "*tribunal de primera instancia*" and not as "*corte suprema*" because the meaning is completely opposite. In Spanish, the adjective "supreme" is commonly used for designing the highest courts, hence in Colombia, a supreme court is the highest judicial body in civil and penal matters and issues of criminal and civil procedure, while for the state of New York it is simply a trial court of unlimited original jurisdictions. As a consequence, in Colombia it results impossible to appellate a decision made by the Supreme Court; in New York, by contrast, since the Supreme Court is a trial court, it is possible to appellate if so desired by the affected party of a decision.

4. Yellowstone injunction. This is an available injunction for the tenants in the State of New York and it is defined as follows:

> It is a New York Supreme Court proceeding initiated by the tenant when the landlord seeks to terminate the lease because of a claimed default by the tenant. A Yellowstone injunction asks the court to maintain the status quo. Hence, the landlord is prevented from terminating the lease and the tenant is given the right to

cure the alleged default without the notice to cure expiring (USLegal, 2019).

Translating this term was difficult because there is no equivalent term in the Colombian legal system; due to this I coined the term "*recurso Yellowstone*". Nevertheless, it was not necessary to include an explanation in the translation because a definition of this injunction was provided by the source text.

5. Tortious conduct. To correctly translate this term, it is important to understand the concept of tort in common law: "a legal wrong committed upon the person or property independent of contract" (The Law Dictionary, 2020). In other words, tort is the part of the law that governs civil liability that does not emanate from contracts, that is, non-contractual. A similar situation happens in the Colombian legal system in which civil liability is also divided into two categories: *responsabilidad civil contractual* and *responsabilidad civil extracontractual*. Hence, an accurate translation of this term in the civil law of the Colombian legal system is the one proposed by Alcaraz and Hughes (2007): *"acto ilícito civil extracontractual*" (p. 553).

6. Champerty. This is another that proves to be difficult to translate because it conveys a concept inherent to common law and no equivalent was found in our civil law system. I decided to leave the concept in English using borrowing as a translation technique and then I proceeded to extend the translation by explaining the term.

7. Lochner era. It was impossible to find an equivalent for this term because it makes part of the case law of the United States (Lochner v. New York, 198 US 45 (1905), as a consequence I translated it as "*jurisprudencia Lochner*" and I did not have to explain it because in the source text itself the term and its importance for this case are explained.

8. Equity - Equitable. Although it is possible to translate both terms into Spanish, I preferred to leave the term as "*derecho de equity*" because a literal translation in this case would be confusing and misleading, implying an understanding of equity in its broadest sense only as a concept of fairness. By contrast, in the source text, equity is understood as follows:

> A system of law, developed by the Court of Chancery in parallel with the common law, designed to complement it, providing remedies for situations that were unavailable at law, thereby adding a dimension of flexibility and justice that was sometimes lacking because of the common law's rigidity. (Farlex, 2003-2019).

> The term "equity" refers to a particular set of remedies and associated procedures involved with civil law. These equitable doctrines and procedures are distinguished from "legal" ones. While legal remedies typically involve monetary damages, equitable relief typically refers to injunctions, specific performance, or vacatur. A court will typically award equitable remedies when a legal remedy is insufficient or inadequate. For example, courts will typically award equitable relief for a claim which involves a particular or unique piece of real estate, or if the plaintiff requests specific performance. (Cornell University).

As a consequence, equity is a legal entity that is exclusively from common law and does not exist in civil law, therefore I used borrowing, one of the translation techniques proposed by Hurtado (2001), to maintain the original term. Regarding remedies, unlike common law, in Colombia there are only legal remedies that have to be asked in Court; in case a remedy is rejected by any Court there are no possibilities to resort to a court of equity.

9. Certified question. This is a term for which literal translation cannot be applied, instead, I had to look for the legal definition and tried to think about a quasi-equivalent term in the Colombian legal system. Down below the definition of this term:

> A certified question is when one court formally asks another court for advice about an issue. Certified questions are an important means of communication between different courts. They help each court to operate with the highest level of judicial understanding, and they prevent courts from having to proceed when there is uncertainty about laws or other information. This helps to keep the courts and the

> legal system operating at a higher level of efficiency and integrity. As a result, people who are on trial get a better court system to work with. (Justipedia, 2019)

Since I could not find the same equivalent, I decided to translate certified question as "*concepto*" which is usually a legal recommendation. It is nonetheless important to clarify that in Colombia it is common that people or some entities ask for a legal concept to have an orientation criterion regarding a topic or to receive a response to a question raised, but those concepts generally do not have a legal effect, except in specific cases of some public entities. As a consequence, if a court asks another one for a concept, the requesting court is not forced to apply the recommendation given.

10. Declaratory judgment. For this term, I have used a literal translation "*sentencia declarativa*" because in the Colombian legal system there are declaratory judgments, nevertheless, the scope of declaratory judgments in the United States is more restrictive than in Colombia. Down below a definition of the term:

> A declaratory judgment is a statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his or her legal rights. A binding adjudication of the rights and status of litigants even though no consequential relief is awarded. Individuals may seek a declaratory judgment after a legal controversy has arisen but before any damages have occurred or any laws have been violated. A declaratory judgment differs from other judicial rulings in that it does not require that any action be taken. Instead, the judge, after analyzing the controversy, simply issues an opinion declaring the rights of each of the parties involved. A declaratory judgment may only be granted in justiciable controversies—that is, in actual, rather than hypothetical, controversies that fall within a court's jurisdiction. (Farlex, 2019)

As a consequence, in the United States it is not possible to ask for damages in a declaratory judgment, while in Colombia it is possible and very common, people usually do not suit if they do not have the opportunity to ask for damages.

Linguistic difficulties

In this section, I will take into account the main features of legal English proposed by Veretina-Chiriac (2012): lexical and syntactic features to explain the difficulties I faced when translating the source text. Furthermore, I will add and explain additional difficulties that I have found in the translation process.

Lexical difficulties. I faced the following challenges related to lexical features:

1. Technical terms of contract law. Legal language is commonly difficult to understand due to the use of a variety of technical words and phrases which are unfamiliar to the layman. In this sense, translating from English into Spanish is even more difficult because the translator needs to understand technical terms and their implications in both languages. Besides, in cases where it is not possible to find an equivalent for a term, the translator needs to be carefully creative but accurate to look for an adequate term or explanation that conveys the same concept as the source term. Some technical terms that are inherent to the contract law will be presented down below with their corresponding translation and some of them will include an explanation:

- Hobson's choice: *decisión irrevocable*.
- Statute of limitations: *regimen de prescripciones*.
- Tortious conduct: *acto ilícito civil extracontractual*.
- Accrual of claims: *día en que surge el evento que ocasiona una responsabilidad*.
- Boilerplate: *cláusula estándar*.
- Waiver clause: *cláusula de renuncia*.
- Commercial lease: *contrato de arrendamiento comercial*.

- Termination: *resolución de contrato*.
- Cure period: *periodo de reparación*.
- Efficient Breach: *incumplimiento por motivos de rentabilidad*.
- Damages: *indemnización por daños y perjuicios*.
- Detrimental reliance: *perjuicios por gastos asumidos en fase precontractual*.
- Resolution: *resolución de un contrato*.
- Justice dissenting: *magistrado con salvamento de voto*.
- Doctrine of unconscionability: *doctrina de la lesión enorme*.
- Contract away: *renunciar a un derecho mediante un contrato*.

2. Foreign words and expressions. As it is widely known, legal texts usually include foreign words such as Latinisms, Gallicisms, Arabisms, etc., and this source text was not an exception. In this case, text words in French, Italian and Latin were found.

- *Latinisms. "*English law uses so many Latin terms because it grew out of the legal development of the Middle Ages, when Latin, which was bolstered by the power and prestige of the Roman Catholic Church, was the lingua franca throughout Europe for written texts" (Translexitalian, 2016). Similarly, Spanish as the other Romance languages comes from Latin and its law is based on Roman law.

Some of the Latin words found in the source text were the following: *de facto*, *status quo*, *sui generis*, and *per se*. I decided to leave the first three terms as pure borrowings, that is, not to translate them considering that they are highly understood by students from a Faculty of Law. Although per se is another Latin word easy to understand, I decided to translate it because of the emphasis placed on the phrase that is even underlined.

The source text also included another group of Latin words such as *condemnatio*, *prae-judicium*, and *pronunciato* that made part of the Roman Law of Procedure. In those cases as in most of the Latin terms, I decided to use the translation technique called pure borrowing in which no translation is done. This decision was made because after each term was mentioned a definition was given. By doing so, I maintained the importance and influence of the Roman law for nowadays decisions.

- *Gallicisms.* Considering that French was spoken for about 400 hundred years in the courts of England, it is very common to see French expressions in legal English. To this respect, Singh, cited by Roth (2010) states the following:

> In 1042, the accession to the English throne of Edward the Confessor, who had spent time in exile in Normandy, brought French into early contact with English. However, it was the Norman Conquest of 1066 that saw the arrival of a new Anglo-Norman ruling class in England, and with it an Anglo-French (A-F) language. The new arrivals 'inevitably transferred their everyday tongue to their official offices' with the result that Anglo-French 'became established alongside the traditional Latin as the language of public state business and the court. (p. 255)

The source text only included a term in this category: raison d'être, which I decided to translate because it is not very common that in a faculty of law of Colombia students understand French. In this way, I favored more understanding of the term than its origin in French.

3. Repetition of words. A variety of sentences and paragraphs with repetition of words was determined. Normally this is done intending to avoid ambiguities; however, in the case of words that do not refer to the legal technical language I preferred to use a variety of synonyms to avoid unnecessary repetition of words. For example:

- Because the future is hard to predict, *because* even the best efforts at precision in language may wind up imprecise, *because* contracting parties sometimes deliberately avoid negotiating… This was translated as follows: *"Debido a que el futuro es difícil de predecir,*

ya que incluso los mejores esfuerzos de precisión en el lenguaje pueden resultar imprecisos, porque las partes contratantes…"

Not only in the source text, but also in the target text some repetition of words can be seen, especially before proofreading of the text; however, the recommendation is to avoid that repetition of words by using synonyms or changing the structure of some sentences. For example:

- *En Nueva York, los acuerdos negociados en igualdad de condiciones por partes expertas y asesoradas se hacen cumplir generalmente de acuerdo con su lenguaje sencillo, esto de conformidad con nuestra sólida política pública que favorece la libertad de contractual. En este caso, los arrendatarios comerciales que de manera inequívoca acordaron renunciar al derecho de iniciar una acción de juicio declarativo con arreglo a los términos de sus contratos…* After the proofreading, the repetition of "*de conformidad con*" was changed by "*con arreglo a*".

4. False friends. One of the challenges that a translator has to face is related to the number of false friends that can be encountered in a text. "False friends are often associated with historically or culturally related languages such as English and Spanish. Hence, false friends are constantly created either as loan words or as words which share common derivation (Chesñevar, 1998, p. 47). In legal translation, the treatment given to false friends must be quite accurate because they can indicate an idea completely opposite to the one that is believed or implies legal effects. In my experience, I have realized that the more I translate and know about legal texts the more false friends I recognize and I translate accurately. Of some of the false friends found in the source text I already knew the correct translation because of my previous background, and there were other false friends for which I looked for the correct definition in monolingual dictionaries and specialized texts. The following is a list of the false friends found in the source text with their corresponding definitions:

- Act: *ley*
- Adjudicate: *resolver, emitir una decisión*
- Affect: *alterar*
- Cabin: *restringir, limitar*
- Consideration: *contraprestación*
- Construction: *interpretación*
- Court: *tribunal*
- Cure: *reparación*
- Execute: *firmar*
- Industry: *sector comercial*
- Initial: *firmar con las iniciales*
- Jurisprudence: *doctrina o filosofía del derecho*
- Justice: *magistrado*
- Opinion: *sentencia*
- Material: *sustancial*
- Provision: *disposición*
- Remedy: *recurso*
- Sophisticated: *experto*
- Statute: *ley*
- Vitiate: *declarar nulo*

5. Translation of laws. For translating laws, it was necessary to research if each of the laws already had an official translation, otherwise, I translated the name of the laws into Spanish but in brackets, I kept the original names in English. The names of the laws are precise, thus it is a good idea to keep the original names in case a reader wants to look for the law in the source text or language, and also the Spanish translation is important for the reader to understand the meaning of the laws' names. The laws mentioned in the source text were the following:

- Rent Stabilization Code: *Código de Estabilización de Rentas*
- Lien Law: *Ley de Gravámenes*
- General Obligations Law: *Ley General de Obligaciones*
- Civil Practice Act: *Ley de Procedimento Civil*
- Civil Practice Law and Rules: *Ley y Normas de Procedimiento Civil*
- Declaratory Judgment Act: *Ley de Juicio Declarativo*
- Real Property Actions and Proceedings Law: *Ley de Acciones y Procedimientos de Bienes Inmuebles*

6. Translation of books and essays. Books and essays are treated differently. For books, it is mandatory to find out if the book already has a translation; in that case, an established translation must be used. For essays, it is recommended to leave them in English but with a corresponding translation in Spanish, by doing so the comprehension of the essay's name is facilitated for the reader, who in turn, has the possibility to look for it in the source language. I made that translation decision because this is a communicative translation, which in accordance with Newmark (1988) is the one in which "the translators

attempt to produce on its readers an effect as close as possible to that obtained on the readers of the original" (p. 39). The following are a few examples:

- Adam Smith, Wealth of Nations: since this is a book and has an official translation, I used the established translation: "*La riqueza de las naciones*".
- Karl N. Llewellyn, "What Price Contract? – An essay in Perspective": since this is an essay I left it in English with the corresponding translation in brackets ["*¿A qué precio contratar? - Un ensayo en perspectiva*"].

Syntactic difficulties. They concern the problem of how roles such as subject and object are allocated in sentences and how different meanings are bound together. I faced the following challenges related to syntactic features:

1. Sentence length. In legal texts, it is very common to notice that the paragraphs contain a large number of propositions, explanations, and subparagraphs that often make the sentences long and difficult to understand. "Those long sentences are known as subordinate clauses. They are linked to the element they depend on (verb, noun, adjective or adverb) through a conjunction or a relative" (Muñoz, 2017, p. 77). The possibility of subordinating some sentences to others is a strategy of economy and linguistic flexibility, however, those sentences are a double-edge word because when they are excessive, they cause syntax errors, making reading and understanding a text a difficult task.

In the source text, a variety of subordinated clauses were found. Down below two examples:

- Because the legal liability remains in limbo when the tenant must make that choice, the tenant's ability to consider an efficient breach (e.g. moving to a different space would be less expensive than paying for a compliant ventilation system, with which the landlord

would be happy because it could rent the space to other at a higher price) is eliminated, and society's benefit is lost in balance. Translated as: *Debido a que la responsabilidad legal permanece en el limbo cuando el arrendatario debe tomar esa decisión, se elimina la posibilidad de que el arrendatario considere un incumplimiento por motivos de rentabilidad (p. ej., trasladarse a un lugar diferente podría ser menos costoso que pagar por un sistema de ventilación compatible, por lo cual el propietario estaría contento porque podría rentar el lugar a otros a un precio más alto) y el beneficio de la sociedad se pierde en el balance.*

- It is further agreed that in the event injunctive relief is sought by Tenant and such relief shall be the Owner shall be entitled to recover the costs of opposing such an application, or action, including its attorney's fee actually incurred, it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings. Translated as: *Además, se acordó que en el caso de que el arrendatario solicitara una medida cautelar y fuera otorgada, el propietario tendrá derecho a recuperar las costas por oponerse a dicha solicitud o acción, lo que incluye los honorarios de abogado que él efectivamente asuma, en caso de que sea voluntad de las partes que en adelante sus disputas se resuelvan a través de procesos sumarios*.

2. Impersonal style. Legal texts are characterized by their impersonality since they are generally produced by an institutional issuer and are addressed to a recipient that is often general or not predetermined. Therefore, legal language usually uses impersonal verbal forms that avoid referring to the first person. Notwithstanding, I must clarify that as the source text is an opinion, it represents an exception to this rule of impersonal style

because although this opinion can serve as case law for other similar cases, the judges refer directly to the plaintiffs and the defendant in this particular case.

Hereafter some examples where the first person singular and the first person plural are used:

- We now affirm.
- We begin with…
- Applying our well-settled contract interpretation principles.
- We reject that argument.
- Our public policy.
- We are unpersuaded.
- We have deemed a contractual provision.
- I can enter into an agreement.
- I regret sincerely that I am unable to agree with the judgment in this case.

For translating those sentences, it was not necessary to leave the pronouns, by doing so sentences were translating more naturally into Spanish, for example: "*confirmamos, aplicamos, lamento*."

Semantic difficulties. In this category, the following difficulties were found:

1. Polysemy. This coexistence of many possible meanings for a word or phrase is a common situation that posed serious difficulties when translating some terms of the source text. The most appropriate way to solve this difficulty was by using the monolingual dictionaries, which allowed me to properly understand the different possible meanings of some terms, especially of those that are the most repeated in legal texts and carefully analyze the context in which each term is used. Some examples will be explained below:

- Law: *derecho, ley*. In the sentence: "in which the faith of contracts is not supported by law" I preferred to use the word *ley* because it is more specific than the word *derecho* which is much more broader and general: "*en el cual la ley no respalde la voluntad de los*

contratos." In the source text, I could not find an example in which law could be translated as *derecho*.

- Justice: *magistrado, justicia*. With a term like this, the translator needs to be really careful to avoid a misunderstanding. For example, in a sentence like this: "Today's decision, like Lochner, rests on "juristic thought of an individualist conception of justice", the word justice clearly refers to the concept of fairness and not the person who decides cases in a court of law. Besides, the translator needs to be aware that in Colombia *magistrado* is a judge of the higher courts, while in the United States magistrate is a judge of the trial courts, which means that depending on the type of court the term must be translated as *juez* or *magistrado*.

- Court: *tribunal*, *corte*. This is a complex term since in English the only possible term to refer to the administrators of justice is court, while in Spanish we have the terms *juzgado*, *tribunal*, and *corte*. As a consequence, it is required for the translator to be aware of those differences because the translation into Spanish depends on the hierarchy of the jurisdiction. Besides, in a country such as the United States in which each of the states has a different judicial organization, it was mandatory to compare the judicial system of the state of New York with the judicial system of Colombia. For example, in a sentence like this: "plaintiffs commenced this action by way of order to show cause in Supreme Court seeking…" I found out that in the state of New York, the Supreme Court is a trial court and not one of the highest courts; as a result, I rendered as "*tribunal de primera instancia*".

- Opinion: *opinión, sentencia*. In the process of translation, I realized that opinion

(defined above in the theoretical framework) is not exactly the point of view of some judges regarding a case, instead, it is an explanation of the court's judgment; therefore, it can be translated as *sentencia*.

- Fraud: *fraude, dolo*. Depending on the context this term can be translated as *fraude* or *dolo*. As the source text is related to contract law the preferred equivalent term is *fraude* because *dolo* is more related to criminal law.

- Equitable: *equitativo, conforme al derecho de equity*. In this sentence: "declaratory relief is sui generis and is as much legal as *equitable*" the intention is to indicate that a declaratory relief is in accordance with the equity; while in this sentence: "Decisions like these are not based on a search for the equitable outcome of a particular case…" they do not refer to the equity law, for that reason it has been translated as follows: "*Decisiones como estas no se basan en la búsqueda de un resultado equitativo en un caso particular…"*

2. Comprehension difficulties. Several comprehension difficulties were found in the source text because the language of the judges is not easy to understand due to the vocabulary they use, the complexity of the sentences, the metaphors, the reference to other texts, etc. Therefore, reading parallel texts and understanding several concepts of common law and the context in which the source text was written helped me to overcome those difficulties. To this respect, Nord (2005), states that "the more the translator knows about the situation in which the source text is, or was, used, the better the comprehensibility of the text" (p. 168).

In respect of legal texts, comprehension difficulties are often raised in literature. Šarčević (2012) states that "language of legal texts are complex, thus requiring translators to possess language proficiency and also considerable specialist knowledge of the source and target legal systems" (p. 3). Similarly, Cao (2007) affirms that "the nature of law and legal language contributes to the complexity and difficulty in legal translation" (p. 23). Hence, I had to understand the complexity of the legal language used in the opinion to overcome translation difficulties. Some examples of comprehension difficulties that I had to face will be shown hereinafter (the underlined words or sentences were the most complicated to understand):

- In New York, agreements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language pursuant to our strong public policy favoring freedom of contract. Translated as: *En Nueva York, generalmente los acuerdos negociados en igualdad de condiciones por partes expertas y asesoradas se hacen cumplir de acuerdo con su lenguaje sencillo, esto de conformidad con nuestra sólida política pública que favorece la libertad contractual*.

- While the lengthy and detailed leases contained a standard form, its terms were not accepted as boilerplate but rather contained numerous handwritten additions and deletions, initialed by the parties. Translated as: *Si bien los extensos y detallados contratos de arrendamientos comerciales estaban redactados en un formato estándar, sus términos y condiciones no fueron aceptados como cláusulas estándares, sino que contenían numerosas adiciones y supresiones escritas a mano, firmadas por las partes con sus iniciales.*

- Before the cure period expired, plaintiffs commenced this action by way of order to

show cause in Supreme Court seeking, as relevant here, a declaratory judgment that they were not in default. Translated as: *Antes de que terminara el periodo para subsanar el incumplimiento, los demandantes solicitaron ante un tribunal de primera instancia que mediante un juicio declarativo se declarara que ellos no habían incurrido en incumplimiento.*

- "[n]o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved"]). Translated as: "[*no será posible establecer un derecho de dominio sobre una propiedad, si es que lo hubiera, con el fin de que se ejerza dentro un periodo superior a veintiún años contabilizado desde el momento en que asistieron todas las personas con vida a la creación el derecho y cualquier periodo de gestación involucrado*"]).

- Nor was this declaratory judgment waiver rendered unenforceable because, under the circumstances presented here, it resulted in an inability to obtain Yellowstone relief. Translated as: *la renuncia a un juicio declarativo no perdió validez porque de acuerdo con las circunstancias que se presentaron aquí, tuvo como consecuencia la imposibilidad de obtener el recurso Yellowstone.*

- Whether the state chooses to enforce certain types of agreements turns on whether enforcement would generally advance society's interests. Translated as: *la cuestión de si el estado opta por exigir el cumplimiento de ciertos tipos de contratos gira en torno a si la exigibilidad en general promovería los intereses de la sociedad*.

3. Translation of fixed expressions. In the source text there were fixed expressions of which I could not elucidate their sense effortlessly. To correctly understand those expressions I implemented the following strategies: first, I researched the meaning of those expressions in the source language, trying to find examples that facilitate their understanding; second, I examined if in Spanish there were fixed expressions that were the same or similar to those in the source text; third, I researched in glossaries of fixed expressions; finally, I read the expressions and the source text several times until I could find the most accurate meaning in the legal context. The following are some examples:

- The plaintiffs, having been boxed into a corner: translated as *los demandantes, después de haber estado en un callejón sin salida*…
- "The Extent to Which 'Yellowstone Injunctions' Apply in Favor of Residential Tenants Who Will See Red, Who Can Earn Green, and Who May Feel Blue." Translated as: *El alcance al cual se aplican los 'recursos Yellowstone' a favor de los arrendatarios comerciales: quienes no estarán de acuerdo, quienes podrán recibir compensación económica, y quienes podrán sentirse decepcionados.* In an example like this, the author tried to keep a play on words mentioning different colors to express some ideas, however, it was impossible to keep that play on words using literal translation because they would not make sense in Spanish, instead, I favored the comprehension of the text by elucidating the hidden message of each of the sentences.
- Agreements negotiated at arm's length: translated as *acuerdos negociados en igualdad de condiciones*.

Spanish grammar difficulties.

1. Use of capital letters. This is something that is usually challenging when translating from English into Spanish because English is generally more permissive with the use of capital letters, as a consequence sometimes the translator may be influenced by this excessive use of capital letters. During the translation, difficulties arose when I had to translate the names of courts, laws and reference books because I was not sure if all elements had to be with capital letters. In order to clarify those doubts, I followed Muñoz (2017):

- State of New York Court of Appeals: translated as *Tribunal de Apelaciones del* estado de Nueva York. The author states that nouns such as court and hearing are written in lower case except when they belong to a specific body or its headquarters.
- General Obligations Law: translated as *Ley General de Obligaciones*. In cases like this, it is essential to identify if the author is referring to the full name of the law, if that is the case, all elements must be capitalized.
- Adam Smith, Wealth of Nations: translated as *Adam Smith, La riqueza de las naciones*. To this respect, Muñoz (2017) states that the first word of a book, movie, musical, etc. must be capitalized.

2. Gender agreement. This issue sometimes implies difficulties when translating into Spanish because in English, in general, there is no distinction between masculine and feminine nouns and adjectives do not take the plural ending. For example:

- Redbridge Bedford, LLC, Respondent. Since LLC means limited liability company, the word company implies that the word "respondent" must be translated as a feminine word: "*apelada"* instead of "*apelado*"

Besides, it is very common to observe that in a variety of legal texts sentences are long, making their comprehension demanding since keeping the agreement of both gender and number represents a challenge. This takes place, for instance, when the referent is often placed at a considerable distance from the adjective that modifies it. However, it is important to clarify that in the source text I could not find an example of this.

3. Use of gerunds. The use of gerunds causes difficulties when translating into Spanish because in English it is much more frequent, while the use of gerunds in Spanish only applies to very specific cases. The following are some examples in which it is possible to observe some patterns that result from the translation of gerunds from English into Spanish, some end up in prepositional phrases, others in relative constructions:

- Defendant sent notices to plaintiffs alleging various defaults and stating that plaintiffs had fifteen days to cure the violations in order to avoid termination of the leases. Translated as: *el demandado envió notificación a los demandantes en la cual alegaba varios incumplimientos e informaba que los demandantes tenían quince días para subsanar los incumplimientos y de esta manera evitar la resolución de los contratos de arrendamiento*.

- Quoting Baltimore & Ohio Ry. Co. v Voight. Translated as: *en el cual se cita a Baltimore & Ohio vs. Voight.*

- Pursuant to our strong public policy favoring freedom of contract. Translated as: *en virtud de nuestra política pública que favorece la libertad contractual.*

- The Appellate Division, with one Justice dissenting, affirmed, determining that the

declaratory judgment waiver was enforceable… Translated as: *La División de Apelaciones, con un magistrado con salvamento de voto, confirmó la decisión, al determinar que la renuncia al juicio declarativo era exigible…*

- Applying our well-settled contract interpretation principles. Translated as: *al aplicar nuestros bien establecidos principios de interpretación contractual.*

- Even before Roman times, King Salomon issued a declaratory judgment, determining the rights of the parties. Translated as: *incluso antes de la época romana, el rey Salomón emitió una sentencia declarativa en la que determinó los derechos de las partes*.

4. Use of imperfect tense. In English the imperfect tense indicates a continuous period of time while the past tense is used to show that a completed action took place at a specific time in the past. Some sentences in which I used the imperfect tense are shown below:

- The Appellate Division, with one Justice dissenting, affirmed, determining that the declaratory judgment waiver was enforceable and barred plaintiffs' claim. Translated as: *la División de Apelaciones, con un magistrado con salvamento de voto, confirmó la decisión, al determinar que la renuncia al juicio declarativo era exigible y desestimó la reclamación de los demandantes.*

- In the Roman law of procedure, as in our own, actions at law resulted in an executory judgment, called a *condemnatio*, which decreed that something must be done, including that damages might have to be paid. Translated as: *en el derecho procesal romano, así como en el nuestro, las acciones legales daban como resultado un juicio*

ejecutivo, denominado un condemnatio, el cual decretaba que se debe hacer algo, incluso que se deben pagar las indemnizaciones por daños y perjuicios.

5. Use of passive voice. Passive voice is used frequently in legal English. According to different authors such as Borja (2000), and Alcaraz and Hughes (2014), among others, English is widely known for using more the passive voice than Spanish. Hence, in the source text I found a great variety of passive voice sentences that made the process of translation more difficult because they often created ambiguity. By contrast, in Spanish the active voice is preferred. Consequently, a solution that I adopted was using transposition as a translation technique considering that "in Spanish greater naturalism can often be achieved by transposition from one mode to the other" (Alcaraz & Hughes, 2014). Some of the passive voice sentences found were the following:

- […] indeed, the request was rendered academic by the dismissal of the complaint.

Translated as: *de hecho, el rechazo de la demanda hizo que la solicitud pasara a ser una discusión más teórica.*

- […] because the declaratory judgment waiver is enforceable, the action was properly dismissed. Translated as: *debido a que se puede exigir el cumplimiento de la renuncia a un juicio declarativo, la acción se desestimó de manera adecuada.*

- […] in New York, agreements at arm's length by sophisticated, counseled parties.

Translated as: *en Nueva York, los contratos celebrados por partes en igualdad de condiciones*.

6. Punctuation. This is an issue that is related to translation in general and not particularly with legal translation. Nevertheless, it is mandatory to consider how punctuation might affect the translation process. The misuse of punctuation marks implies

an effect in translation because even if there are similarities in punctuation of English and Spanish, there are also differences of which the translator must be aware.

a) Ellipses: "An ellipsis is a set of three periods (. . .) indicating an omission. Each period should have a single space on either side, except when adjacent to a quotation mark, in which case there should be no space" (ThePunctuationGuide, 2020). In the source text, ellipses were found in multiple paragraphs, sometimes at the beginning, in the middle or at the end of the sentences. One of the uses of ellipses in Spanish is to indicate the deletion of a word or fragment in a textual quotation. In those cases, ellipses must be in brackets or parentheses (Diccionario panhispánico de dudas [DPD], 2005). For instance:

- Tenant waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease . . . Translated as: *El arrendatario renuncia a su derecho de iniciar una acción de juicio declarativo con respecto a cualquier disposición de este Contrato de arrendamiento […]*

- Thus, "[f]reedom of contract prevails in an arm's length transaction between sophisticated parties . . . Translated as: *Por lo tanto, la "[…] libertad contractual prevalece en una transacción que se realiza en igualdad de condiciones entre partes expertas [...]*

b) Em-dash: this is a punctuation mark whose use does not always agree with Spanish. In the source text I have found an example using em-dash and to correctly use punctuation in Spanish I preferred to change the em-dash by a semicolon. "Depending on the context, the em-dash can take the place of commas, parentheses, or colons—in each case to slightly different effect" (ThePunctuationGuide, 2020). In the following example, the em-dash took

the place of a comma, taking into account that one of its uses is to separate elements or sentences within the same statement (DPD, 2005).

- "…engender uncertainties in the free market system in connection with untold numbers of sophisticated business transactions—a not insignificant potentiality in the State that harbors the financial capital of the world". Translated as follows: *"[…] suscitar incertidumbres en el sistema de libre mercado en relación con un incontable número de elaboradas transacciones comerciales, lo cual es una significante posibilidad en el estado que alberga el capital financiero del mundo."*

c) Punctuation with quotation marks: in English, "commas and periods that are part of the overall sentence go inside the quotation marks, even though they are not part of the original quotation" (ThePunctuationGuide, 2020), while in Spanish the opposite applies (Fundéu BBVA, 2011). For example:

- ["The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations."]) Translated as: *["El propósito general del juicio declarativo es cumplir con algún fin practico para calmar o estabilizar una relación de derecho incierta o controvertida, ya sea en cuanto a las obligaciones actuales o futuras".]).*

d) Use of comma before "and". In English, the comma has several uses that are similar to the uses of the comma in Spanish, however, it is important to point out that in English the use of the comma before "and" is correct and it is called serial comma or Oxford comma and it is recommended when listing three or more items (Grammarly, 2020). By contrast, in Spanish the use of this comma is generally incorrect, except in some

cases in which the elements of a list are separated by a semicolon or when two sentences joined by the conjunction "y" have different subjects (Fundéu BBVA, 2008). For instance:

- Supreme Court denied plaintiffs' motion for a Yellowstone injunction, granted defendant's cross motion for summary judgment, and dismissed the action in its entirety. Translated as: *El tribunal de primera instancia denegó a los demandantes la solicitud de recurso Yellowstone, concedió a los demandados la solicitud de juicio sumario y desestimó la acción en su totalidad*.

- […] plaintiffs retained the right to receive notices under the leases, to seek damages for breach of contract and tort, and to defend themselves in summary proceedings. Translated as: *los demandantes conservaban el derecho a recibir notificaciones en virtud de los contratos de arrendamiento, a solicitar indemnización por daños y perjuicios causados por incumplimiento contractual y por responsabilidad civil extracontractual y, además, a defenderse en procesos sumarios*.

e) Numbers and decimals: "English-speaking countries tend to use a decimal point and separate thousands with commas" (Whiteley, 2014), while in Latin American countries, both the period and the comma are valid and accepted for separating numbers and decimals. However, the custom in translation practices demonstrates that in Colombia as "in most Latin American countries the use of period is preferred for numbers and comma for decimals, except in Mexico that prefers to follow the English-speaking countries pattern" (Fundéu BBVA, 2017). As a consequence, taking into account the skopos of my translation project, I translated the numbers and decimals as follows:

- Together, the twenty-year leases permit plaintiffs to occupy 13,000 square feet of

property in Brooklyn to operate a Foodtown supermarket. Rents started at $341,628 per year and were to increase over the lifetime of the leases to $564,659.02, which included a ten-year option at escalating rents. Translated as: *Juntos, los contratos de arrendamiento de veinte años permiten a los demandantes ocupar 1.207,7 metros cuadrados de propiedad en Brooklyn para gestionar un supermercado Foodtown. Los cánones de arrendamiento iniciaron en 341.628 USD por año y fueron incrementando durante la vida útil de los contratos de arrendamiento hasta 564.659,02 USD, los cuales incluían una opción de diez años en contratos de arrendamiento con un incremento gradual*.

In a nutshell, after having analyzed my commented translation and identified all difficulties that arise in the translation of a legal text, I can conclude that the most challenging difficulties arise when translation involves two different legal systems. In this case, the common law system prevailing in the United States and the civil law that rules Colombia. In view of this, I will suggest some strategies that might be useful for future translators of legal texts when they have to face translations that involve different legal systems:

Analyzing the context is essential for understanding some concepts that are difficult to translate because sometimes the context itself explains what the concept is or means. For example, the term *Yellowstone injunction* is a remedy that does not exist in the Colombian legal system, however, the first time the source text mentioned this term, it provided its explanation.

Sometimes, there are terms that are not explained by the context of the source text and that do not have any equivalent in the Colombian legal system. For instance, the source text does not provide any explanation for the term *Champerty*. In cases like this, my

suggestion is to understand what the concept means and implies in the source language and legal system, in this case common law, and if possible try to find an equivalent. This can be done by using monolingual legal dictionaries or glossaries or by talking to an expert in law or legal translation. For the term *Champerty*, I used explanation and borrowing as translation techniques, in this way I made the translation more understandable for the reader.

Finally, there are other terms that are difficult to translate since they do not have any equivalent in the target language. For those terms, I recommend to use borrowing as a translation technique. That is the case of the term *Equity* for which I did not include any explanation, instead, I preferred to keep the same word in the target text as it is found in the source text because using literal translation and translating the word as *equidad* would have been a huge mistake that is not related to the real meaning and context where the term comes from.

Cultural difficulties

At this point, culture is understood as legal culture because it is related to "historically conditioned attitudes about the nature of law and about the proper structure and operation of a legal system that are at large in the society" (Merryman, 1994, as cited by Cao, 2007, p. 31). Cao (2007) also states that between language and society there is an integrated connection. Therefore, legal language is a social practice that is reflected in legal texts and that the translator cannot ignore. To this respect, Šarčević (1985) states that "each country has its own legal language representing the social reality of its specific legal order". As a result, a legal translator needs to make an exercise of comparative law to understand

the culture in which the source text is made and try to correctly transfer cultural elements into the target text.

Although there are multiple differences between the legal cultures of both legal systems, I will explain some of them that represented challenges in the translation process:

The reasoning of the judges. This varies according to each legal system. For example, Borja (2000) points out that judges in common law mainly refer to case law to base their decisions on previous cases because from their perspective, they reflect the reality of the enforcement of law, while in civil law judges base their decisions primarily on what is established by the law for each case.

The federal system of governing. This is the system of governing of the United States and it is substantially different from the republican system of Colombia. This cultural difference, which is not the only one, is relevant for the translation of the source text because in a federal system each state is independent in its way of proceeding, therefore, the states are empowered to name their courts as they please, for example, in New York, a supreme court is actually a trial court, while in Colombia there is a specific division of the judicial branch that departments or states cannot ignore, that is, the hierarchy expressed by the words "*supremo, superior, del circuito, municipal, promiscuo, etc."* is respected.

In conclusion, in accordance with Chromá (2004) "translating legal texts means transferring legal information from one language and culture into another language and culture, considering the differences in the legal systems and the purpose of translation" (p. 2). For this reason, a translator of legal texts needs to understand the culture in which the

source text has been created to adopt better translation decisions for the target text and make it more comprehensible for the target audience.

Conclusions

In carrying out this commented translation, I have realized that translation becomes less complicated and more systematic when the translator finds a methodology that provides steps to follow that guide the translation process. Hence, in my translation I have applied the methodology proposed by Prieto (2011) for translating legal texts, that is, the integrative process-oriented approach, which I found entirely useful, therefore, I recommend using it as it allows an analysis of the source text going from the general to the particular, thus facilitating the work of the translator.

By conducting this commented translation, I had the opportunity to experience not only a research in the field of legal translation, but also a translation of a considerably extensive and difficult legal text since its early stage. The steps that I considered the most relevant for carrying out this commented translation were the documentation about legal translation and contract law that I did before starting the translation and also the analysis of the source text before and after the translation.

This experience has been undoubtedly rewarding for my training as a legal translator because it has increased my knowledge in this field, and allowed me to be more aware of translation decisions that I usually made in an unconscious way. Besides, based on my experience and the argument of Cao (2007) that "all legal translators need to know law", I confirmed my conception that translating law is not a simple task, furthermore, it requires a translator with sufficient linguistic knowledge of the source and target language, as well as specific knowledge of the law depending on the type of text to be translated and the branch of law involved. Consequently, the fact that I am a lawyer greatly facilitated my translation work because if I had not had the training in law, translation would have been a

double challenge: to overcome the difficulties of translating from English into Spanish plus those difficulties inherent in legal languages coming from diverse legal systems, taking into account that this type of translation requires a high difficulty comparative analysis since not only terms are compared but also possible legal consequences. Precisely for this reason, the translator who wishes to venture into the exciting world of legal translation, even without holding a degree in law, should necessarily be committed to legal training, otherwise, it is possible that translations lack quality and accuracy.

REFERENCES

ABBYY (2020). ABBYY FineReader 15 for Windows. https://www.abbyy.com/finereader/

ALM (2020). Search Legal Terms and Definitions. https://dictionary.law.com/

Alcaraz, E. (2000). *El inglés jurídico, textos y documentos*. Ariel, S.A.

Alcaraz, E. & Hughes, B. (2002). *El español jurídico*. Ariel, S.A.

Alcaraz, E. & Hughes, B. (2007). *Diccionario de términos jurídicos: inglés-español, Spanish-English = A Dictionary of legal terms: inglés-español, spanish-english*. Ariel, S.A.

Alcaraz, E & Hughes, B. (2014). *Legal Translation Explained*. Routledge.

BerkeleyLaw (2010). The Common Law and Civil Law Traditions. https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf

Berukstiene, D. (2016). Legal Discourse Reconsidered: Genres of Legal Texts. *Comparative Legilinguistics, 28*, 89-117. http://dx.doi.org/10.14746/cl.2016.28.5.

Borja, A. (2000). *El texto jurídico inglés y su traducción al español*. Ariel, S.A.

Borja, A. (2016). *Estrategias, materiales y recursos para la traducción jurídica inglés-español, 2ª edición*. Universitat Jaume I.

Brand, O. (2007). Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies. *Brooklyn Journal of International Law*, *32*(2), 405-466. https://brooklynworks.brooklaw.edu/bjil/vol32/iss2/3

Cabré, M. T. (2010). "Terminology and Translation". In *Handbook of Translation Studies:* (vol 1, pp. 356-356). John Benjamins Publishing Company. https://benjamins.com/catalog/hts.1.ter1

Cao, D. (2007). *Translating Law*. England Multilingual Matters.

Chesñevar, C. (1998). False Friends in English-Spanish Translations in Computer Science Literature. *Perspectives Studies in Translatology, 6*(1), 47-59.

Chromá, M. (2004). Cross-Cultural Traps in Legal Translation. In *Intercultural Aspects of Specialized Communication*. Peter Lang.

Comma before and. (2020). Grammarly blog. Retrieved (January 20, 2020) from: https://www.grammarly.com/blog/comma-before-and/

What is the Oxford Comma? (2020). Grammarly blog. Retrieved (May, 10, 2020) from: https://www.grammarly.com/blog/what-is-the-oxford-comma-and-why-do-people-care-so-much-about-it/

Cornell Law School (n.d.). Wex, Legal Encyclopedia. https://www.law.cornell.edu/wex

Corte Constitucional (2004). *Sentencia C-670 de 2004.* Retrieved from: https://www.corteconstitucional.gov.co/relatoria/2004/c-670-04.htm

Corte Constitucional (2014). *Sentencia T-150 de 2007*. https://www.corteconstitucional.gov.co/relatoria/2007/T-150-07.htm

Corte Constitucional (2014). *Sentencia T-427 de 2014*. https://www.corteconstitucional.gov.co/relatoria/2014/T-427-14.htm

Court of Appeals State of New York (2019, May 7). https://www.nycourts.gov/ctapps/Decisions/2019/May19/26opn19-Decision.pdf

Cuñado, F. (2019). *Bibliografía y recursos sobre la traducción jurídica*. https://traduccionjuridica.es/bibliografia-y-recursos-sobre-traduccion-juridica/

David, R. & Brierley, J. (1985). *Major Legal Systems in the World Today – An Introduction to the Comparative Study of Law.* (2nd ed.). Free Press, Collier-Macmillan.

De Groot, G. R. (1987). Problems of Legal Translation from the Point of View of a Comparative Lawyer. *Les cahiers de droit, 28*(4), 793-812.

De Groot, G. R. (2006). Legal Translation. In *Elgar Encyclopedia of Comparative Law, Second Edition*. Edward Elgar Publishing.

Didier, E. (1991). La Common Law en français: étude juridique et linguistique de la Common Law en français au Canada. *Revue internationale de droit comparé, 1*, 7-56.

Difiore, J. & Marks, L. (2016). *New York State Courts: An Introductory Guide.* New York: NY State Courts.

Farlex (2003-2019). Declaratory Judgment. Legal Dictionary – The Free Dictionary. https://legal-dictionary.thefreedictionary.com/Declaratory+Judgment

Fundéu BBVA (2008). *Coma antes de y*. Retrieved (February 15, 2020) from: https://www.fundeu.es/consultas/palabra-clave/coma-11/

Fundéu BBVA (2011). *Las comillas y el punto final*. Retrieved (February 15, 2020) from: https://www.fundeu.es/consulta/las-comillas-y-el-punto-final-6553/

Fundéu BBVA (2017). *Puntos y comas en cifras*. Retrieved (February 15, 2020) from: https://www.fundeu.es/consulta/puntos-y-comas-en-cifras-739/

Gémar, J. C. (1995). *Traduire, ou, l'art d'interpréter : Principes*. Presses Universitaires de Québec.

Gémar, J. C. (1998). *Les enjeux de la traduction juridique*. In *Traduction de textes juridiques : problèmes et méthodes. Équivalences.* http://www.tradulex.com/Bern1998/Gemar.pdf

Gémar, J. C. (2000). *Traduire, ou, l'art d'interpréter. Tome 2*. Presses Universitaires de Québec.

Gémar, J. C. (2002). Le plus et le moins-disant culturel du texte juridique. Langue, culture et équivalence. *Meta, 47*(2), 163-176. https://doi.org/10.7202/008006ar

Harvey, M. (2002). What's so Special about Legal Translation? *Meta, 47*(2), 177-185. https://www.erudit.org/fr/revues/meta/2002-v47-n2-meta692/008007ar/

Hernando, L. (2003). *El lenguaje jurídico*. Verbum.

Hurtado, A. (2001). *Traducción y traductología: introducción a la traductología.* Cátedra.

Interactive Terminology for Europe, IATE (2004). European Union Terminology. https://iate.europa.eu/home

Justipedia (2019). Legal Terms. https://www.justipedia.com/dictionary

Leubsdorf, J. (2001). The Structure of Judicial Opinions. *Minnesota Law Review*, 86, 447-495.

Lombardi, J. (n.d.). Glossary of Legal Terminology – English to Spanish. https://www.jud.ct.gov/external/news/jobs/interpreter/Glossary_of_Legal_Terminology_English-to-Spanish.pdf

Merriam-Webster (2020). Merriam-Webster Dictionary. https://www.merriamwebster.com/

Monzó, E. (2008). Saber y buscar: documentación para la traducción jurídica (inglés-español). *Butlletí de l'Associació de Traductors i Intèrprets Jurats*. 1-17.

Muñoz, C. (2012). *Lexicología jurídica*. Oxford University Press.

Muñoz, S. (2017). *Libro de estilo de la justicia*. Real Academia Española/Espasa/Consejo General del Poder Judicial.

National Center for State Courts, NCSC (n.d.). Legal Glossaries and Dictionaries. https://www.ncsc.org/Education-and-Careers/State-Interpreter-Certification/Legal-Glossaries-and-Dictionaries.aspx

Newmark, P. (1988). *Approaches to Translation*. Prentice Hall.

Nadelman, K. & von Mehren, A. (1966). Equivalences in Treaties in the Conflicts Field. *The American Journal of Comparative Law, 15*(1/2), 195-203.

Nord, C. (1991). *Text analysis in translation: theory, methodology, and didactic application of a model for translation-oriented text analysis.* Rodopi.

Nord, C. (2005). *Text analysis in translation: theory, methodology, and didactic application of a model for translation-oriented text analysis.* (2nd ed.). Rodopi.

Oxford LibGuides (2015). United States: Legal Resources: Legal System. http://libguides.bodleian.ox.ac.uk/c.php?g=422817&p=2887103.

Parra, S. (2016). *Translation Revision: Fundamental Methodological Aspects and Effectiveness of the EN-15038:2006 for Translation Quality Assurance.* In Interchange between Languages and Cultures: The Quest for Quality. Palacký University. https://tifo.upol.cz/TIFO2014_book.pdf

Pejovic, C. (2001). Civil Law and Common Law: Two Different Paths leading to the same goal. *Poredbeno Pomorsko Pravo, 40*(155), 817-841.

Penn, J. (2011-2020). The Punctuation Guide. https://www.thepunctuationguide.com/index.html

Peñaranda, A. (2011). *El proceso penal en España, Francia, Inglaterra y Estados Unidos: descripción y terminología*. Comares, S.L.

Prieto F. (2009). Interdisciplinariedad y ubicación macrotextual en traducción jurídica. *Translation Journal*, *13*(4), 1-7. https://translationjournal.net/journal/50legal.htm

Prieto, F. (2011). Developing Legal Translation Competence: An Integrative Process-Oriented Approach. *Comparative Legilinguistics*, *5*, 7-20.

Real Academia Española. (2005). *Diccionario panhispánico de dudas.* http://lema.rae.es/dpd/?key=

Real Academia Española. (2019). *Diccionario del español jurídico*. https://dej.rae.es/

Roth, I. (2010). Explore the influence of French on English. *Innervate, 3,* 255-262.

Riera, C. (2015). Plain English in Legal Language: A Comparative Study of Two UK Acts of Parliament. *Alicante Journal of English Studies, 28,* 147-163. https://rua.ua.es/dspace/bitstream/10045/54183/1/RAEI_28_08.pdf

Rubin, A., Wald, P., Feinberg, W., Godbold, J., Dickson, J., Clifford, W., Pollak, L., Levin, L., Mishkin, P., Wermiel, S., & Schwarzer, W. (1991). *Judicial Writing Manual*. Federal Judicial Center.

Šarčević, S. (1985). Translation of Culture-Bound Terms in Laws. *Multilingua, 4*(3), 127-133.

Šarčević, S. (1997). *New Approach to Legal Translation*. Kluwer Law International.

Šarčević, S. (2000). *New Approach to Legal Translation*. (2nd ed.). Kluwer Law International.

Šarčević, S. (2003). *Legal Translation and Translation Theory: a Receiver-Oriented Approach*. In International Colloquium 'Legal Translation, Theories and Practice', University of Rijeka. https://www.tradulex.com/Actes2000/sarcevic.pdf

Šarčević, S. (2012). "Challenges to the legal translator." In *The Oxford Handbook of Language and Law*. https://www.oxfordhandbooks.com

Scuk, A. (2016). Top Three Free Cat Tools You Can Start Using Right Now. https://translatorthoughts.com/2016/08/top-three-free-cat-tools/

Smith, S.A. (1995). “Cultural Clash: Anglo-American Case Law and German Civil Law in Translation.” In *Translation and the Law*, M. Morris (ed.) John Benjamins Publishing Company.

Translex Italian (2016). Latinisms in Legal Texts. Retrieved (January 10, 2020) from: https://translexitalian.com/latinisms-in-the-legal-text/

UNESCOTERM (1999). Glossaries / Thesauri. http://www.unesco.org/unesdi/index.php/eng/thesaurus/tous.118

UNTERM (2014). United Nations Multilingual Terminology Database. https://www.un.org/depts/DGACM/unterm.shtml

USLegal (1997-2019). The USLegal Dictionary. https://uslegal.com/

Vega, A. (2018). A Brief Explanation of Colombia’s Legal System. https://www.animallaw.info/article/brief-explanation-colombia%E2%80%99s-legal-system.

Veretina-Chiriac, I. (2012). Characteristics and Features of Legal English Vocabulary. *Lingvistică şi Literatură*, *4*, 103-107.

Whiteley, S. (2014). Numbers: decimal comma or decimal point. Retrieved (January 10, 2020) from: https://www.quicksilvertranslate.com/252/numbers-decimal-comma-or-decimal-point

Wolff, L. (2011). Legal Translation. In *The Oxford Handbook of Translation Studies*. https://www.oxfordhandbooks.com

APPENDIX A. BILINGUAL GLOSSARY OF LEGAL TERMS

Table 1. *Bilingual glossary of legal terms*

N.º of Terms	Source Term	N.º of Tokens	Target Term
1	abide	1	cumplir, acatar
2	abrogate	2	revocar, anular, derogar
3	act at their peril	1	actuar bajo su responsabilidad
4	adjudicate	2	resolver, emitir una decisión
5	agreement	46	contrato, acuerdo
6	allege	1	alegar, pretender
7	answer	3	contestar
8	appeal	3	apelar
9	appellate division	7	división de apelaciones
10	appellate precedent	1	precedente de apelación
11	arbitration clause	7	cláusula de arbitraje
12	award	2	indemnización, laudo arbitral
13	bargain	18	negociación
14	bargaining power	5	poder de negociación
15	barred	6	prohibido
16	bedrock	1	fundamento, base
17	boilerplate	1	cláusula estándar
18	breach	16	incumplimiento
19	bring	7	presentar, entablar, incoar
20	by way of order	1	mediante auto/resolución
21	civil court	8	tribunal civil
22	civil practice act	2	ley de procedimiento civil
23	claim	16	pretensión, reivindicación
24	commercial lease	6	contrato de arrendamiento comercial
25	common law	21	derecho de common law
26	condemnatio	2	condena
27	consideration	3	contraprestación
28	construction	2	interpretación
29	contract	111	contrato, acuerdo
30	contract law	1	derecho contractual
31	counsel	4	abogado o defensa
32	counterclaim	1	contrademanda

33	countervailing	3	compensatorio
34	criminalize	1	penalizar
35	cross-move	1	solicitar
36	cure	16	reparación
37	damage	10	daños y perjuicios
38	de facto	1	de hecho
39	decisional law	3	jurisprudencia
40	declaratory judgment	79	juicio declarativo
41	declaratory relief	17	reparación judicial declarativa
42	default	16	incumplimiento
43	defendant	10	demandado
44	defense	8	defensa, excepción
45	derogation	4	derogación, excepción
46	detrimental reliance	1	perjuicios por gastos asumidos en fase precontractual
47	dispute	31	controversia
48	dissenting	7	salvamento de voto, voto disidente
49	doctrine of unconscionability	1	doctrina del abuso del derecho
50	duress	2	coerción
51	efficient breach	3	incumplimiento por motivos de rentabilidad
52	enact	6	promulgar
53	estate	6	bien inmueble, patrimonio
54	eviction	13	desalojo
55	execute	1	firmar
56	factual inaccuracy	1	inexactitud de hecho
57	file	3	registrar, expediente
58	foreclose	2	infringir
59	forfeiture	1	decomiso, embargo
60	fraud	3	fraude
61	free-market system	1	sistema de libre mercado
62	general obligations law	3	ley general de obligaciones
63	grant	6	conceder, otorgar
64	house reports	1	informes de la cámara
65	injunction	26	recurso
66	invalidate	5	anular
67	judicial avenue	4	vía judicial
68	justice	3	magistrado
69	law	51	derecho, ley

70	lease term	4	términos y condiciones del contrato de arrendamiento
71	legal redress	1	reparación legal
72	legislature	23	legislador
73	lessee	1	arrendatario
74	lessor	2	arrendador
75	liability	4	responsabilidad
76	litigate	2	litigar
77	motion	2	solicitud
78	nonbreaching party	2	parte cumplidora
79	nonwaivable	5	irrenunciable
80	notice	12	notificación
81	obligation	25	obligación
82	observe	2	cumplir, acatar
83	overriden	2	anulado
84	parol evidence	4	prueba oral
85	party	109	parte
86	pendency	2	pendencia, en curso
87	plaintiff	51	demandante
88	preclude	8	prohibir, impedir
89	predecessor-in-interest	1	antecesor en derecho
90	prevent	13	evitar
91	provision	37	disposición
92	public injury	1	daño a la sociedad
93	purport	4	tener la intención de
94	raise	5	presentar
95	relief	47	reparación judicial
96	relieve	1	eximir
97	relinquish	2	renunciar
98	remedy	6	recurso
99	render	5	quedar
100	renewal option	1	opción de renovación
101	rider	2	anexo
102	scope	2	alcance, ámbito
103	seek	22	solicitar
104	senate	3	senado
105	set aside	2	anular, dejar sin efecto
106	set down	1	establecer, fijar
107	statute	23	ley
108	sublease	1	contrato de subarrendamiento

109	suit	3	demanda
110	summary proceeding	18	proceso sumario
111	eviction proceeding	3	procedimiento de desalojo
112	supreme court	12	tribunal de primera instancia
113	term	20	término, cláusula
114	termination	6	resolución, rescisión
115	tort	2	responsabilidad civil extracontractual
116	uphold	6	respetar
117	vindicate	1	reconocer
118	vitiate	1	declarar la nulidad
119	waiver	50	renuncia
120	yellowstone injunction	10	recurso Yellowstone

APPENDIX B. SOURCE TEXT

State of New York Court of Appeals

OPINION

No. 26
159 MP Corp., et al.,
Appellants,
v.
Redbridge Bedford, LLC,
Respondent.

A. Joshua Ehrlich, for appellants.
Jonathan D. Lupkin, for respondent.

DiFIORE, Chief Judge:

In New York, agreements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language pursuant to our strong public policy favoring freedom of contract. In this case, commercial tenants who

unambiguously agreed to waive the right to commence a declaratory judgment action as to the terms of their leases ask us to invalidate that waiver on the rationale that the waiver is void as against public policy. We agree with the courts below that, under the circumstances of this case, the waiver clause is enforceable, requiring dismissal of the complaint.

Plaintiffs 159 MP Corp. and 240 Bedford Ave Realty Holding Corp. executed two commercial leases with the predecessor-in-interest of defendant Redbridge Bedford LLC, the current owner of the subject building. Together, the twenty-year leases permit plaintiffs to occupy 13,000 square feet of property in Brooklyn to operate a Foodtown supermarket. Rents started at $341,628 per year and were to increase over the lifetime of the leases to $564,659.02, which included a ten-year option at escalating rents. While the lengthy and detailed leases contained a standard form, its terms were not accepted as boilerplate but rather contained numerous handwritten additions and deletions, initialed by the parties. Of particular relevance to this dispute, each lease also incorporated a 36-paragraph rider, which was also replete with handwritten additions and deletions. Paragraph 67(H) of the rider provides:

> "Tenant waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease . . . [I]t is the intention of the parties hereto that their disputes be adjudicated via summary proceedings" (emphasis added).

In March 2014, defendant sent notices to plaintiffs alleging various defaults and stating that plaintiffs had fifteen days to cure the violations in order to avoid termination of the leases. Before the cure period expired, plaintiffs commenced this action by way of order to show cause in Supreme Court seeking, as relevant here, a declaratory judgment

that they were not in default. Plaintiffs also sought a Yellowstone injunction in order to prevent the owner from terminating the leases or commencing summary proceedings during the pendency of the declaratory judgment action. Defendant answered and cross-moved for summary judgment dismissing the complaint, arguing that the action and, thus, the request for Yellowstone relief were barred by the waiver clause in the leases.[1] In response, plaintiffs asserted, among other things,[2] that if interpreted in the manner urged by the owner, the waiver clause was unenforceable and that the waiver was premised on mutual mistake concerning the scope of summary proceedings.

Supreme Court denied plaintiffs' motion for a Yellowstone injunction, granted defendant's cross motion for summary judgment, and dismissed the action in its entirety. The court began by observing that, "absent some violation of law or transgression of strong public policy, the parties to a contract are basically free to make whatever agreement they wish, no matter how unwise it may appear to a third-party" (159 MP Corp. v Redbridge Bedford LLC, 2015 NY Slip Op 32817(U), at *3 [Sup Ct, Kings County 2015], citing Rowe v Great Atlantic & Pacific Tea Co., 46 NY2d 62, 67-68 [1978]). Relying on the plain language of the contract, the court concluded plaintiffs clearly waived the right to

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[1] Although defendant cited a portion of Paragraph 67(H) stating that commencement of a declaratory judgment action provided a separate basis for termination of the leases, it did not counterclaim seeking either a declaration that the leases terminated or eviction based on purported breach of this provision. Because that provision was not enforced in this case, we have no occasion to further address it.

[2] Plaintiffs also argued that the complaint pleaded a cognizable breach of contract claim that was not barred by the waiver clause. However, that argument is not presented in this Court.

bring a declaratory judgment action and, in enforcing the provision, referenced the fact that the waiver did not "prevent either side from performing the agreement or from recovering damages as a result of a breach or the parties' tortious conduct . . . [and did not] deny plaintiffs all legal redress in this instance [because i]f plaintiffs dispute that they are in breach of the leases, they may raise any defenses they may have in any . . . summary proceeding brought by defendant in Civil Court to evict them" (159 MP Corp., 2015 NY Slip Op 32817(U), at *3 [citations omitted]). The court also rejected plaintiffs' mutual mistake argument, noting that plaintiffs had neither alleged fraud nor claimed they had been unable to review the leases with counsel (id.).

The Appellate Division, with one Justice dissenting, affirmed, determining that the declaratory judgment waiver was enforceable and barred plaintiffs' claim (159 MP Corp. v Redbridge Bedford, LLC, 160 AD3d 176 [2d Dept 2018]). The court commented, in light of the strong public policy favoring freedom of contract, that parties may waive a wide range of rights, observing that the parties here are "sophisticated entities that negotiated at arm's length" and entered contracts that defined their obligations "with great apparent care and specificity" (id. at 187, 189). Like Supreme Court, the Appellate Division emphasized that the waiver clause did not leave plaintiffs without other available legal remedies, noting that plaintiffs retained the right to receive notices under the leases (and thus cure defaults), to seek damages for breach of contract and tort, and to defend themselves in summary proceedings (id. at 191). Moreover, the Appellate Division observed that plaintiffs will remain in possession of the property unless summary proceedings are commenced and, if vindicated in a summary proceeding, would remain

indefinitely until expiration of the leases (id. at 191-92). In contrast, if found to have been in default, plaintiffs would properly be evicted under the terms of the leases (id. at 192).

One Justice dissented, concluding that the waiver clause is void as against public policy and, thus, unenforceable (160 AD3d at 194 [Connolly, J., dissenting]). The dissent reasoned that declaratory relief serves the important societal function of providing certainty in contractual relationships and that the tenant's ability to litigate in summary proceedings commenced by the owner was not a sufficient substitute for the ability to commence a declaratory judgment action (id. at 203-206). The Appellate Division granted plaintiffs leave to appeal to this Court, certifying the question whether its order was properly made, and we now affirm.

We begin with the "familiar and eminently sensible proposition of law [] that, when parties set down their agreements in a clear, complete document, their writing should . . . be enforced according to its terms" (Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004] [citation omitted]). As we noted in Vermont Teddy Bear, a seminal case involving a commercial lease, this rule has "special import in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated counseled business people negotiating at arms length" (id. [internal quotation marks and citation omitted]). The lease provision at the center of this dispute could not be clearer. In it, plaintiffs "waive[d] [the] right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease." Applying our well-settled contract interpretation principles, this unambiguous waiver clause reflects the

parties' intent that plaintiffs be precluded from commencing precisely the type of suit they initiated here and, as such, this action was foreclosed by the plain language of the leases. Plaintiffs nonetheless ask us to relieve them of the consequences of their bargain, contending that the waiver clause violates a public policy strong enough to warrant a departure from the bedrock principle of freedom of contract. We reject that argument.

Freedom of contract is a "deeply rooted" public policy of this state (New England Mut. Life Ins. Co. v Caruso, 73 NY2d 74, 81 [1989]) and a right of constitutional dimension (U.S. Const. art. I, § 10[1]). In keeping with New York's status as the preeminent commercial center in the United States, if not the world, our courts have long deemed the enforcement of commercial contracts according to the terms adopted by the parties to be a pillar of the common law. Thus, "[f]reedom of contract prevails in an arm's length transaction between sophisticated parties . . . , and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain" (Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 695 [1995]).[3] We have cautioned that, when a court invalidates a contractual provision, one party is deprived of the benefit of the bargain (see id.; Rowe, 46 NY2d at 67). By disfavoring judicial upending of the balance struck at the conclusion of the parties' negotiations, our public

[3] See also Bluebird Partners v First Fid. Bank, 94 NY2d 726, 739 (2000) (declining to enforce the contract on champerty grounds may "engender uncertainties in the free market system in connection with untold numbers of sophisticated business transactions—a not insignificant potentiality in the State that harbors the financial capital of the world"); J. Zeevi & Sons, Ltd. v Grindlays Bank (Uganda) Ltd., 37 NY2d 220, 227 (1975) ("In order to maintain [New York's] pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected").

policy in favor of freedom of contract both promotes certainty and predictability and respects the autonomy of commercial parties in ordering their own business arrangements.

Of course, the public policyfavoring freedom of contract does not mandate that the language of an agreement be enforced in all circumstances. Contractual provisions entered unknowingly or under duress or coercion may not be enforced (see Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown, 46 NY2d 450, 455 [1979]; see also Austin Instrument v Loral Corp., 29 NY2d 124, 130 [1971]). The doctrine of unconscionability also protects against "unjust enforcement of onerous contractual terms which one party is able to impose [upon] the other because of a significant disparity in bargaining power" (Rowe, 46 NY2d at 68). Plaintiffs raised none of these defenses.

Here, plaintiffs assert that the declaratory judgment waiver is unenforceable because it is void as against public policy. Thus, plaintiffs' challenge is not predicated on the circumstances surrounding the making of this particular agreement, such as allegations of unequal bargaining power, coercive tactics or lack of counsel – claims pertinent to other well-established contract defenses. Rather, plaintiffs' contention is that the right to bring a declaratory judgment action is so central and critical to the public policy of this state that it cannot be waived by even the most well-counseled, knowledgeable or sophisticated commercial tenant. We are unpersuaded.

We have deemed a contractual provision to be unenforceable where the public policy in favor of freedom of contract is overridden by another weighty and countervailing

public policy (Oppenheimer & Co., 86 NY2d at 695).[4] But, because freedom of contract is itself a strong public policy interest in New York, we may void an agreement only after "balancing" the public interests favoring invalidation of a term chosen by the parties against those served by enforcement of the clause and concluding that the interests favoring invalidation are stronger (see New England Mut. Life Ins. Co., 73 NY2d at 81). Although we possess the power to set aside agreements on this basis, our "usual and most important function" is to enforce contracts rather than invalidate them "on the pretext of public policy," unless they "clearly . . . contravene public right or the public welfare" (Miller v Continental Ins. Co., 40 NY2d 675, 679 [1976], quoting Baltimore & Ohio Ry. Co. v Voight, 176 US 498, 505 [1900]).

The fact that a contract term may be contrary to a policy reflected in the Constitution, a statute or a judicial decision does not render it unenforceable; "that a public interest is present does not erect an inviolable shield to waiver" (Matter of American Broadcasting Cos., Inc. v Roberts, 61 NY2d 244, 249 [1984]). Indeed, we regularly uphold agreements waiving statutory or constitutional rights, indicating that we look for more than the impingement of a benefit provided by law before deeming a voluntary agreement void as against public policy (see e.g. id. [upholding waiver of Labor Law protections that serve the societal interest of preventing worker exhaustion]; Abramovich, 46 NY2d 450

[4] When we refer to public policy in this context, we mean "the law of the State, whether found in the Constitution, statutes or decisions of the courts" (New England Mut. Life Ins. Co., 73 NY2d at 81). It is not enough that the agreement appears unwise to outsiders (see Rowe, 46 NY2d at 68), or violates "personal notions of fairness" (Welsbach Elec. Corp. v MasTec N. Am., Inc., 7 NY3d 624, 629 [2006]) or "[courts'] subjective view of what is sound policy" (Matter of Walker, 64 NY2d 354, 359 [1985]).

[upholding waiver by tenured teacher of the protections in Education Law § 3020-a]; Antinore v State of New York, 40 NY2d 921 [1976] [upholding waiver of due process protections afforded by disciplinary hearings under Civil Service Law §§ 75 and 76]). Many rights implicate societal interests and, yet, they have been determined to be waivable.

Only a limited group of public policy interests has been identified as sufficiently fundamental to outweigh the public policy favoring freedom of contract. In some circumstances, the Legislature has identified the benefits or obligations recognized in constitutional, statutory or decisional law that are so weighty and critical to the public interest that they are nonwaivable. For example, General Obligations Law § 5-321 states that agreements exempting a lessor for liability resulting from its own negligence are "void as against public policy" (see Great N. Ins. Co. v Interior Constr. Corp., 7 NY3d 412, 418 [2006]). Likewise, Rent Stabilization Code § 2520.13 states that "[a]n agreement by the tenant to waive the benefit of any provisions of the [Rent Stabilization Law] or this code is void" (see Thornton v Baron, 5 NY3d 175, 179 [2005]). The Legislature has similarly deemed unenforceable agreements to extend the statute of limitations before accrual of a claim by express statutory proscription in General Obligations Law § 17-103 ("[a] promise to . . . extend . . . the statute of limitations has no effect" except where made after accrual of a claim) (see John J. Kassner & Co. v City of New York, 46 NY2d 544, 552 [1979]). There are other examples (see e.g. West-Fair Elec. Constr. v Aetna Cas. & Sur. Co., 87 NY2d 148, 156 [1995] [applying Lien Law § 34 classifying waivers of the right to file or enforce certain liens "void as against public policy and wholly unenforceable"]; Symphony Space v Pergola Props., 88 NY2d 466, 476 [1996] [applying New York's Rule against

Perpetuities statute EPTL 9-1.1, stating that "[n]o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved"]). Where the Legislature has not expressly precluded waiver of a right or obligation, we have deemed that to be a significant factor militating against invalidation of a contract term on public policy grounds (see e.g. Ballentine v Koch, 89 NY2d 51, 59 [1996] [there is no "general prohibition preventing the creation of benefits for retired public employees that exist separately from the applicable pension or retirement system"]; Abramovich, 46 NY2d at 455 ["the statute contains no express provision preventing a teacher from waiving its benefits"]; Matter of Feinerman v Board of Coop. Educ. Servs. of Nassau County, 48 NY2d 491, 498 [1979] [the relevant statute "does not contain a provision which prevents a prospective teacher from knowingly and voluntarily waiving the three-year probationary period embodied therein"]; see generally Slayko v Security Mut. Ins. Co., 98 NY2d 289, 295 [2002]).

We have also classified as void agreements that involve illegal activity.[5] We refused to permit a lender that charged usurious interest from recovering principal (see Szerdahelyi v Harris, 67 NY2d 42 [1986]) and refused to permit a lawyer not licensed in New York from collecting fees for work performed here (see Spivak v Sachs, 16 NY2d 163 [1965]). Similarly, in Mount Vernon Trust Co. v Bergoff (272 NY 192 [1936]), we invalidated an

[5] "Decisions like these are not based on a search for the equitable outcome of a particular case, or on a calculation of which result will most contribute, in an immediate and practical way, to the enforcement of a particular statute or public policy" (Balbuena v IDR Realty LLC, 6 NY3d 338, 364–365 [2006]). "Rather, they are based on the sound premise that courts show insufficient respect for themselves and for the law when they help a party to benefit from illegal activity" (id. at 365).

agreement on the public policy rationale that it was essentially fraudulent as to society. Addressing an agreement that a note made to a bank would be unenforceable against its maker, we explained that such "[a] fictitious note delivered to a bank, intended to become part of its apparent assets . . . is in itself a continuing falsehood calculated to deceive the public" and undermines the stability of banks, which is a matter of public concern reflected in the regulatory oversight systems for banking (id. at 196). No interest of this magnitude is implicated in this case.

Here, the declaratory judgment waiver is clear and unambiguous, was adopted by sophisticated parties negotiating at arm's length, and does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract. Although plaintiffs argue otherwise, there is simply nothing in our contemporary statutory, constitutional, or decisional law indicating that the interest in access to declaratory judgment actions or, more generally, to a full suite of litigation options without limitation, is so weighty and fundamental that it cannot be waived by sophisticated, counseled parties in a commercial lease. CPLR 3001 enables Supreme Court to grant declaratory judgments in the context of justiciable controversies but in no way indicates that sophisticated parties may not voluntarily waive the right to seek such relief. A declaratory judgment is a useful tool for providing clarity as to parties' obligations and may, in some circumstances, enable parties to perform under a contract they might otherwise have breached. Access to declaratory relief benefits the parties as well as society in quieting disputes. However, a declaratory judgment is merely one form of relief available to litigants in enforcing a contract. In codifying the right to seek declaratory relief, the Legislature neither expressly

nor impliedly made access to such a claim nonwaivable with respect to any party, much less sophisticated commercial tenants.

Our case law discussing declaratory relief explains its benefits in stabilizing uncertainty in contractual relations but likewise expresses no concrete public policy so weighty that it would justify broadly restricting commercial entities from freely waiving in negotiations the ability to seek such relief (see e.g. James v Alderton Dock Yards, 256 NY 298, 305 [1931]). To the contrary, this Court already held in Kalisch-Jarcho, Inc. v City of New York that a party can relinquish its right to commence a declaratory judgment action in favor of an alternative dispute resolution method (72 NY2d 727 [1988]). There, the Court held that a declaratory judgment action filed by a construction contractor was barred by a contract provision requiring the contractor to use an administrative procedure to resolve mid-project disputes, postponing claims for additional compensation until project completion (id.). The Court reached this conclusion despite recognizing the benefits of declaratory relief in "settling justiciable disputes as to contract rights and obligations" (id. at 731).

The availability of declaratory relief may indirectly encourage parties to freely contract at the outset, knowing that they can later obtain judicial clarification of their obligations at the moment a justiciable controversy arises. However, a party who has chosen freely to waive the right to seek such relief could not have relied on any such expectation; that party may compensate for the waiver by demanding greater clarity in the construction of other contract terms so that the parties' respective rights and obligations are fully understood before they sign the agreement. Regardless, a party may agree to such

a waiver during contract negotiations to obtain a valuable benefit, such as a rent concession or the inclusion of a cure period following a notice of default. Such considerations are for the parties to weigh in crafting a commercial agreement that meets their unique needs.

Critically, the waiver clause at issue here does not preclude access to the courts but leaves available other judicial avenues through which plaintiffs may adjudicate their rights under the leases. The waiver permits plaintiffs to raise defenses to allegations of default in summary proceedings in Civil Court, under Real Property Actions and Proceedings Law (RPAPL) article 7, and specifically states that "it is the intention of the parties that their disputes be adjudicated via summary proceedings." As this Court has observed, RPAPL article 7 "represents the Legislature's attempt to balance the rights of landlords and tenants to provide for expeditious and fair procedures for the determination of disputes involving the possession of real property" (Matter of Mennella v Lopez-Torres, 91 NY2d 474, 478 [1998] [citations omitted]). Thus, the leases reflect the parties' general intent to resolve their disputes in proceedings carefully designed for that purpose. Moreover, the waiver does not impair plaintiffs' ability to seek damages on breach of contract or tort theories.

Indeed, despite the waiver clause, the judicial review available to plaintiffs is more generous than that available to parties whose contracts contain arbitration clauses – yet we routinely enforce arbitration clauses (see e.g. Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am., 37 NY2d 91, 95 [1975]). Such clauses preclude plenary litigation of disputes in court; when an award is made, typically the sole avenue for judicial review is a summary proceeding under CPLR article 75. Courts may set aside an arbitration award only if "it violates a strong public policy, is irrational, or clearly exceeds a

specifically enumerated limitation on the arbitrator's power" and may not "interpret the substantive conditions of the contract or . . . determine the merits of the dispute . . . even where the apparent, or even the plain, meaning of the words of the contract [was] disregarded" by the arbitrator (Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Bd. of Educ. of City School Dist. of City of New York, 1 NY3d 72, 79, 82-83 [2003] [internal quotation marks and citations omitted]). An arbitration clause – providing no access to court for initial litigation of the merits and limited judicial review – is more restrictive than the declaratory judgment waiver here, which permits judicial resolution of the parties' dispute in a RPAPL article 7 proceeding with full appellate review.

Although they significantly limit access to court, arbitration clauses provide "an effective and expeditious means of resolving disputes between willing parties desirous of avoiding the expense and delay frequently attendant to the judicial process" (Maross Constr. v Central N.Y. Regional Transp. Auth., 66 NY2d 341, 345 [1985] [citations omitted]). "It has long been the policy of the law to interfere as little as possible with the freedom of consenting parties to achieve that objective" (Matter of Siegel [Lewis], 40 NY2d 687, 689 [1976]). That policy applies with equal force here where the parties selected a summary proceeding as the primary vehicle for resolution of their disputes. That we permit parties to waive the right to substantive review of their disputes in court by entering arbitration arrangements supports the conclusion we reach here: that there is no overriding public policy preventing sophisticated entities from waiving the right to commence a declaratory judgment action, which presents merely one tool for litigating a dispute.

Nor was this declaratory judgment waiver rendered unenforceable because, under the circumstances presented here, it resulted in an inability to obtain Yellowstone relief. We have described the Yellowstone injunction as a "creative remedy" crafted by the lower courts to extend the notice and cure period for commercial tenants faced with lease termination (Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 NY2d 508, 514 [1999]). In the wake of First Natl. Stores v Yellowstone Shopping Ctr. (21 NY2d 630 [1968]), tenants challenging notices of default in declaratory judgment actions "developed the practice of obtaining a stay of the cure period before it expired to preserve the lease until the merits of the dispute could be settled in court," and courts have "accepted far less than the normal showing required" for injunctive relief under CPLR article 63 (Post v 120 E. End Ave. Corp., 62 NY2d 19, 25 [1984]). Requests for a Yellowstone injunction are necessarily made in Supreme Court rather than Civil Court, which lacks authority to issue injunctive relief and, as such, may not be obtained in a summary proceeding under RPAPL article 7. Yellowstone relief is not an end in itself but merely a means of maintaining the status quo by tolling a contractual cure period during a pending action, permitting a tenant who loses on the merits of the lease dispute to cure the defect and retain the tenancy. Here, because plaintiffs' declaratory judgment action was barred by the lease waiver, there was no pending action in which to adjudicate the parties' rights and to support interim relief in the form of a Yellowstone injunction. Indeed, the request was rendered academic by the dismissal of the complaint.

Plaintiffs' inability in this case to obtain Yellowstone relief does not prevent them from raising defenses in summary proceedings if commenced and thus vindicating their

rights under the leases if the owners' allegations of default are baseless. It is undisputed that the owner cannot evict plaintiffs without commencing a summary proceeding and establishing that plaintiffs materially breached the leases. Absent such a proceeding, plaintiffs remain in possession of the premises and their rights under the leases are undisturbed. If plaintiffs' defenses fail on the merits – if plaintiffs in fact breached the leases – then their interest in the tenancy would properly be extinguished under the plain language of the leases. Furthermore, if plaintiffs believe that the owner is not performing its respective obligations under the leases, they can bring an action in Supreme Court for breach of contract and request specific performance. Thus, a Yellowstone injunction is not essential to protect property rights in a commercial tenancy which, of course, are governed by the terms of the lease negotiated by the parties. As this Court has recognized, Yellowstone injunctions are useful procedural tools for tenants seeking to litigate notices of default (see Graubard, 93 NY2d at 514). But there is no strong societal interest in the ability of commercial entities to seek such a remedy that would justify voiding an unambiguous declaratory judgment waiver negotiated at arm's length, merely because this incidentally precluded access to Yellowstone relief.

Nothing in our statutory or decisional law suggests otherwise. The Legislature has made certain rights nonwaivable in the context of landlord-tenant law (see e.g. General Obligations Law § 5-321 [right to seek damages for injury caused by landlord's negligence]; RPAPL 235-b [right to habitability]; RPAPL 236 [right of a deceased tenant's estate to assign the lease when reasonable]) but has not precluded a commercial tenant's waiver of interim Yellowstone relief. Notably, the Legislature has recognized the utility

of Yellowstone-type relief for some residential tenants. RPAPL 753(4) (L 1982, ch 870) provides New York City residential tenants with a nonwaivable ten-day post-adjudication cure period at the conclusion of a summary proceeding and thus offers a losing tenant relief comparable to that obtained with a Yellowstone injunction in Supreme Court (i.e., the ability to cure a violation after a judicial determination that the tenant breached the lease) (Post, 62 NY2d at 26). The decision to provide this benefit only to a class of residential tenants indicates that the Legislature did not view this type of relief as fundamental for commercial tenants, believing that their rights were adequately protected under existing law, which included the availability of Yellowstone relief for parties who timely sought such an injunction. As remains true, at that time there was no appellate precedent suggesting that the right of commercial tenants to seek such relief could not be waived by the inclusion of unambiguous language to that effect in a negotiated lease. The Legislature was obviously aware of our strong public policy favoring freedom of contract, which is why it included the narrowly-crafted benefit among a group of rights expressly declared to be nonwaivable (RPTL 753[5]). Yet, the Legislature did nothing to alter the status quo for commercial tenants. Thus, notwithstanding plaintiffs' inability to obtain a Yellowstone injunction, we are unpersuaded that the voluntary declaratory judgment waiver by this sophisticated commercial tenant is void as against public policy.

The right to commence a declaratory judgment action, although a useful litigation tool, does not reflect such a fundamental public policy interest that it may not be waived by counseled, commercial entities in exchange for other benefits or concessions. Entities like those party to this appeal are well-situated to manage their affairs during negotiations,

and to conclude otherwise would patronize sophisticated parties and destabilize their contractual relationships – contrary to New York's strong public policy in favor of freedom of contract. Because the declaratory judgment waiver is enforceable, the action was properly dismissed.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question not answered as unnecessary.

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No. 26

WILSON, J. (dissenting):

"In New York, agreements at arm's length by sophisticated, counseled parties are generally enforced according to their plain language pursuant to our strong public policy favoring freedom of contract" (majority op at 1). Just so, but why? The majority's thesis

is our State's commitment to freedom of contract is so powerful that it cannot be overcome by competing public policies unless, for example, the legislature has criminalized object of the contract (majority op at 10) or has expressly stated a prohibition on waiver by statute (id. at 9). That thesis has little to do with this case. The public policy at play here, which requires us to disallow contractual provisions depriving a party of the ability to seek a declaratory judgment, is the freedom of contract itself. A contractual provision that forecloses a party from timely knowing its contractual obligations – instead forcing parties to gamble on the contract's meaning – undermines the contract and with it, society's benefit from the freedom of contract.

In any event, freedom of contract is not a limitless right. It should not be elevated above every other protection the law affords to litigants. The majority's decision today will result in the elimination of the "Yellowstone injunction", a common-law precedent that has existed in New York for more than half a century. That injunction allows commercial tenants to determine their responsibilities under the terms of their lease agreements without risking eviction. The Yellowstone injunction expresses a public policy of this state and is grounded in the legislature's century-old determination that New York's public policy broadly favors the availability of declaratory relief in preference to more protracted, costly and antagonistic litigation.

After this decision, commercial building owners and landlords will undoubtedly include a waiver of declaratory and Yellowstone relief in their leases as a matter of course. Those clauses will enable them to terminate the leases based on a tenant's technical or

dubious violation whenever rent values in the neighborhood have increased sufficiently to entice landlords to shirk their contractual obligations. The majority insists that its decision represents the application of the well-settled public policy supporting freedom of contract. That notion of the unlimited primacy of contract rights is based on a jurisprudence discredited since the Great Depression. The majority's decision will alter the landscape of landlord-tenant law, and of neighborhoods, throughout the state for decades to come, absent legislative action.

I

What does "freedom of contract" mean, and why do we care about it? I can enter in to an agreement with anyone about anything – I am "free" to contract in that sense, even if the agreement is not legally enforceable. You and I can agree to have dinner next Thursday, and we can both think of it as to our advantage, but if one of us cancels, society has no interest in treating that agreement as enforceable, letting you sue me for damages, or compelling us to sup. We make some agreements legally enforceable because of the societal benefit from doing so, not because of the benefit to the contracting parties *per se*. Of course, the parties who strike a legally enforceable bargain believe the bargain will benefit each of them individually, and it most often will, but that is also true of agreements that are not legally enforceable.

Another vantagepoint from which to understand that freedom of contract is not an individual right, but rather is grounded in the benefit to society at large, is the concept of

efficient breach. Damages for breach of contract are not punitive; they are calculated to make the nonbreaching party whole (see e.g. Freund v Washington Square Press, Inc., 34 N.Y.2d 379 [1974]). If the breaching party can put its goods or services to a (societally) higher use than what the contract requires even after fully compensating the nonbreaching party, that is a socially beneficial result: the nonbreaching party receives the full value of its bargain, the breaching party earns more, and society benefits in the process because the property is put to a higher use. That the breaching party also receives a benefit is not the purpose of the efficient breach – it is the engine that drives the party to breach so that the resources can be put to their best use.

So "freedom of contract" cannot properly be understood as an individual right of the contracting parties. "Commerce and manufactures can seldom flourish long in any state . . . in which the faith of contracts is not supported by law." (Adam Smith, Wealth of Nations at 710.) The free-market system is driven by the principle that contracting parties will reach agreements that maximize social welfare (output, thought of as price, quantity and quality) by maximizing their individual interests through bargaining in a market in which multiple buyers and sellers exist and transaction costs are as low as possible. The freedom of contract is of fundamental importance in society because it creates legally enforceable rights, on which the contracting parties can act now based on assurances about the future: contracts are a way that economic actors can obtain some measure of security about an otherwise uncertain future. "[T]he major importance of legal contract is to provide a framework for well-nigh every type of group organization and for well-nigh

every type of passing or permanent relation between individuals and groups." Karl N. Llewellyn, "What Price Contract? – An Essay in Perspective," 40 Yale L. J. 704, 736-37 (1931).

Freedom of contract is based on the understanding that "stability and predictability in contractual affairs is a highly desirable jurisprudential value" (Sabetay v Sterling Drug, 69 NY2d 329, 336 [1987]). "The traditional concerns of contract law, and warranty law in particular, are the protection of the parties' freedom of contract and *the fulfillment of reasonable economic expectations*" (Bellevue S. Assoc. v HRH Constr. Corp., 78 NY2d 282, 304 [1991] [emphasis added]). "It is clear that public policy and the interests of society favor the utmost freedom of contract" (Diamond Match Co. v Roeber, 106 NY 473, 482 [1887]). "[A] party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved, and having once done so he cannot subsequently invoke its protection" (Sentenis v Ladew, 140 NY 463, 466 [1893]). However, "waiver is not permitted where a question of jurisdiction or fundamental rights is involved and public injury would result" (People ex rel. Battista v Christian, 249 NY 314, 318 [1928]).

Whether the state chooses to enforce certain types of agreements turns on whether enforcement would generally advance society's interests. Our rules about contract formalities, parol evidence, consideration, detrimental reliance, fraud, duress, illegality and so on are ways to cabin enforceability to the types of contracts from which society will

ordinarily benefit. For example, since 1677, common law jurisdictions like New York have had some version of the statute of frauds, requiring that certain kinds of contract be in writing so that highly consequential matters (marriage, long-term contracts, etc.) must be in writing to be enforced (see General Obligations Law § 5-701). Similarly, the parol evidence rule serves to clarify obligations by limiting the scope of a contractual dispute to its writing.

II

Declaratory judgments constitute another vital strand in this cord. Because the future is hard to predict, because even the best efforts at precision in language may wind up imprecise, because contracting parties sometimes deliberately avoid negotiating a contentious issue in the expectation that it will never transpire during the life of the contract, and because motivations change, courts since time immemorial have been asked to interpret agreements. Declaratory judgment actions allow contracting parties to know their rights and obligations under a contract prior to breach (NY Pub. Interest Research Group, Inc. v Carey, 42 NY2d 527, 530 [1977] ["when a party contemplates taking certain action a genuine dispute may arise before any breach or violation has occurred and before there is any need or right to resort to coercive measures. In such a case all that may be required to insure compliance with the law is for the courts to declare the rights and obligations of the parties so that they may act accordingly. That is the theory of the declaratory judgment action authorized by CPLR 3001"]; see also 44 Report of New York

State Bar Ass'n, 194-96 [1921] ["congratulat[ing] the People of New York upon the adoption of this enlightened policy" that "enables parties to entertain an honest difference of opinion as to their rights, particularly under written instruments . . . without becoming enemies and undergoing a long expense."). That knowledge removes a material uncertainty (James v Alderton Dock Yards, Ltd., 256 NY 298, 305 [1931] ["The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations"]). Uncertainty is itself a form of transaction cost that society has a clear interest in minimizing. As but one example, a party's ability to determine that breach would be efficient depends on its knowledge as to the interpretation of the contract.[1] "[C]ontract remedies should . . . give the party to a contract an incentive to fulfill [its] promise unless the result would be an inefficient use of resources" (Richard A. Posner, Economic Analysis of the Law, 56 [1972]).

Although superficially a private matter between contracting parties, the availability of declaratory judgments has far-reaching societal impacts. Parties may enter into contracts that seem quite clear, only to later find the terms are ambiguous (see e.g., the famous "Peerless" case, Raffles v Wichelhaus, 2 H. & C. 906, 159 Eng. Rep. 375 [Exh. 1864]).

[1] Here, for instance, the landlord and tenant each claim that the other is responsible to resolve several lease violations, including the current configuration of a ventilation system. If the tenant knows it is liable, it might decide to terminate the lease; the landlord apparently has better offers for the space, so that the tenant could walk away without liability and the landlord could rent the space to a higher-paying tenant. If the landlord knows it is liable, it may then determine whether it is more profitable to buy out the tenant and lease the space to a higher-paying tenant or to continue under the existing lease terms.

Because ambiguity often strikes, society has a powerful interest in adopting procedures that permit a timely and conclusive determination that preserves the object of the parties' bargain. We have previously extolled the virtues of stability and certainty, particularly with respect to real estate (see Estate of Thomson v Wade, 69 NY2d 570, 574 [1987]). Here, the majority has conflated the object of the bargain (the lease of space to a grocery store) with a procedural provision (the prohibition of a declaratory judgment action). The object of the contract – the lease of space – provides the societal value. The provision barring the tenant from seeking a declaratory judgment impedes that very value, by forcing a party (in this case, the tenant) either to refuse to replace the ventilation system and risk eviction if a court later determines that the tenant was responsible, or to replace the ventilation system (if within the tenant's wherewithal) and later institute an action of some sort to recover the costs of doing so if a court later determines that the landlord was responsible. Because the legal liability remains in limbo when the tenant must make that choice, the tenant's ability to consider an efficient breach (e.g., moving to a different space would be less expensive than paying for a compliant ventilation system, with which the landlord would be happy because it could rent the space to others at a higher price) is eliminated, and society's benefit is lost in the balance. Yes, both the use of the space and the declaratory judgment bar appear in the contract, but society's benefit derives from the former, and is defeated by the latter. The availability of declaratory judgments enhances the stability of contracts, allows deviations from the status quo to be done on an informed

basis, and allows the efficiency gains of the freedom of contract to be spread throughout the economic system – the fundamental purpose of "freedom of contract."

A waiver of the right to declaratory judgment, by contrast, creates instability by undermining the purposes and benefits of the freedom of contract, and the enforcement of such a waiver violates that very public policy. The ability to obtain declaratory relief is a part of our state's public policy because it is an essential part of the policy of freedom of contract. We should no more allow contracting parties – however sophisticated – to strike declaratory judgments than we would allow them to strike the parol evidence rule or the statute of limitations. The majority's fundamental mistake comes from treating "freedom of contract" as if it were an individual right, when its *raison d'etre* is the economic advancement of society.

That mistake is the same conceptual mistake made during the Lochner era, in which the United States Supreme Court aggrandized freedom of contract as if it were solely a personal right, rather than an important ingredient to the formation and advancement of society as a whole (Lochner v New York, 198 US 45 [1905]). There, the Supreme Court invalidated a law enacted by the New York Legislature to prevent the overwork of bakers. Here, the majority upholds a contractual provision that prevents the tenant (and notably, the tenant alone) from seeking a judicial declaration of the rights and obligation of the parties to a lease agreement. Today's decision, like Lochner, rests on "juristic thought of an individualist conception of justice, which exaggerates the importance of property and

of contract [and] exaggerates private right at the expense of public right" (Roscoe Pound, "Liberty of Contract," 18 Yale L.J. 454 at 457 [1909]).

III

When contractual obligations are unclear and disputed, a declaratory judgment affords the parties a conclusive determination, without the attachment of any damages or injunction. The availability of a pre-breach (or pre-enforcement) interpretation of disputed rights and obligations is incorporated by, but long predates, the common law.[2] In the Roman law of procedure, as in our own, actions at law resulted in an executory judgment, called a *condemnatio*, which decreed that something must be done, including that damages might have to be paid (see Edwin M. Borchard, *The Declaratory Judgment – A Needed Procedural Reform*, 28 Yale L.J. 1, 10 [1918]). Often, a preliminary procedure would be sought, known as *prae-judicium*, where parties merely asked for questions of law or fact to be determined, resulting in statements of law known as *pronunciato* (id. at 11). Those preliminary proceedings proved so advantageous they eventually developed into independent actions, without any *condemnatio* ever sought (id.).

The declaratory judgment continued to develop in Italy through the Middle Ages, including the creation of negative declaratory actions, or actions to declare that another does not have a claim against the plaintiff (id.). Upon the "reception" of Roman law into

[2] Even before Roman times, King Solomon issued a declaratory judgment, determining the rights of the parties without requiring either putative mother to abscond with the infant (Kings 3:16-28).

central Europe in 1495, both forms of declaratory judgment would have been known (id.). The declaratory judgment of the Middle Ages first made its way into common law countries through Scotland, with cases of "declarator" occurring as far back as the 1500s (id. at 21). England would adopt a form of the declaratory judgment in 1852, with a version much like what we know today adopted in 1883 (id. at 25).

That history is not some far-flung obscurity. Professor Borchard's 1918 article was the first written in the United States about declaratory judgments; three years later, the New York State Bar Association extolled the virtues of declaratory judgments, and referenced that history and Professor Borchard's work (New York State Bar Association, Proceedings of the 44th Annual Meeting, 194-96 [1921]). The next year, 1922, when the New York legislature first enacted the Civil Practice Act, a portion of that Act authorized declaratory judgments (see generally, Louis S. Posner, "Declaratory Judgments in New York," St. John's Law Review: Vol. 1 : No. 2 , Article 2. [1927]). Shortly after, the federal government and numerous other States legislatively created the right to seek declaratory judgments. Unlike the several states that modeled their legislation on the Commission on Uniform State Legislation's Uniform Declaratory Judgment Statute, New York's declaratory judgment statute afforded the courts broad leeway in issuing declarations, "based on the theory that the courts should be given as broad powers as possible so that their discretion under the statute be unfettered and that they should accordingly be free to work out their own rules as contingencies may arise" (id.). New York's adoption of the declaratory judgment was so swift that there is no formal legislative history. In its absence,

the history of the federal counterpart, passed shortly afterwards, are instructive. Both the Senate and House Reports note that England had a declaratory judgment act in 1852 and that Scotland's had existed for nearly 400 years (S Rep 1005, 73rd Cong, 2d Sess at 4; H Rep 1264, 73rd Cong, 2d Sess at 1). Both cite Professor Borchard and the history his work chronicled (id.). The reports recount a rapid and substantial movement: between 1919 and the U.S. Senate's report on the Declaratory Judgment Act, 34 states and territories had passed their own declaratory judgment laws (S Rep 1005, 73rd Cong, 2d Sess at 4). The Senate Report notes that our Chief Judge Benjamin Cardozo was one of the principal advocates supporting the federal Act (see id. at 1-2).

We know that the common law allowed suits that were *de facto* declaratory judgments long before this wave of declaratory judgment acts swelled. Suits to quiet title, declare marital status, declare the validity of a trust, or to declare the legitimacy of children are all declaratory judgments of one kind or another. Proponents of expanding declaratory judgments understood this (see id. at 4). When viewed in history properly, Civil Practice Act 473, now embodied in CPLR 3001 is not the start of declaratory judgments in this state, but is rather an expansion and legislative endorsement of a right with a deep legal history.

IV

The majority offers several arguments about why, "under the circumstances of this case," we should enforce the parties' agreement barring the courts from making a

declaration of their rights and obligations: (A) barring declaratory relief does not bar all resort to the courts; (B) agreements to arbitrate are enforceable, and those are a greater bar to the courts than the elimination of declaratory judgments; (C) many constitutional and statutory rights are waivable, so the right to a declaratory judgment must also be waivable; and (D) "only a limited group of public policy interests have been deemed sufficiently fundamental to outweigh the public policy favoring freedom of contract." I address each in turn.

A

By observing that "[c]ritically, the waiver clause at issue here does not preclude access to the courts but leaves available other judicial avenues," the majority concedes that public policy would void a contractual provision that barred the contracting parties from all forms of judicial or quasi-judicial (arbitral) resolution. That concession makes sense, it comports with our cases voiding arbitration agreements as inimical to the common law (discussed below), and it reaffirms the central failure of the majority's thesis: freedom of contract is not merely an individual right (were it so, we would allow contract disputes to be determined by any means to which the parties agreed, including no means at all). Instead, the agreements society will enforce as binding are those of a type that generally improve output for society, because freedom of contract is rooted in its benefit to society. Although the clause in question does not absolutely bar judicial review, it obstructs it in clear contravention of public policy and the common law.

From the time the legislature enacted the declaratory judgment act through its present incarnation as CPLR 3001, the statute has always granted parties the right to seek a declaratory judgment "whether or not further relief is or could be claimed." Thus, when the majority relies on the availability of other avenues of redress as the reason to enforce a clause barring declaratory judgments, it contravenes the legislature's express command: declaratory actions are available regardless of the availability of other avenues for judicial review. Again, because society has an interest in the determination of the parties' contractual obligations, and because that interest is the basis for devoting society's resources to the enforcement of contracts in the first place, public policy demands that such clauses are unenforceable.[3] The public interest in declaratory relief is patent in cases like this, involving a commercial lease. Certainty and stability in the contractual affairs of a neighborhood grocery has consequences for local residents and employees, not merely for the grocer. The majority allows parties to contract away those societal benefits, which we

[3] The majority' reliance on James v Alderton Dock Yards and Kalisch-Jarcho (majority op at 12) is misplaced. In James, we upheld the denial of declaratory relief as an appropriate exercise of the trial court's discretion: "The use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it useful and necessary" (James v Alderton Dock Yards, Ltd., 256 NY 298, 305 [1931]). Likewise, in Kalish-Jarcho (72 NY2d 727 [1988]), the contract between the City and the contractor required the contractor to continue with work even if the obligation to do the work was contested, subject to payment for the additional work at the contract's end. The denial again was for discretionary reasons. Neither case upholds the validity of a provision purporting to extinguish the right to seek a declaration, because the contracts in those cases had no such provision. Even were we to strike as void against public policy the provision at issue here, nothing would prevent Supreme Court from denying declaratory relief or the Yellowstone injunction in a proper exercise of its discretion.

would never allow for a statute of limitations or the parol evidence rule, even though the societal benefits of the latter are more abstract and attenuated.

B

The common-law entitlement to judicial determination of contractual disputes is quite powerful, to be overcome by legislative action (narrowly construed) or a judicial modification of the common law based on some more important public policy. In that regard, the majority's framework is backwards, assuming instead that parties are free to avoid judicial (and, with arbitration now firmly established by statute, quasi-judicial) resolution of disputes if they so desire.

One would not understand, from the majority's opinion, that New York common law condemned arbitration clauses as contrary to public policy, and thus unenforceable, because arbitration agreements purported to bar parties from the courts (Meacham v Jamestown, F. & C. R. Co., 211 NY 346, 354 [1914] [J. Cardozo concurring: "If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary"]). Ousting jurisdiction by contract is precisely what the majority seeks to legitimate by theorizing that a party might obtain "a valuable benefit, such as a rent concession" in exchange for waiving the right to a declaratory judgment (majority op at 13). So too might a party obtain that same benefit by waiving all judicial and arbitral resolution of contract disputes, or by waiving the statute of limitations or the

rules of evidence. Thus, neither the benefit to a party nor the expectation of the parties determines whether our public policy is violated.

New York's policy was in line with other common-law courts, which had been deeply suspicious of arbitration for centuries, dating back to England (see Angelina M. Petti, Note, *Judicial Enforcement of Arbitration Agreements: The Stay-Dismissal Dichotomy of FAA Section 3*, 34 Hofstra L. Rev. 565, 570-71 [2005]). New York was at the forefront of the nationwide shift in attitude toward arbitration clauses, with the Arbitration Act, passed in 1920, serving as a template for the federal act passed five years later. The Court of Appeals accepted that legislative derogation of the common law, albeit with a strong caveat: "The new policy does not mean that there is to be an inquisition rather than a trial, and that evidence unknown to the parties and gathered without notice may be made the basis of the judgment" (Stefano Berizzi Co. v Krausz, 239 NY 315, 319 [1925][J. Cardozo writing for the Court]).

Given the above, addressing the majority's argument about arbitration agreements is short work. The legislature modified the common law in 1920 to make arbitration agreements enforceable, against a common law that voided them as contrary to public policy. Having expressly provided that declaratory relief is available "whether or not further relief is or could be claimed," the legislature never provided that private parties could contract otherwise. Ironically, the majority now justifies the contractual elimination of the legislature's grant by relying on the "availab[ility of] other judicial avenues" (majority op at 13).

The majority's claims about arbitration ignore the above history and, thus, erroneously invert the presumption against the derogation of the common law (Fitzgerald v Quann, 109 NY 441, 445 [1888] ["the rule to be well established and almost universally acted on, that statutes changing the common law must be strictly construed, and that the common law must be held no further abrogated than the clear import of the language used in the statutes absolutely requires"]; Morris v Snappy Car Rental, 84 NY2d 21, 28 [1994] ["It is axiomatic concerning legislative enactments in derogation of common law . . . that they are deemed to abrogate the common law only to the extent required by the clear import of the statutory language"]; Artibee v Home Place Corp., 28 NY3d 739, 748 [2017] ["Because CPLR 1601 is a statute in derogation of the common law, it must be strictly construed"]). The common law has always been suspicious of clauses seeking to limit access to the courts. The history of arbitration clauses demonstrates precisely the opposite of what the majority has concluded.

C

That certain rights afforded to individuals are waivable is true but uninteresting and irrelevant here.[4] Television workers may alter their statutory meal breaks through

[4] The majority's observation that the legislature has specified that several types of agreements are void as against public policy (majority op at 9) is true but irrelevant. No one disputes the legislature's ability to do so (query, then, whether the purported force of the freedom of contract is so great as the majority claims), but the legislature's ability to declare contractual terms void as against public policy does not disable the common law from doing so as well. The cases the majority cites for the proposition that the legislature's failure to preclude a waiver is "a significant factor militating against invalidation of a contract term on public policy grounds" (id. at 10) do not support that proposition at all. Ballentine v Koch (89 NY2d 51 [1996]) contains no such statement; it rejected the

collective bargaining (Am. Broadcasting Cos. v Roberts, 61 NY2d 244 [1984]), and teachers may waive the Education Law's tenure protections (Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown, 46 NY2d 450 [1979]). Those rights are personal, and we leave it up to each individual to determine whether that individual would be personally advantaged by asserting or relinquishing those rights in a particular situation. As explained above, the freedom to contract is not a purely individual right; it is a societal engine for growth and stability.

A criminal defendant may prefer to testify than to remain silent; another may make the opposite choice. Society is indifferent to the choice made, so long as it is knowing and voluntary. Society, however, is not indifferent to whether contracting parties can obtain a quick determination of their rights and obligations before they must or may take actions that would be better informed (and often different) with a declaration in hand. We, as a

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plaintiffs' claim because "they attack as unenforceable an aspect of the legislation that was necessary to the creation of the rights they seek to enforce," and rejected their Contract Clause argument to boot. Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown (46 NY2d 450 [1979]) is not a case in which the legislature was silent; instead, we concluded the waiver there was not against public policy because the statue affirmatively "authorized waiver by simple neglect" and the "waiver serves as the quid pro quo for countervailing benefits." Matter of Feinerman v Board of Coop. Educ. Servs. of Nassau County (48 NY2d 491 [1979]) says nothing about legislative inaction, but instead is merely a follow-on to Abramovich concluding that nontenured faculty have, *a fortiori*, less of a property interest than tenured faculty, and therefore also can waive the rights determined waivable in Abramovich. Only Slayko mentions legislative inaction, but expressly conditions it on the rejection of the plaintiff's attempt to analogize the highly regulated field of automobile insurance to homeowner's insurance: "Cases involving auto insurance coverage--an area in which the contractual relationship and many of its terms are prescribed by law--provide a weak basis for generalization about the constraints public policy places upon other insurance contracts" (Slayko v Sec. Mut. Ins. Co., 98 NY2d 289, 295 [2002]).

society, are not benefitted or burdened by the defendant's choice; we are burdened when a contracting party's choice is made based on guesswork as to contractual rights, and benefitted when contracting parties make decisions informed by knowledge of their rights and obligations. Indeed, the majority's tacit admission that parties cannot contractually waive all judicial and quasi-judicial review, like our common-law decisions voiding arbitration clauses before the legislature stepped in, demonstrates the fundamental difference between the waivable rights to which the majority points and clause barring declaratory relief at issue here.

D

The proposition that only a "limited group of public policy interests" is sufficiently strong to overcome freedom of contract is both wrong and irrelevant here. It is wrong for the following reason: most law-abiding people do not enter into agreements that are against public policy. Countless parties enter into agreements to violate criminal and civil laws; those laws embody thousands of public policies, but those parties do not come to court to seek enforcement of agreements to traffic drugs or people or to recover damages from an illicit stock tip gone bad. Instead of the majority's sweeping claim, a more accurate statement would be that there are a modest number of cases in which the courts have voided an agreement as against public policy, because that circumstance arises only when the alleged violation of public policy is a close call.

The majority's proposition is also irrelevant here: it describes when a public policy other than the freedom to contract is sufficient to outweigh the freedom to contract. Here,

the issue is whether the public policy underlying the freedom to contract itself voids the purported declaratory judgment bar, not whether some distinct public policy voids it. As discussed previously, freedom of contract is vital because of the benefits that flow to society – not because of any individual right to have the government enforce agreements between parties. As the legislature recognized when it provided for a declaration of rights regardless of the existence of other remedies, society is benefitted when disputes between contracting parties can be resolved by a declaration of rights, and injured when parties must guess and act at their peril.

V

This case offers a concrete illustration of why the public policy underlying freedom of contract requires voiding contractual provisions barring declaratory judgments. In 2010, 159 MP Corp. and 240 Bedford Ave Realty Holding Corp. (herein, collectively "MP") entered into 20-year leases for retail and storage space in which to operate a Food Town grocery store in the Williamsburg section of Brooklyn. Two years later, the lessor, BFN, sold the building to Redbridge Bedford, LLC. In 2014, Redbridge Bedford sent MP a "Ten (10) Day Notice to Cure Violations." The notice alleged that the site had had work done without proper approvals from city agencies, that the store configuration violated lease terms, that city agencies had improperly been denied access to the premises to inspect the sprinkler system, and that the ventilation system violated the lease and had to be removed.

MP disputes all the violations, asserting they either depend on misreadings of the lease or on factual inaccuracies.

MP filed a verified complaint asserting four causes of action: (1) a request for a declaration that the lease was in effect and no violations had occurred; (2) a request to enjoin Redbridge Bedford from taking any steps to terminate the lease; (3) a claim to estop Redbridge Bedford from asserting violations, if any, to which it and BFN had consented; and (4) a claim for damages. To preserve the status quo, MP also sought a Yellowstone injunction, which would toll the cure period during the pendency of the action.

Redbridge Bedford moved for summary judgment on the ground "that the mere commencement of the declaratory judgment action constituted contractual grounds for terminating the tenancies" (159 MP Corp. v Redbridge Bedford, LLC, 160 AD3d 176, 181 [2d Dept 2018]). The contractual provision on which Redbridge Bedford relied states that MP:

> "waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease. Any breach of this paragraph shall constitute a breach of substantial obligations of the tenancy, and shall be grounds for the immediate termination of this Lease. It is further agreed that in the event injunctive relief is sought by Tenant and such relief shall be the Owner shall be entitled to recover the costs of opposing such an application, or action, including its attorney's fees actually incurred, it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings."

Both Supreme Court and the Appellate Division denied MP's request for a Yellowstone injunction on the basis of the above contractual provision.

The Yellowstone injunction derives from First Natl. Stores, Inc. v Yellowstone Shopping Ctr., Inc. (21 NY2d 630 [1968]). In that case, we held that a tenant's failure to obtain a temporary restraining order prior to the expiration of the 10-day cure period in the lease deprived the court of the power to extend the cure period (id. at 637-38). In so doing, we implicitly endorsed what would come to be known as the Yellowstone injunction, which allows the court to stay the running of a cure period so that tenants may obtain a declaration as to the existence of an alleged lease default and retain the ability to cure such default once their obligations have been determined. The Yellowstone injunction is an important adjunct to one type of declaratory judgment action, in which a tenant threatened with eviction based on debatable claims of breach may obtain a judicial resolution of the debate before deciding whether to cure, to remain with no need to cure, or to accept the eviction. Although CPLR 3001 (and its predecessor) does not mention the prospect of judicial extension of a contractual cure period, we explained that "'declaratory relief is *sui generis* and is as much legal as equitable' . . . Thus, in a proper case a court has the fullest liberty in molding its decree to the necessities of the occasion" (21 NY2d 630, 637 [1968] [quoting Borchard, Declaratory Judgments (2d ed.), p. 239]).

MP has been operating a grocery store in a neighborhood that has undergone, and continues to undergo, rapid gentrification, rendering the real estate substantially more valuable. Its lease is for 20 years, with a further 10-year renewal option. It would like to keep operating the grocery store under the lease terms. Redbridge Bedford would, undoubtedly, like to terminate the lease and make a greater profit from it. Let us assume

that there is a legitimate dispute about whether the violations identified by Redbridge Bedford are MP's obligation to cure. The declaration sought by MP, coupled with the Yellowstone injunction, would allow MP to learn which, if any, of the claimed violations it is obligated to cure, and could then decide whether to cure any for which it is responsible or agree to termination of the lease. Enforcement of the waiver provision eliminates that possibility, requiring MP to take one of the following courses without the benefit of knowing its contractual liability: (1) cure all the alleged defects, even though it might be responsible for none of them; (2) cure none or some of the alleged defects, guessing which, if any, it may be held responsible for, and defend an eviction proceeding hoping that it has guessed correctly; or (3) accept termination of the lease because the eviction proceeding's result is too uncertain, and attempt to move its business elsewhere or shut it down.

The majority protests that MP and all other commercial tenants who waive declaratory and Yellowstone relief in their leases are left with "other judicial avenues through which [they] may adjudicate their rights under the leases" (majority op at 13). The only available legal avenue left to MP, however, as the majority acknowledges, is to wait for Redbridge Bedford to commence summary eviction proceedings in Civil Court and then raise any defenses it may have against the allegations of default in that summary proceeding (see majority op at 13).

Notably, the waiver provision at issue here prevents only the tenant from commencing a declaratory judgment action to clarify its rights and responsibilities. The leases permit Redbridge Bedford to commence a declaratory judgment action at will. As

the dissenting Justice of the Appellate Division noted, MP is completely at the mercy of Redbridge Bedford to commence such summary eviction proceedings before it may raise any defenses it has to the allegations of default (see 160 AD3d 176, 206-207 [2d Dept 2018] [Connolly, J., dissenting]). "In other words, the plaintiffs, having been boxed into a corner, would be entirely dependent on the defendant commencing a summary proceeding in order to bring the issue of the validity of a notice to cure before a court" (id.). Such a tenant "would be faced with great uncertainties with respect to any decision-making related to improving the property, accepting deliveries of new stock or merchandise, or the negotiation of any type of long-term agreement with customers or suppliers" (id.).

Furthermore, as the majority acknowledges (majority op at 15-16), the waiver provision at issue here prevents MP from obtaining a Yellowstone injunction, even though it did not mention Yellowstone itself, because the tenants were limited to defending themselves in summary eviction proceedings commenced by Redbridge Bedford in Civil Court, and Civil Court lacks plenary authority to grant injunctive relief (see New York City Civil Court Act § 209 [b]). If Civil Court therefore determines during the summary eviction proceeding that MP is responsible for some or all of the alleged defaults, even if MP has all along been willing and able to cure those defaults, it will be too late: the leases will have terminated. That "all or nothing result" (Post v 120 E. End Ave. Corp., 62 NY2d 19, 25 [1984]) destabilizes contract relationships and neighborhoods, and effectively allows landlords who own buildings in gentrifying areas to terminate commercial leases at any time based on technical or minor violations. In other words, if a waiver of declaratory

and Yellowstone relief is enforceable, it will be used by landlords as a mechanism to vitiate a lawful contract. That does not preserve the parties' benefit of their bargain, it destroys it.

"The public policy behind Yellowstone relief is not difficult to envision: commercial enterprises leasing business locations have a vested interest in remaining at the locations known to their customers, their premises are often fitted with industry-specific fixtures, and commercial evictions disrupt employments and potential business profitability" (Hon. Mark C. Dillon, "The Extent to Which 'Yellowstone Injunctions' Apply in Favor of Residential Tenants: Who Will See Red, Who Can Earn Green, and Who May Feel Blue," 9 Cardozo Pub. L. Pol'y & Ethics J. 287, 315-316 [2011]). The majority's elimination of the clearly best option – knowing one's rights before determining whether and what action to take – strikes at the very core of declaratory judgments. One of the very first decisions under the then-new declaratory judgment act closely parallels the present case:

> "Plaintiff urges that this construction imposes upon the lessee the risk of forfeiture if he subleased and points out the practical difficulty of finding a subleasee under such circumstances (Young v. Ashley Gardens Properties, Ltd., L. R. [1903] 2 Ch. Div. 112), shows the remedy. There plaintiff sought a declaratory judgment that defendant had no right to withhold consent. Cozens-Hardy, L. J. writes: 'I cannot imagine a more judicious or beneficial exercise of the jurisdiction to make a declaratory order than that which has been adopted in this case.' Under Section 473 of the Civil Practice Act, plaintiff may, if the facts warrant, secure a similar declaration in the instant case"

(Sarner v Kantor, 123 Misc. 469 [1924]). The majority allows a lease provision to undo the legislature's creation of declaratory judgments, the common-law's rejection of contractual

provisions purporting to remove judicial interpretation of contracts, and the longstanding efforts of our court and the lower courts thereafter in fashioning the Yellowstone injunction, which, after fifty years of unquestioned existence, itself is engrained in the common law.

The majority's newfound dismissiveness towards Yellowstone cannot be justified by its observation that the legislature has granted a 10-day post-adjudication cure period for New York City residential tenants and made that cure period unwaivable (see RPAPL 753 [4], [5]). The majority reasons that the legislature's decision to provide that benefit "only to a class of residential tenants indicates that the Legislature did not view this type of relief as fundamental for commercial tenants" (majority op at 17). To the contrary, the legislature did not enact this particular protection for residential tenants in New York City until 1982 (see L 1982, ch 870; see Post, 62 NY2d at 22-24). By that time, Yellowstone injunctions had been a long-established method for commercial tenants to preserve their right to cure if they were alleged to be in default of their lease agreements. It is entirely likely, then, that the legislature extended this protection to certain residential tenants in 1982 but did not extend it to commercial tenants because the legislature believed that Yellowstone itself already adequately protected the rights of commercial tenants. Indeed, a one-size-fits-all 10-day post-adjudication cure period might be appropriate for residential tenants, whereas commercial tenants, whose uses are more specialized and varied, would best be left to the court's discretion to determine the length and nature of any post-adjudication cure period. The majority's reasoning is backwards, drawing a negative

inference about our jurisprudence from the legislature's provision of a fixed post-adjudication cure period to residential tenants. At most, this would qualify as longstanding legislative inaction in the face of well-established common law, which we typically construe as approval (see People v Defore, 242 NY 13, 23 [1926] [Cardozo, J.] ["If we had misread the statute or misconceived the public policy, a few words of amendment would have quickly set us right. The process of amendment is prompt and simple. It is without the delays or obstructions that clog the change of constitutions. In such circumstances silence itself is the declaration of a policy"]). By holding today that commercial tenants may waive declaratory and Yellowstone relief, the majority is effectively unwinding 50 years of common-law precedent based in part on erroneous assumptions about the legislature's intent.

The majority appears to assume that commercial tenants have a relatively higher level of sophistication and bargaining power than residential tenants, and therefore commercial tenants should be allowed to waive the availability of Yellowstone relief even though some residential tenants cannot (see RPAPL 743 [4], [5]). Indeed, the majority states several times that "sophisticated" commercial tenants should be allowed to waive their right to declaratory relief. A contract provision that violates public policy, however, cannot be enforceable regardless of the level of the sophistication of the parties (see 160 AD3d at 207 [Connolly, J., dissenting]; see e.g. Riverside Syndicate, Inc. v Munroe, 10 NY3d 18 [2008] [wherein a sophisticated tenant bargained away the rent limits of the Rent Stabilization Code as part of an eviction settlement that allowed his tenancy to continue

despite being a non-primary residence]; see also Bissell v Michigan S. & N. I. R. Cos., 22 NY 258, 285 [1860] ["That contracts which do in reality contravene any principle of public policy are illegal and void, is not and cannot be denied. The doctrine is universal. There is no exception"]). Furthermore, there is no evidence on this record demonstrating the sophistication of these particular tenants.[5] The majority assumes that because they were commercial tenants, they were sophisticated. The level of sophistication of commercial tenants, and their relative bargaining power, may fall anywhere between Wal-Mart and *Cheers*' Sam Malone. It is not true that all commercial tenants will understand the meaning of a waiver of declaratory relief, or will have the bargaining power to negotiate for removal of such a waiver if they understand it, and we should not assume otherwise.

VI

The majority has now undone the faithful work of the courts over the past 50 years in creating the Yellowstone injunction, based on the uniform understanding of the Appellate Division departments that the declaratory judgment act, when applied in the context of commercial leases, requires a specialized form of augmenting injunction (see (Another Slice, Inc. v 3620 Broadway Invs. LLC, 90 AD3d 559, [1st Dept 2011], Caldwell v Am. Package Co., Inc., 57 AD3d 15, 18 [2d Dept 2008], Kem Cleaners v Shaker Pine,

[5] The majority not only asserts that plaintiffs were "sophisticated" but also that they were "counseled" (majority op at 11, 17). There is no evidence in the record before us that plaintiffs reviewed the lease terms with counsel. Supreme Court concluded that plaintiffs had the "opportunity" to review the leases with the assistance and guidance of counsel, not that such assistance and guidance actually occurred.

217 AD2d 787 [3d Dept 1995], Fay's Inc. v Park Ctr. Dev., 226 AD2d 1067 [4th Dept 1996]). That undoing calls for a simple enough legislative fix. The far more troubling aspect of the majority's decision is that it, perhaps unwittingly, heads us down the road of the roundly discredited Lochner-era jurisprudence, in which "freedom of contract" was misunderstood as an individual right instead of as a doctrine by which society decides to enforce only those types of agreements that tend to enhance social welfare. "[F]reedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses" (West Coast Hotel Co. v Parrish, 300 US 379, 392 [1937] [quoting Chicago, B. & Q. R. Co. v McGuire, 219 US 549, 567 (1911) and overruling Adkins v Children's Hosp., 261 US 525 (1923) and Lochner]).

It is easy to see why freedom of contract is enhanced when the parties, arriving at a dispute about what a contract requires, can have that dispute resolved and then act accordingly. That best preserves the substance of their bargain and provides assurance to future negotiating parties that our law will not require a Hobson's choice of them. Conversely, what reason is there to allow parties to agree to bar declaratory judgments, other than "the-parties-agreed-to-it-so-it-must-be-their-right"? As Charles Evans Hughes commented in support of New York's declaratory judgment act, "[w]hatever may be said as to the propriety of desirability of such a change in practice, the point that anybody will be injured in that way cannot be regarded as well taken" (New York State Bar Association, 196). We deserve better than the majority's resuscitation of the long-discredited "assumption that economic liberty is the holy of holies in a just constitutional system"

(Robert Green McCloskey, American Conservatism in the Age of Enterprise 83 [1951]).

"I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent" (Lochner, 198 US at 74-75 [Holmes, J., dissenting]).

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Order affirmed, with costs, and certified question not answered as unnecessary. Opinion by Chief Judge DiFiore. Judges Stein, Garcia and Feinman concur. Judge Wilson dissents in an opinion in which Judges Rivera and Fahey concur.

Decided May 7, 2019

APPENDIX C. TARGET TEXT

Tribunal de Apelaciones del estado de Nueva York

SENTENCIA

Esta sentencia no está confirmada y está sujeta a revisión antes de su publicación en el Informe Oficial de Nueva York.

N.º 26
159 MP Corp., y otros,
apelantes,
vs.
Redbridge Bedford, LLC,
apelada.

A. Joshua Ehrlich,
quien actúa en representación de los apelantes.
Jonathan D. Lupkin,
quien actúa en representación de la apelada.

DiFIORE, magistrado ponente:

En Nueva York, generalmente los acuerdos negociados en igualdad de condiciones por partes expertas y asesoradas se hacen cumplir de acuerdo con su lenguaje sencillo, esto de conformidad con nuestra sólida política pública que favorece la libertad de contractual. En este caso, los arrendatarios comerciales que de manera inequívoca acordaron renunciar al derecho de iniciar una acción de juicio declarativo con arreglo a los términos de sus

contratos de arrendamiento nos piden que invalidemos dicha renuncia con base en que la misma es nula y contraria a la política pública. Estamos de acuerdo con los tribunales inferiores en que, bajo las circunstancias de este caso, la cláusula de renuncia es válida y por lo tanto se justifica el rechazo de la demanda.

Los demandantes 159 MP Corp. y 240 Bedford Ave Realty Holding Corp. firmaron dos contratos de arrendamiento comercial con el antecesor en derecho del demandado Redbridge Bedford LLC, el propietario actual del edificio en cuestión. Juntos, los contratos de arrendamiento de veinte años permiten a los demandantes ocupar 1.207,7 metros cuadrados de propiedad en Brooklyn para gestionar un supermercado Foodtown. Los cánones de arrendamiento iniciaron en 341.628 USD por año y fueron incrementando durante la vida útil de los contratos de arrendamiento hasta 564.659,02 USD, los cuales incluían una opción de diez años en contratos de arrendamiento con un incremento gradual. Si bien los extensos y detallados contratos de arrendamientos estaban redactados en un formato estándar, sus términos y condiciones no fueron aceptados como cláusulas estándares, sino que contenían numerosas adiciones y supresiones escritas a mano, firmadas por las partes con sus iniciales. Cabe mencionar igualmente que cada contrato de arrendamiento también incorporó un anexo de 36 parágrafos, que también estaba repleto de adiciones y eliminaciones escritas a mano. El parágrafo 67(H) del anexo establece lo siguiente:

> "El arrendatario renuncia a su derecho de iniciar una acción de juicio declarativo con respecto a cualquier disposición de este contrato de arrendamiento […] Por medio del presente las partes manifiestan su intención de que las disputas se resuelvan mediante procesos sumarios" (énfasis añadido).

En marzo de 2014, el demandado envió notificación a los demandantes en la cual alegaba varios incumplimientos e informaba que los demandantes tenían quince días para subsanar los incumplimientos y de esta manera evitar la resolución de los contratos de arrendamiento. Antes de que terminara el periodo para subsanar el incumplimiento, los demandantes solicitaron ante un tribunal de primera instancia que mediante un juicio declarativo se declarara que ellos no habían incurrido en incumplimiento. Los demandantes también solicitaron el recurso Yellowstone con el fin de evitar que el propietario resolviera los contratos de arrendamiento o iniciara un proceso sumario mientras estuviera en curso la acción de juicio declarativo. El demandado contestó y solicitó un juicio sumario para desestimar la demanda al argumentar que la acción y, por lo tanto, la solicitud del recurso Yellowstone estaban prohibidas por la cláusula de renuncia en los contratos de arrendamiento[1]. En respuesta, los demandantes afirmaron, entre otras cosas[2] que, si se interpretaba de la manera solicitada por el propietario, la cláusula de renuncia era inaplicable y que la renuncia se basaba en un error mutuo sobre el alcance de los procesos sumarios.

El tribunal de primera instancia denegó a los demandantes la solicitud de recurso Yellowstone, concedió a los demandados la solicitud de juicio sumario y desestimó la

[1] Si bien el demandado citó una parte del parágrafo 67(H) que establece que el inicio de una acción de juicio declarativo daba lugar a la resolución de los contratos de arrendamiento, no contestó solicitando una declaración para que los contratos de arrendamiento se resolvieran o se realizara un proceso de desalojo basado en el supuesto incumplimiento de esta disposición. Debido a que en este caso no se exigió el cumplimiento de esa disposición, no tenemos más motivos para abordarla.

[2] Los demandantes también argumentaron que la demanda alegaba una reclamación suficientemente fundada por incumplimiento de contrato que no estaba prohibida por la cláusula de renuncia. Sin embargo, ese argumento no fue presentado ante este Tribunal.

acción en su totalidad. El tribunal inició observando que, "en caso de no existir alguna infracción a la ley o transgresión de una política pública sólida, las partes en un contrato son prácticamente libres de llevar a cabo el contrato que deseen, sin importar cuán inapropiado pueda parecerle a un tercero" (159 MP Corp. vs Redbridge Bedford LLC, 2015 NY Slip Op 32817(U), en *3 [Tribunal de Primera Instancia, condado de Kings 2015], en el cual se cita a Rowe vs. Great Atlantic & Pacific Tea Co., 46 NY2d 62, 67-68 [1978]). Teniendo como base el lenguaje claro del contrato, el tribunal llegó a la conclusión de que los demandantes renunciaron libremente al derecho de iniciar una acción de juicio declarativo y, para hacer cumplir la disposición, hicieron referencia al hecho de que la renuncia no "impide a ninguna de las partes ejecutar el contrato o solicitar una indemnización por daños y perjuicios como resultado de un incumplimiento o la conducta dolosa de las partes… [y no] denegó a los demandantes toda reparación legal en este caso [porque si] los demandantes alegan que los contratos de arrendamiento se están incumpliendo, pueden presentar cualquier defensa que puedan tener en cualquier proceso sumario presentado por el demandado ante un tribunal civil con el fin de desalojarlos" (159 MP Corp., 2015 NY Slip Op 32817(U), en *3 [citas omitidas]). El tribunal también rechazó el argumento de error mutuo de los demandantes, al señalar que los demandantes no habían alegado fraude ni tampoco que no habían podido revisar los contratos de arrendamiento con un abogado (id.).

La División de Apelaciones, con un magistrado con salvamento de voto, confirmó la decisión, al determinar que la renuncia al juicio declarativo era exigible y desestimó la reclamación de los demandantes. (159 MP Corp. vs. Redbridge Bedford, LLC, 160 AD3d

176 [2.º Depto. 2018]). El tribunal comentó, a la luz de una política pública sólida a favor de la libertad contractual que las partes pueden renunciar a una amplia gama de derechos, teniendo en cuenta que las partes en este caso son "entidades expertas que negociaron en igualdad de condiciones" y firmaron contratos que establecieron sus obligaciones "con gran cuidado y especificidad aparente" (id. en 187, 189). Al igual que el Tribunal de primera instancia […] la División de Apelaciones enfatizó que la cláusula de renuncia no dejaba a los demandantes sin otros recursos legales disponibles, y señaló que los demandantes conservaban el derecho a recibir notificaciones en virtud de los contratos de arrendamiento (y por lo tanto los incumplimientos de resarcimiento), a solicitar indemnización por daños y perjuicios causados por incumplimiento contractual y por responsabilidad civil extracontractual y, además, a defenderse en procesos sumarios (id. en 191). Además, la División de Apelaciones estableció que los demandantes permanecieran en posesión de la propiedad a menos que se iniciaran procesos sumarios y, si se reconociera en un proceso sumario, permanecerían indefinidamente hasta el vencimiento de los contratos de arrendamiento (id. en 191-92). Por el contrario, si se determinara que han incurrido en incumplimiento, los demandantes serían desalojados justificadamente de conformidad con los términos de los contratos de arrendamiento (id. en 192).

Un magistrado emitió un salvamento de voto al concluir que la cláusula de renuncia es nula, va en contravía del interés público y, por lo tanto, es inaplicable (160 AD3d en 194 [Magistrado Connolly, con salvamento de voto]). En el salvamento de voto se argumentó que la reparación judicial declarativa cumple la importante función social de

proporcionar certeza en las relaciones contractuales y que la capacidad del arrendatario para litigar en procesos sumarios iniciados por el propietario no era un sustituto suficiente para la posibilidad de iniciar una acción de juicio declarativo (id. en 203-206). La División de Apelaciones concedió a los demandantes autorización para apelar ante este Tribunal, con el fin de establecer si la resolución judicial se realizó correctamente, la cual ahora confirmamos.

Comenzamos con la "común y sumamente sensata premisa de ley […] que indica que cuando las partes establecen sus acuerdos en un documento sencillo y completo, su contenido debe... ser ejecutado de acuerdo a sus términos y condiciones" (Vermont Teddy Bear Co. vs 538 Madison Realty Co.,1 NY3d 470, 475 [2004] [cita omitida]). Como se observó en Vermont Teddy Bear, un importante caso de referencia que involucra un contrato de arrendamiento comercial, esta regla cobra "especial importancia en el contexto de transacciones de bienes inmuebles, donde la certeza comercial es una preocupación primordial y donde... el documento legal se negoció entre empresarios expertos y asesorados que negociaron en igualdad de condiciones" (id. se omitieron las comillas y citas internas]). La disposición del contrato de arrendamiento en medio de esta controversia no podría ser más clara. En ella, los demandantes "renunciaron […] [al] derecho de iniciar una acción de juicio declarativo relacionada con cualquier disposición de este Contrato de arrendamiento o con respecto a cualquier notificación enviada en virtud de las disposiciones de este Contrato de arrendamiento". Al aplicar nuestros bien establecidos principios de interpretación contractual, esta cláusula de renuncia inequívoca refleja la intención de las partes de que a los demandantes no se les permita iniciar

concretamente el tipo de demanda que ellos iniciaron aquí y, como tal, no era posible presentar esta acción en virtud del lenguaje sencillo de los contratos de arrendamiento. Sin embargo, los demandantes nos piden que los eximamos de las consecuencias de su negociación, al alegar que la cláusula de renuncia incumple una política pública lo suficientemente sólida que amerita una excepción del principio fundamental de libertad contractual. Rechazamos ese argumento.

La libertad contractual es una política pública "profundamente arraigada" de este estado (New England Mut. Life Ins. Co. vs. Caruso, 73 NY2d 74, 81 [1989]) y un derecho de alcance constitucional (Constitución de los Estados Unidos, título I, artículo 10[1]). De conformidad con el estatus de Nueva York como el punto comercial preeminente en los Estados Unidos, y hasta del mundo, nuestros tribunales han considerado durante mucho tiempo la ejecución de los contratos comerciales de acuerdo a los términos y condiciones adoptados por las partes como un pilar del derecho de *common law*. Por lo tanto, la "[…] libertad contractual prevalece en una transacción que se realiza en igualdad de condiciones entre partes expertas [...], y en ausencia de cuestiones compensatorias de política pública, no existe motivo alguno para eximirlos de las consecuencias de su negociación" (Oppenheimer & Co. vs. Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 695 [1995])[3].

[3] Véase también Bluebird Partners vs. First Fid. Bank, 94 NY2d 726, 739 (2000) negarse a hacer cumplir el contrato con fundamento en la doctrina *Champerty* —la cual establece que ninguna persona natural o jurídica (...) puede comprar documentos de crédito vencidos (...) con la intención y el propósito de interponer una acción o un proceso judicial con respecto a la misma"— puede "suscitar incertidumbres en el sistema de libre mercado en relación con un incontable número de elaboradas transacciones comerciales, lo cual es una significante posibilidad en el estado que alberga el capital financiero del mundo".); J. Zeevi & Sons, Ltd. vs. Grindlays Bank (Uganda) Ltd., 37 NY2d 220, 227 (1975) ("Para mantener la posición financiera preeminente de Nueva York, es importante proteger las expectativas justificadas de las partes del contrato").

Nosotros hemos advertido que, cuando un tribunal anula una disposición contractual, una de las partes se ve privada del beneficio de la negociación (véase id.; Rowe, 46 NY2d en 67). Al desfavorecer el giro judicial del equilibrio alcanzado al concluir las negociaciones de las partes, nuestra política pública a favor de la libertad contractual promueve tanto la certeza como la previsibilidad y respeta la autonomía de las partes comerciales para efectuar sus propios acuerdos comerciales.

Evidentemente, la política pública a favor de la libertad contractual no exige que se hagan cumplir los términos de un contrato en conjunto. Las disposiciones contractuales celebradas por error o bajo coerción o coacción no se pueden hacer cumplir (véase el caso de Abramovich vs. Board of Educ. of Cent. School Dist. N.º1 of Towns of Brookhaven & Smithtown, 46 NY2d 450, 455 [1979]; véase también Austin Instrument vs. Loral Corp., 29 NY2d 124, 130[1971]). La doctrina de la lesión enorme también protege en contra de "la aplicación injusta de términos y condiciones contractuales onerosos que una parte puede imponer [sobre] la otra debido a una disparidad significativa en el poder de negociación" (Rowe, 46 NY2d en 68). Los demandantes no hicieron uso de estas defensas.

Aquí, los demandantes afirman que la renuncia al juicio declarativo no se puede hacer cumplir porque es nula y en contra de la política pública. Por lo tanto, el desafío de los demandantes no se basa en las circunstancias alrededor de la realización de este contrato en particular, como pueden ser las acusaciones de poder de negociación desigual, tácticas coercitivas o falta de asesoría, los cuales son reclamos pertinentes a otras defensas contractuales bien establecidas. Más bien, el argumento de los demandantes es que el derecho a iniciar una acción de juicio declarativo es tan primordial y crítico para la política

pública de este estado que ni siquiera el arrendatario comercial con mejor asesoría, conocimiento o experiencia mejor asesorado, conocedor o experto puede renunciar a este derecho. No estamos de acuerdo con este argumento.

Hemos considerado que una disposición contractual es inaplicable cuando la política pública a favor de la libertad contractual se invalida por otra política pública de peso y compensatoria (Oppenheimer & Co., 86 NY2d en 695)[4]. Pero, debido a que la libertad contractual es en sí un fuerte interés de política pública en Nueva York, podemos anular un contrato solo después de "equilibrar" los intereses públicos que favorecen la anulación de un término elegido por las partes contra aquellos a quienes se aplica la cláusula y concluir que los intereses que favorecen la anulación son más fuertes (véase New England Mut. Life Ins. Co., 73 NY2d en 81). Aunque tenemos la potestad de anular contratos por este motivo, nuestra "función habitual y más importante" es hacer cumplir los contratos en lugar de invalidarlos "bajo el pretexto de la política pública", a menos que "evidentemente… contravengan el derecho público o el bienestar social" (Miller vs. Continental Ins. Co., 40 NY2d 675, 679 [1976], en el cual se cita a Baltimore & Ohio Ry. Co.vs. Voight, 176 US 498, 505 [1900]).

El hecho de que una cláusula contractual pueda ser contraria a una norma reflejada en la Constitución, una ley o una decisión judicial no la vuelve inaplicable; "que un interés

[4] Cuando nos referimos a la política pública en este contexto, nos referimos a "la ley del Estado, ya sea que se encuentre en la Constitución, las leyes o las decisiones de los tribunales" (New England Mut. Life Ins. Co., 73 NY2d en 81). No es suficiente que el contrato parezca desacertado para los terceros (véase Rowe, 46 NY2d en 68), que incumpla "conceptos personales de justicia" (Welsbach Elec. Corp. vs. MasTec N. Am., Inc., 7 NY3d 624, 629 [2006]) o tenga una visión subjetiva "[por parte de los tribunales'] de lo que es una política bien constituida" (caso de Walker, 64 NY2d 354, 359 [1985]).

público esté presente no establece una protección inviolable a la que se pueda renunciar" (caso de American Broadcasting Cos., Inc. vs. Roberts, 61 NY2d 244, 249 [1984]). De hecho, habitualmente respetamos los contratos en los que se renuncia a derechos legales o constitucionales, lo cual indica que buscamos más que el impacto de un beneficio provisto por la ley antes de considerar nulo un acuerdo voluntario en contra de la política pública (véase p. ej. id. [se respeta la renuncia de la Ley de Protección Laboral que cumple con el interés social de evitar el agotamiento del trabajador]; Abramovich, 46 NY2d 450 [se respeta la renuncia por parte del maestro titular sobre los derechos en la Ley de Educación, artículo 3020-a]; Antinore vs. Estado de Nueva York, 40 NY2d 921 [1976] [se respeta la renuncia al derecho de debido proceso otorgado por las audiencias disciplinarias de conformidad con la Ley de Administración Pública, (Civil Service Law) artículos 75 y 76]). Muchos derechos implican intereses sociales y, sin embargo, se ha determinado que son renunciables.

Solo un grupo limitado de intereses de política pública se considera suficientemente fundamental como para sobrepasar la política pública que favorece la libertad contractual. En algunas circunstancias, el legislador ha identificado los derechos y obligaciones reconocidos en el derecho constitucional, las leyes o la jurisprudencia, los cuales son tan importantes y críticos para el interés público que no son renunciables. Por ejemplo, la Ley General de Obligaciones (General Obligations Law), artículo 5-321 establece que los contratos que eximen a un arrendador por responsabilidad derivada de su propia negligencia son "nulos por estar en contravía del interés público" (véase Great N. Ins. Co. vs. Interior Constr. Corp., 7 NY3d 412,418 [2006]). Asimismo, el Código de

Estabilización de Rentas (Rent Stabilization Code), artículo 2520.13 establece que "[…] un acuerdo por parte del arrendatario para renunciar al derecho de cualquier disposición del [Código de Estabilización de Rentas] o de este código es nulo" (véase Thornton vs. Baron, 5 NY3d 175, 179 [2005]). El legislador también ha considerado inaplicables algunos acuerdos para extender el régimen de prescripción antes de la presentación de una demanda por expresa prohibición legal en la Ley General de Obligaciones, artículos 17-103 ("[una] promesa de... prorrogar el régimen de prescripción no tiene efecto" excepto cuando fue hecha antes del momento en que se da el hecho que genera la demanda) (véase John J. Kassner & Co.vs. Ciudad de Nueva York, 46 NY2d 544, 552 [1979]). Existen otros ejemplos (véase p.ej. West-Fair Elec. Constr. vs. Aetna Cas. & Sur. Co., 87 NY2d 148, 156 [1995] [en el que se aplica la Ley de Gravámenes (Lien Law) artículo 34 que clasifica las renuncias del derecho a presentar o hacer cumplir ciertos gravámenes "nulos en contra de la política pública y que son totalmente inexigibles"]; Symphony Space vs. Pergola Props., 88 NY2d 466, 476 [1996] [en el que se aplica la Ley de Nueva York contra la Perpetuidad (New York's Rule against Perpetuities, EPTL) 9-1.1, que establece que "[…] No será posible establecer un derecho de dominio sobre una propiedad, si es que lo hubiera, con el fin de que se ejerza dentro un periodo superior a veintiún años contabilizado desde el momento en que asistieron todas las personas con vida a la creación el derecho y cualquier periodo de gestación involucrado"]). Cuando el legislador no ha prohibido expresamente la renuncia a un derecho u obligación, hemos considerado que es un factor significativo que dificulta la invalidación de una cláusula contractual por motivos de interés público (véase, p. ej., Ballentine vs. Koch, 89 NY2d 51, 59 [1996] [no existe una "prohibición general que impida la generación de derechos para los empleados públicos

jubilados que existan de manera independiente al sistema de pensiones o jubilación aplicable"]; Abramovich, 46 NY2d en 455 ["la ley no incluye ninguna disposición expresa que impida a un maestro renunciar a sus derechos"]; caso de Feinerman vs. Board of Coop. Educ. Servs. del condado de Nassau, 48 NY2d 491, 498 [1979] [la ley pertinente "no incluye una disposición que evite que un futuro maestro renuncie consciente y voluntariamente al periodo de prueba de tres años incorporado"]; véase generalmente Slayko vs. Security Mut. Ins. Co., 98 NY2d 289, 295 [2002]).

También hemos considerado nulos aquellos contratos que involucran actividades ilícitas[5]. Nos negamos a permitir que un prestamista que cobraba intereses de usura recupere el capital (véase Szerdahelyi vs. Harris, 67 NY2d 42 [1986]) y nos negamos a permitir que un abogado sin licencia en Nueva York recaude honorarios por el trabajo realizado en esas circunstancias (véase Spivak vs. Sachs, 16 NY2d 163 [1965]). De igual manera, en Mount Vernon Trust Co. vs. Bergoff (272 NY 192 [1936]), con fundamento en el interés público, anulamos un contrato que era prácticamente fraudulento para la sociedad. Al abordar un contrato en el que un pagaré hecho a favor de un banco sería inaplicable contra su creador, explicamos que dicho "pagaré ficticio entregado a un banco, tenía la intención de formar parte de sus activos aparentes... esta es en sí misma una falsedad continua estimada para engañar al público" y menoscaba la estabilidad de los bancos, lo cual es un asunto de preocupación pública que se refleja en los sistemas de

[5] "Decisiones como estas no se basan en la búsqueda de un resultado equitativo en un caso particular, o en una estimación de cual resultado contribuirá más, de manera inmediata y práctica, a la aplicación de una ley o política pública en particular" (Balbuena vs. IDR Realty LLC, 6 NY3d 338, 364–365 [2006]). "Por el contrario, se basan en la sólida premisa de que los tribunales muestran un respeto insuficiente por sí mismos y por la ley cuando ayudan a una parte a beneficiarse de una actividad ilícita" (id. en 365).

supervisión reglamentaria para los bancos (id. en 196). Ningún interés de esta magnitud está implicado en este caso.

Aquí, la renuncia a un juicio declarativo es evidente e inequívoca, fue aprobada por partes expertas que negociaron en igualdad de condiciones, no incumplieron el tipo de interés de política pública que sobrepasaría la sólida política pública a favor de la libertad contractual. Aunque los demandantes argumenten lo contrario, simplemente no hay nada en nuestra legislación contemporánea, constitucional o jurisprudencial que indique que el interés en el acceso a acciones de juicio declarativo o, de manera más general, a un conjunto completo de opciones de litigio sin restricción, sea tan importante y fundamental que unas partes expertas y asesoradas en un contrato de arrendamiento comercial no puedan renunciar a ello. La Ley y Normas de Procedimiento Civil (Civil Practice Law and Rules, CPLR) 3001 le permite a un tribunal de primera instancia conceder juicios declarativos en el contexto de controversias procesables, pero de ninguna manera indica que las partes expertas no puedan renunciar voluntariamente al derecho de solicitar dicha reparación. Un juicio declarativo es un instrumento útil para proporcionar claridad en cuanto a las obligaciones de las partes y, en algunas circunstancias, puede permitir que las partes cumplan con un contrato que de otro modo podrían haber incumplido. El acceso a la reparación judicial declarativa beneficia a las partes, así como a la sociedad a disminuir controversias. Sin embargo, un juicio declarativo es meramente una forma de reparación disponible para los litigantes en la ejecución de un contrato. Al codificar el derecho a solicitar una reparación judicial declarativa, el legislador no dispuso ni expresa ni implícitamente que ninguna de las partes ni mucho menos arrendatarios comerciales

expertos pudieran renunciar a la solicitud de dicha reclamación.

Al examinar la reparación judicial declarativa, nuestra jurisprudencia explica sus beneficios para estabilizar la incertidumbre en las relaciones contractuales, pero tampoco expresa una política pública concreta tan importante que justifique ampliamente prohibir a las entidades comerciales renunciar libremente en sus negociaciones a la posibilidad de solicitar dicha reparación (véase p. ej. James vs. Alderton Dock Yards, 256 NY 298, 305 [1931]). Por el contrario, este Tribunal ya sostuvo en Kalisch-Jarcho, Inc. vs. Ciudad de Nueva York que una parte puede renunciar a su derecho de iniciar una acción de juicio declarativo a favor de un método alterno de resolución de conflictos (72 NY2d 727 [1988]). Allí, el Tribunal sostuvo que una acción de juicio declarativo presentada por un contratista de construcción estaba prohibida por una disposición del contrato que requería que el contratista usara un procedimiento administrativo para resolver conflictos a mitad del proyecto, posponiendo demandas por compensaciones adicionales hasta la finalización del proyecto (id.). El Tribunal llegó a esta conclusión a pesar de reconocer los beneficios de una reparación judicial declarativa para "resolver controversias procesables en cuanto a los derechos y obligaciones contractuales" (id. en 731).

La disponibilidad de reparación judicial declarativa puede alentar indirectamente a las partes a contratar libremente desde el principio, al saber que luego pueden obtener una aclaración judicial de sus obligaciones en el momento en que surja una controversia procesable. Sin embargo, una parte que haya escogido libremente renunciar al derecho de solicitar dicha reparación no podría haber confiado en tal expectativa; esa parte puede compensar la renuncia al exigir una mayor claridad en la interpretación de otros términos

contractuales para que los respectivos derechos y obligaciones de las partes se entiendan completamente antes de firmar el contrato. Independientemente, una parte puede acordar dicha renuncia durante las negociaciones del contrato para obtener un beneficio a título oneroso, como una cesión de contrato de arrendamiento o la inclusión de un periodo de reparación después de una notificación de incumplimiento. Las partes deben sopesar estas consideraciones al momento de elaborar un contrato que satisfaga sus necesidades individuales.

De manera crítica, en este caso la cláusula de renuncia en cuestión no impide el acceso a los tribunales, sino que deja disponibles otras vías judiciales por medio de las cuales se pueden decidir los derechos de los demandantes en virtud de los contratos de arrendamiento. La renuncia faculta a los demandantes para presentar defensas a las alegaciones de incumplimiento en procesos sumarios que se llevan a cabo en un tribunal civil, de conformidad con el artículo 7 de la Ley de Acciones y Procedimientos de Bienes Inmuebles (Real Property Actions and Proceedings Law, RPAPL), y específicamente establece que "es la voluntad de las partes que sus controversias se decidan a través de procesos sumarios". Como lo ha contemplado este Tribunal, el artículo 7 de la RPAPL "representa el intento del legislador de equilibrar los derechos de los propietarios y arrendatarios con el fin de disponer de procedimientos expeditos y justos para la resolución de controversias relacionadas con la posesión de bienes inmuebles" (caso de Mennella vs. Lopez-Torres, 91 NY2d 474, 478 [1998] [citas omitidas]). Por lo tanto, los contratos de arrendamiento reflejan la voluntad general de las partes de resolver sus controversias a través de procedimientos cuidadosamente establecidos para tal propósito. Además, la

renuncia no afecta la capacidad de los demandantes para solicitar indemnización por daños y perjuicios debido a incumplimiento contractual o asuntos de responsabilidad civil extracontractual.

De hecho, a pesar de la cláusula de renuncia, la revisión judicial disponible para los demandantes es más generosa aun que aquella de la que disponen las partes cuyos contratos contienen cláusulas de arbitraje; sin embargo, habitualmente nosotros exigimos el cumplimiento de cláusulas de arbitraje (véase p. ej. el caso de Nationwide Gen. Ins. Co. vs. Investors Ins. Co. of Am., 37 NY2d 91, 95 [1975]). Dichas cláusulas prohíben litigio plenario de controversias ante el tribunal; de acuerdo con el artículo 75 de la CPLR, cuando se emite un laudo arbitral, generalmente la única vía para la revisión judicial es por medio de un proceso sumario. Los tribunales pueden dejar sin efecto un laudo arbitral solo si "infringe una política pública sólida, es irracional o de manera evidente excede una restricción enunciada específicamente en la potestad del árbitro" y puede que no se interpreten las condiciones sustantivas del contrato o... se resuelvan los fundamentos de la controversia… incluso cuando el significado evidente o aun claro de los términos del contrato [fue] desestimado" por el árbitro (caso de United Fedn. of Teachers, Local 2, AFT, AFL- CIO vs. Bd. of Educ. of City School Dist. of City of New York, 1 NY3d 72, 79, 82-83 [2003] [comillas internas y citas omitidas]). Una cláusula de arbitraje, que no establece el acceso al tribunal para el litigio inicial de fondo y restringe la revisión judicial, es más restrictiva que la renuncia a un juicio declarativo en este caso, lo cual permite la resolución judicial de la controversia de las partes según el artículo 7 de la RPAPL que procede con una revisión de apelación completa.

Aunque las cláusulas de arbitraje restringen significativamente el acceso a los tribunales, también proporcionan "un medio eficaz y rápido de resolver controversias entre las partes interesadas que desean evitar las costas y retrasos que con frecuencia son inherentes al proceso judicial" (Maross Constr. vs. Central N.Y. Regional Transp. Auth., 66 NY2d 341, 345 [1985] [citas omitidas]). "Durante mucho tiempo la intención de la ley ha sido interferir lo menos posible en la libertad de las partes para acordar cumplir con ese objetivo" (caso de Siegel [Lewis], 40 NY2d 687, 689 [1976]). Esa intención se aplica de manera similar aquí donde las partes escogieron un proceso sumario como el medio principal para la resolución de sus controversias. El hecho de que permitamos que las partes renuncien al derecho a una revisión sustantiva de sus controversias ante el tribunal como consecuencia de la celebración de acuerdos de arbitraje respalda la conclusión a la que llegamos en este caso: no existe una política pública predominante que le impida a entidades expertas renunciar al derecho de iniciar una acción de juicio declarativo, el cual representa tan solo un instrumento para litigar una controversia.

La renuncia a un juicio declarativo no perdió validez porque de acuerdo con las circunstancias que se presentaron aquí, tuvo como consecuencia la imposibilidad de obtener el recurso Yellowstone. Hemos descrito al recurso Yellowstone como una "reparación creativa" que los tribunales inferiores crearon para ampliar la notificación y el periodo de reparación para los arrendatarios comerciales que se enfrentan con la resolución del contrato de arrendamiento (Graubard Mollen Horowitz Pomeranz & Shapiro vs. 600 Third Ave. Assoc., 93 NY2d 508, 514 [1999]). Como consecuencia del caso First Natl. Stores vs. Yellowstone Shopping Ctr. (21 NY2d 630 [1968]), los arrendatarios que

impugnaban las notificaciones de incumplimiento en acciones de juicio declarativo "desarrollaron la práctica de obtener una suspensión del período de subsanación antes de que expirara con el fin de mantener el contrato de arrendamiento hasta que pudiera resolverse el fondo de la controversia en el tribunal", y los tribunales han "aceptado mucho menos que la fundamentación jurídica que no es acorde con el nivel normal requerido "para la reparación judicial de conformidad con el artículo 63 de la CPLR (Post vs. 120 E. End Ave. Corp., 62 NY2d 19, 25 [1984]). Las solicitudes de recurso Yellowstone se hacen necesariamente ante el tribunal de primera instancia en lugar del tribunal civil, el cual carece de autoridad para otorgar medidas cautelares y, como tal, no puede obtenerse en un proceso sumario según el artículo 7 de la RPAPL. El recurso Yellowstone no es un fin en sí mismo sino un simple medio para mantener el estado actual al cobrar un periodo de subsanación contractual durante una acción pendiente, lo cual permite al arrendatario que pierda el fondo de la controversia del contrato de arrendamiento reparar el defecto y mantener el contrato de arrendamiento. En este caso, debido a que la renuncia del contrato de arrendamiento prohibió la acción de juicio declarativo de los demandantes, no había ninguna acción en curso para decidir los derechos de las partes y para justificar las medidas provisionales por medio de una orden de recurso Yellowstone. De hecho, el rechazo de la demanda hizo que la solicitud pasara a ser una discusión más teórica.

La imposibilidad de los demandantes en este caso para obtener el recurso Yellowstone no les impide presentar defensas en procesos sumarios que se hayan iniciado y, por lo tanto, defender sus derechos en virtud de los contratos de arrendamiento en caso de que las alegaciones de incumplimiento de los propietarios no tuvieran fundamento. Es

indiscutible que el propietario no puede desalojar a los demandantes sin iniciar un proceso sumario y establecer que los demandantes incumplieron sustancialmente los contratos de arrendamiento. En ausencia de tal procedimiento, los demandantes permanecen en posesión de los inmuebles y de acuerdo a los contratos de arrendamiento sus derechos no se ven afectados. Si las defensas de los demandantes están presentan defectos de fondo, —de hecho, si los demandantes incumplieron los contratos de arrendamiento— entonces su interés en el contrato de arrendamiento se extinguiría efectivamente según el lenguaje claro de los contratos de arrendamiento. Además, si los demandantes consideran que el propietario no está cumpliendo con sus respectivas obligaciones en virtud de los contratos de arrendamiento, pueden presentar una acción ante el tribunal de primera instancia por incumplimiento de contrato y solicitar un cumplimiento de lo estrictamente pactado. Por lo tanto, un recurso Yellowstone no es esencial para proteger los derechos de propiedad en un contrato de arrendamiento comercial que, por supuesto, se rigen por los términos y condiciones del contrato de arrendamiento negociado por las partes. Como lo ha reconocido este Tribunal, los recursos Yellowstone son instrumentos procesales útiles para los arrendatarios que buscan litigar notificaciones de incumplimiento (véase Graubard, 93 NY2d en 514). Sin embargo, no hay un fuerte interés social en la posibilidad de que las entidades comerciales soliciten tal reparación que podría justificar la anulación de la renuncia a un juicio declarativo que fue negociada en igualdad de condiciones, simplemente porque de manera incidental esto impidió el acceso al recurso Yellowstone.

Nada en nuestra ley o jurisprudencia sugiere lo contrario. En el contexto de propietario-arrendatario, el legislador ha convertido cierto tipo de derechos en

irrenunciables (véase p. ej. el artículo 5-321 de la Ley General de Obligaciones [derecho a solicitar daños y perjuicios por daños causados por la negligencia del propietario]; RPAPL artículo 235-b [derecho a la habitabilidad]; RPAPL artículo 236 [derecho de la sucesión de un arrendatario fallecido a ceder el contrato de arrendamiento cuando sea razonable]) pero no ha impedido que un arrendatario comercial renuncie a las medidas provisionales como el recurso Yellowstone. En particular, el legislador ha reconocido la utilidad del recurso de tipo Yellowstone para algunos arrendatarios residenciales.

El artículo 753(4) de la RPAPL (L 1982, cap. 870) otorga a los arrendatarios residenciales de la ciudad de Nueva York un periodo irrenunciable de reparación de diez días posteriores al fallo al final de un proceso sumario y, por lo tanto, ofrece un recurso para el arrendatario perdedor comparable al que se obtiene con un recurso Yellowstone ante el tribunal de primera instancia (p. ej., la posibilidad de reparar un incumplimiento después de que en una determinación judicial se establezca que el arrendatario incumplió el contrato de arrendamiento) (Publicación, 62 NY2d en 26). La decisión de otorgar este derecho exclusivamente a un grupo de arrendatarios residenciales indica que el legislador no vio este tipo de recurso como fundamental para ellos, al creer que sus derechos estaban protegidos de manera adecuada de conformidad con la ley existente, la cual incluía la posibilidad del recurso Yellowstone para aquellas partes que solicitaban oportunamente tal recurso. Al igual que ahora, en ese momento no había un precedente de apelación que sugiriera que no era posible que los arrendatarios comerciales renunciaran al derecho a solicitar dicha reparación al incluir un lenguaje claro para tal efecto en un contrato de arrendamiento acordado. Desde luego, el legislador era consciente de nuestra política pública sólida a favor de la libertad contractual, por lo que incluyó el derecho diseñado de

manera muy precisa entre un grupo de derechos expresamente declarados como irrenunciables. (RPTL 753[5]). De este modo, el legislador no hizo nada para cambiar el estado actual para los arrendatarios comerciales. Sin embargo, a pesar de la imposibilidad de los demandantes para obtener un recurso Yellowstone no estamos convencidos de que la renuncia voluntaria a un juicio declarativo por parte de este arrendatario comercial experto sea nula y en contra del interés público.

Aunque el derecho a iniciar una acción de juicio declarativo es un instrumento útil de litigio, no refleja un interés de política pública tan fundamental al cual las entidades comerciales asesoradas no puedan renunciar a cambio de otros beneficios o concesiones. Entidades como aquellas que forman parte de esta apelación están en una buena situación para administrar sus asuntos durante las negociaciones, y concluir lo contrario sería subestimar a las partes expertas y debilitaría sus relaciones contractuales, en contra de la política pública sólida de Nueva York a favor de la libertad contractual. Debido a que se puede exigir el cumplimiento de la renuncia a un juicio declarativo, la acción se desestimó de manera adecuada.

En consecuencia, la resolución judicial de la División de Apelaciones debe confirmar esta resolución, con las respectivas costas judiciales y el concepto solicitado a este tribunal no se respondió porque no fue necesario hacerlo.

Magistrado WILSON (salvamento de voto):

"En Nueva York, los contratos celebrados por partes en igualdad de condiciones, expertas y asesoradas generalmente son exigibles de acuerdo con su lenguaje sencillo en virtud de nuestra política pública que favorece la libertad contractual" (opinión mayoritaria en la sección 1). Estoy de acuerdo, pero ¿por qué? La tesis mayoritaria es

que el compromiso de nuestro estado con la libertad contractual es tan fuerte que no puede vencerse mediante políticas públicas contrarias a menos que, por ejemplo, el legislador haya penalizado el objeto del contrato (opinión mayoritaria en la sección 10) o haya establecido expresamente por ley una prohibición a la renuncia (id. en 9). Esa tesis tiene poco que ver con este caso. La política pública en juego aquí que nos obliga a rechazar las disposiciones contractuales que privan a una parte de la posibilidad de solicitar un juicio declarativo, es la libertad contractual en sí misma. Una disposición contractual que impide a una parte conocer oportunamente sus obligaciones contractuales, en lugar de obligar a las partes a apostar por lo estipulado en el contrato desvirtúa el contrato y con él, el beneficio de la sociedad de la libertad contractual.

En cualquier caso, la libertad contractual no es un derecho sin límites. No debe sobreponerse sobre cualquier otra protección que la ley brinde a los litigantes. La decisión mayoritaria de hoy tendrá como consecuencia la eliminación del "recurso Yellowstone", un precedente del derecho de common law que ha existido en Nueva York por más de medio siglo. El recurso permite a los arrendatarios comerciales determinar sus responsabilidades de conformidad con los términos y condiciones de sus contratos de arrendamiento sin correr el riesgo de desalojo. El recurso Yellowstone manifiesta una política pública de este estado y se basa en la determinación centenaria del legislador de que la política pública de Nueva York favorece a grandes rasgos la posibilidad de reparación judicial declarativa en lugar de litigios más prolongados, costosos y antagónicos.

Después de esta decisión, los propietarios y arrendadores de inmuebles comerciales

incluirán sin duda alguna una renuncia de juicio declarativo y de recurso Yellowstone en sus contratos de arrendamiento como cuestión de costumbre. Esas cláusulas les permitirán resolver los contratos de arrendamiento en función de un incumplimiento técnico o dudoso por parte de un arrendatario siempre que los cánones de arrendamiento en el vecindario hayan aumentado lo suficiente como para incitar a los propietarios a evadir sus obligaciones contractuales. La mayoría insiste en que su decisión representa la aplicación de una política pública bien establecida que respalda la libertad contractual. Esa noción de la prevalencia ilimitada de los derechos contractuales se basa en la jurisprudencia desacreditada desde la Gran Depresión. La decisión mayoritaria cambiará el panorama de la ley de arrendadores y arrendatarios, y de los vecindarios, en todo el estado durante las próximas décadas, sin una acción legislativa.

I

¿Qué significa "libertad contractual" y por qué nos importa? Puedo celebrar un contrato con cualquier persona sobre cualquier cosa, soy "libre" de contratar en ese sentido, incluso si el contrato no es legalmente exigible. Usted y yo podemos acordar cenar el próximo jueves y ambos podemos considerarlo como una ventaja; sin embargo, si uno de los dos decide cancelar, la sociedad no tiene interés en tratar ese acuerdo como exigible, permitiéndole demandarme por daños y perjuicios u obligándonos a cenar. Establecemos algunos acuerdos legalmente exigibles debido al beneficio social de hacerlo, no por el beneficio para las partes contratantes en sí. Por supuesto, las partes que llegan a un acuerdo legalmente exigible consideran que las negociaciones beneficiarán a cada una de ellas de manera individual, y la mayoría de las veces así será, pero eso también aplica para los acuerdos que no son legalmente exigibles.

Otro punto de vista desde el cual entender que la libertad contractual no es un derecho individual, sino que se basa en el beneficio para la sociedad en general, es el concepto de "incumplimiento por motivos de rentabilidad". Los daños y perjuicios por incumplimiento contractual no son punitivos; se calculan para hacer que la parte cumplidora sea compensada (véase p. ej. Freund vs. Washington Square Press, Inc., 34N.Y.2d 379 [1974]). Si la parte incumplidora puede utilizar sus bienes o servicios (socialmente) más allá de lo que requiere el contrato incluso después de compensar por completo a la parte cumplidora, eso es un resultado socialmente beneficioso: la parte cumplidora recibe el valor total de su negociación, la parte incumplidora gana más, y la sociedad se beneficia en el proceso porque el inmueble tiene un mayor uso. El propósito del incumplimiento por motivos de rentabilidad no es que la parte incumplidora también reciba un beneficio, es la motivación que impulsa a la parte incumplidora para que los recursos puedan aprovecharse al máximo.

Por lo tanto, la "libertad contractual" no puede entenderse propiamente como un derecho individual de las partes contratantes. "El comercio y las fábricas rara vez pueden prosperar por mucho tiempo en cualquier estado… en el cual la ley no respalde la voluntad de los contratos". (Adam Smith, La riqueza de las naciones, en 710 [versión en inglés]). El sistema de libre mercado está impulsado por el principio de que las partes contratantes lleguen a acuerdos que aumenten el bienestar social (producto, entendido como precio, cantidad y calidad) al maximizar sus intereses individuales mediante la negociación en un mercado en el cual existen múltiples compradores y vendedores y los costos de transacción son tan bajos como sea posible. La libertad contractual tiene una importancia fundamental en la sociedad porque crea derechos legalmente exigibles, sobre los cuales las partes

contratantes pueden actuar ahora con base en garantías sobre el futuro: los contratos son una manera en la que los agentes económicos pueden obtener cierta medida de seguridad acerca de un futuro que de otra manera sería incierto. "[...] La importancia principal del contrato legal es estipular un marco de referencia para casi todo tipo de organización grupal y para casi todo tipo de relación pasajera o permanente entre individuos y grupos". Karl N. Llewellyn, "What Price Contract? – An essay in Perspective ["¿A qué precio contratar? - Un ensayo en perspectiva"], 40 Yale L. J. 704, 736-37 (1931).

La libertad contractual se basa en el entendimiento de que "la estabilidad y la previsibilidad en asuntos contractuales es un valor jurisprudencial muy deseable" (Sabetay vs. Sterling Drug, 69 NY2d 329, 336 [1987]). "Las preocupaciones tradicionales del derecho contractual y del derecho de garantías en particular son la protección de la libertad contractual de las partes y *el cumplimiento de expectativas económicas razonables*" (Bellevue S. Assoc. vs. HRH Constr. Corp., 78 NY2d 282, 304 [1991] [énfasis añadido]). "Está claro que la política pública y los intereses de la sociedad favorecen la máxima libertad de contratación" (Diamond Match Co. vs. Roeber, 106 NY 473, 482 [1887]). "[Una] parte puede renunciar a un principio legal o a una ley, o incluso a una disposición constitucional promulgada para su beneficio o protección, cuando es exclusivamente una cuestión de derecho privado y no hay cuestiones de política pública o moral, y una vez hecho esto no puede invocar su protección con posterioridad" (Sentenis vs. Ladew, 140 NY 463, 466 [1893]). Sin embargo, "la renuncia no se permite cuando se trata de una cuestión de competencia o de derechos fundamentales y causaría daños a la sociedad" (People ex rel. Battista vs. Christian, 249 NY 314, 318 [1928]).

La cuestión de si el estado opta por exigir el cumplimiento de ciertos tipos de contratos gira en torno a si la exigibilidad en general promovería los intereses de la sociedad. Nuestras reglas sobre las formalidades contractuales, pruebas orales, contraprestación, perjuicios por gastos asumidos en fase precontractual, fraude, coerción, ilegalidad, entre otras, son maneras de limitar exigibilidad a los tipos de contratos de los cuales la sociedad normalmente se beneficiará. Por ejemplo, desde 1677, las jurisdicciones de derecho de common law como Nueva York han tenido alguna versión de la ley de fraude, la cual requiere que ciertos tipos de contratos se realicen por escrito para que se pueda exigir el cumplimiento de los asuntos altamente relevantes (matrimonio, contratos a largo plazo, etc.). (Véase Ley General de Obligaciones, artículo 5-701). De manera similar, la ley de pruebas orales sirve para aclarar las obligaciones al limitar el alcance de una controversia contractual a su redacción.

II

Los juicios declarativos constituyen otro hilo vital en esta cuerda. Debido a que el futuro es difícil de predecir, ya que incluso los mejores esfuerzos de precisión en el lenguaje pueden resultar imprecisos, porque las partes contratantes algunas veces evitan negociar deliberadamente un asunto polémico con la expectativa de que nunca sucederá durante la vigencia del contrato, y como consecuencia de que las motivaciones cambian, desde tiempos inmemoriales a los tribunales se les ha pedido interpretar los contratos. Las acciones de juicio declarativo permiten a las partes contratantes conocer sus derechos y obligaciones de conformidad con un contrato anterior al incumplimiento (NY Pub. Interest Research Group, Inc. vs. Carey, 42 NY2d 527, 530[1977] [“cuando una de las partes considera tomar ciertas medidas puede surgir una controversia real antes de que ocurra

cualquier incumplimiento o violación y antes de que haya alguna necesidad o derecho de recurrir a medidas coercitivas. En tal caso, todo lo que se requiere para asegurar el cumplimiento de la ley es que los tribunales declaren los derechos y obligaciones de las partes para que puedan actuar como corresponde. Esa es la teoría de acción de juicio declarativo autorizada por la CPLR 3001"]; véase también el 44 Informe 44.º del Colegio de Abogados del Estado de Nueva York, 194-96 [1921] ["que felicita] a la gente de Nueva York por la adopción de esta política ilustrada" que "permite a las partes considerar una diferencia de opinión honesta con sus derechos, especialmente en virtud de sus documentos escritos… sin convertirse en enemigos ni someterse a un gasto extenso".). Ese conocimiento elimina una incertidumbre sustancial (James vs. Alderton Dock Yards, Ltd., 256 NY 298, 305 [1931] ["El propósito general del juicio declarativo es cumplir con algún fin práctico para calmar o estabilizar una relación de derecho incierta o controvertida, ya sea en cuanto a las obligaciones actuales o futuras".]). La incertidumbre es en sí misma una forma de costo de transacción que la sociedad tiene un claro interés en minimizar. Como un simple ejemplo, la capacidad de una parte para determinar si un incumplimiento sería rentable depende de su conocimiento así como de la interpretación del contrato[1]. "[...] Las reparaciones contractuales deben... dar a la parte de un contrato un incentivo para cumplir [su] promesa a menos que el resultado sea un uso ineficiente de los recursos" (Richard A.

[1] Aquí, por ejemplo, tanto el propietario como el arrendatario reclaman que el otro es responsable de subsanar varios incumplimientos del contrato de arrendamiento, lo que incluye la instalación actual de un sistema de ventilación. Si el arrendatario sabe que es responsable, podría decidir la resolución del contrato de arrendamiento; el propietario aparentemente tiene mejores ofertas para el lugar, de modo que el arrendatario podría retirarse sin ninguna responsabilidad y el propietario podría rentar el lugar a un arrendatario que pague más. Si el propietario sabe que es responsable, entonces puede determinar si es más rentable indemnizar al arrendatario y arrendar el lugar a un arrendatario que pague más o continuar bajo los términos y condiciones del contrato de arrendamiento existente.

Posner, Economic Analisis of the Law, 56 [1972]).

Aunque someramente es un asunto privado entre las partes contratantes, la posibilidad de juicios declarativos tiene impactos sociales de gran alcance. Las partes pueden celebrar contratos que parezcan bastante claros, únicamente para constatar que los términos y condiciones son ambiguos (véase p. ej., el famoso caso "inigualable", Raffles vs. Wichelhaus, 2 H. & C. 906, 159 Eng. Rep. 375 [Exh. 1864]). Debido a que la incertidumbre a menudo aparece, la sociedad tiene un interés fuerte en adoptar procedimientos que permitan una determinación oportuna y concluyente que mantenga el objeto de la negociación de las partes. Anteriormente hemos elogiado las virtudes de la estabilidad y la certeza, en especial con respecto a los bienes inmuebles (véase Estate of Thomson vs. Wade, 69 NY2d 570, 574 [1987]). Aquí, la mayoría ha combinado el objeto de la negociación (el arrendamiento del lugar a una tienda de abarrotes) con una disposición procesal (la prohibición de una acción de juicio declarativo). El objeto del contrato, el arrendamiento del lugar, estipula el valor social. La disposición que prohíbe al arrendatario solicitar un juicio declarativo impide ese gran valor, al obligar a una parte (en este caso, el arrendatario) a negarse a reemplazar el sistema de ventilación y arriesgarse a ser desalojado si un tribunal posteriormente determina que el arrendatario fue responsable, o a reemplazar el sistema de ventilación (si está dentro de los medios del arrendatario) y después instituye una acción de algún tipo para recuperar los costos de hacerlo si un tribunal determina con posterioridad que el propietario era responsable. Debido a que la responsabilidad legal permanece en el limbo cuando el arrendatario debe tomar esa decisión, se elimina la posibilidad de que el arrendatario considere un incumplimiento por motivos de rentabilidad (p. ej., trasladarse a un lugar diferente podría ser menos costoso que pagar por un sistema

de ventilación compatible, por lo cual el propietario estaría contento porque podría rentar el lugar a otros a un precio más alto) y el beneficio de la sociedad se pierde en el balance. Sí, tanto el uso del lugar como la prohibición de juicio declarativo aparecen en el contrato, pero el beneficio de la sociedad deriva del primero y se vence por el segundo. La posibilidad de juicios declarativos aumenta la estabilidad de los contratos, permite que se realicen cambios del estado actual al ser hechos de manera informada y permite que las ganancias en eficiencia de la libertad contractual se extiendan por todo el sistema económico, el propósito fundamental de la "libertad contractual".

Una renuncia al derecho de juicio declarativo, por el contrario, genera inestabilidad al desvirtuar los propósitos y beneficios de la libertad contractual, y la aplicación de dicha renuncia incumple esa política pública. La posibilidad de obtener una reparación judicial declarativa es parte de la política pública de nuestro estado ya que es un elemento esencial de la política de libertad contractual. No deberíamos permitir que las partes contratantes, aunque expertas, descarten juicios declarativos que les permitirían solicitar la regla de prueba oral o el régimen de prescripciones. El principal error de la mayoría proviene de tratar la "libertad contractual" como si fuera un derecho individual, cuando su razón de ser es el avance económico de la sociedad.

Ese error es el mismo error conceptual cometido durante la jurisprudencia Lochner, en la cual el tribunal de primera instancia de los Estados Unidos engrandeció la libertad contractual como si fuera un derecho personal, en lugar de un elemento importante para la formación y el avance de la sociedad en conjunto. (Lochner vs. New York, 198 US 45 [1905]). Allí, el tribunal de primera instancia anuló una ley que promulgó el legislador de Nueva York para evitar el exceso de trabajo de los panaderos. Aquí, la mayoría respeta una

disposición contractual que le impida al arrendatario (y en particular, solo al arrendatario) solicitar una declaración judicial de los derechos y obligaciones de las partes en un contrato de arrendamiento. La decisión de hoy, como en Lochner, se basa en el "pensamiento jurídico de una concepción individualista de la justicia, la cual exagera la importancia de los bienes y del contrato [y] sobredimensiona el derecho privado a expensas del derecho público" (Roscoe Pound, "Liberty of Contract" ("La libertad contractual"), 18 Yale L.J. 454 a 457 [1909]).

III

Cuando las obligaciones contractuales no son claras y están en disputa, un juicio declarativo ofrece a las partes una solución concluyente, sin el establecimiento de ninguna indemnización por daños y perjuicios o un requerimiento judicial. La posibilidad de una interpretación previa al incumplimiento (o previa a la exigibilidad) de los derechos y obligaciones en disputa se incorpora, mucho antes por el derecho de common law[2]. En el derecho procesal romano, así como en el nuestro, las acciones legales daban como resultado un juicio ejecutivo, denominado un *condemnatio*, el cual decretaba que se debía hacer algo, incluso que se debían pagar las indemnizaciones por daños y perjuicios (véase Edwin M. Borchard, *The Declaratory Judgment – A Needed Procedural Reform* (*La acción de juicio declarativo, una reforma procesal necesaria)*, 28 Yale L.J. 1, 10 [1918]). Con frecuencia, se podía solicitar un proceso preliminar, conocido como *prae-judicium*, en el cual las partes solamente pedían que se resolvieran cuestiones de hecho o de derecho,

[2] Incluso antes de la época romana, el rey Salomón emitió una sentencia declarativa en la que determinó los derechos de las partes sin requerir que una madre putativa se fugara con el niño (Reyes 3:16-28).

lo que resultaba en declaraciones de ley conocidas como *pronunciato* (id. en 11). Esos procesos preliminares resultaban tan ventajosos que después de un tiempo se convirtieron en acciones independientes, sin ninguna solicitud de *condemnatio* (id.).

La acción de juicio declarativo continuó desarrollándose en Italia durante la edad media, lo cual incluía la creación de acciones declarativas negativas o acciones para declarar que otro no tiene una reclamación en contra del demandante (id.). Tras la "recepción" del derecho romano en Europa central en 1495, se dieron a conocer ambas formas de juicio de juicio declarativo (id.). El juicio declarativo de la edad media se abrió paso por primera vez en los países de derecho de common law por medio de Escocia, con casos de "declarante" que se remontan a los años 1500 (id. en 21). Inglaterra adoptaría una forma de juicio declarativo en 1852, con una versión muy parecida a la que hoy conocemos y que se adoptó en 1883 (id. en 25).

Esa historia no representa un asunto lejano. El artículo del profesor Borchard de 1918 fue el primer escrito en los Estados Unidos sobre juicios declarativos; tres años después, el Colegio de Abogados del Estado de Nueva York exaltó las ventajas de los juicios declarativos, mencionó esa historia y la obra del profesor Borchard (Colegio de Abogados del Estado de Nueva York, actas de la 44.ª reunión anual, 194-96 [1921]). El año siguiente, 1922, cuando el legislador de Nueva York promulgó por primera vez la Ley de Procedimiento Civil, una parte de esa ley autorizó los juicios declarativos (véase por lo general, Louis S.Posner, "Declaratory Judgments in New York", ("Juicios declarativos en Nueva York"). St. John's Law Review: vol. 1: n.º 2, articulo 2. [1927]). Poco después, el gobierno federal y muchos otros estados crearon legislativamente el derecho a solicitar juicios declarativos. A diferencia de diversos estados que basaron su legislación en la

Comisión sobre la Ley Uniforme del Juicio Declarativo de la Legislación Estatal Uniforme, la ley de juicio declarativo de Nueva York otorgó a los tribunales una amplia libertad de acción para realizar este tipo de juicios), "al basarse en la teoría de que los tribunales deben tener los poderes más amplios posibles para que su discreción en virtud de la ley sea ilimitada y que, en consecuencia, sean libres de elaborar sus propias reglas a medida que puedan surgir imprevistos" (id.). La implementación de Nueva York del juicio declarativo fue tan rápida que no existe un historial legislativo formal. En su ausencia, los antecedentes de la contraparte federal, aprobada poco después, son instructivos. Tanto los Informes del Senado como los Informes de la Cámara señalan que Inglaterra tuvo una ley de juicio declarativo en 1852 y que en Escocia había existido durante casi 400 años (Informe del Senado 1005, 73.º Cong, 2.ª sesión en 4; Informe de la Cámara 1264, 73.º Cong., 2.ª sesión). Ambos citan al profesor Borchardy la historia que relató en su obra (id.). Los informes relatan un movimiento rápido y sustancial: entre 1919 y el Informe del Senado de los Estados Unidos sobre la Ley de Juicio Declarativo, 34 estados y territorios habían aprobado sus propias leyes sobre juicio declarativo (Informe del Senado 1005, 73.º Cong., 2.ª sesión en 4). El Informe del Senado señala que nuestro magistrado ponente Benjamín Cardozo fue uno de los principales defensores que apoyó la Ley Federal (véase id. en 1-2).

Sabemos que el derecho de common law permitía demandas que eran juicios declarativos *de facto* mucho antes de que esta oleada de juicios declarativos aumentara. Las demandas para establecer la validez de un título, declarar el estado civil, declarar la validez de un fideicomiso o para declarar la legitimidad de menores son juicios declarativos de uno u otro tipo. Los defensores de incrementar los juicios declarativos

entendieron esto (véase id. en 4). Cuando analizaron la historia de manera detallada, la Ley de Procedimiento Civil 473 actualmente incorporada en la CPLR 3001 no representa el inicio de juicios declarativos en este estado, sino más bien una expansión y respaldo legislativo de un derecho con una historia legal profunda.

IV

La mayoría presenta varios argumentos sobre por qué, "bajo las circunstancias de este caso", debemos exigir el cumplimiento del acuerdo de las partes que prohíbe a los tribunales hacer una declaración de sus derechos y obligaciones: (A) prohibir la acción judicial declarativa no excluye todos los recursos a los tribunales; (B) los acuerdos de arbitraje son exigibles y estos representan un obstáculo mayor para los tribunales que la eliminación de juicios declarativos; (C) se puede renunciar a muchos derechos constitucionales y legales, por lo tanto el derecho a un juicio declarativo también debe ser renunciable; y (D) "solo un grupo limitado de intereses de política pública se considera lo suficientemente fundamental como para superar la política pública a favor de la libertad contractual". A continuación, abordo cada uno de estos argumentos.

A

Al observar "[...] de manera crítica, la cláusula de renuncia en cuestión en este caso no impide el acceso a los tribunales, sino que deja abiertas otras vías judiciales", la mayoría reconoce que la política pública anularía una disposición contractual que excluyera a las partes contratantes de todas las formas de resolución judicial o cuasijudiciales (arbitral). Tal concesión tiene sentido, concuerda con nuestros casos que anulan los acuerdos de arbitraje que son contrarios al derecho de common law (discutido más adelante) y reafirma el error principal de la tesis mayoritaria: la libertad contractual no es meramente un derecho

individual (si así lo fuera, permitiríamos que las disputas contractuales se determinaran por cualquier medio que las partes hayan acordado, incluso si no se acordó ningún medio). En lugar de ello, los acuerdos que serán exigibles y vinculantes para la sociedad son aquellos que generalmente mejoran la producción para la misma, debido a que la libertad contractual se basa en su beneficio para la sociedad. Aunque la cláusula en cuestión no prohíbe de manera absoluta la revisión judicial, la impide en razón de una clara transgresión a la política pública y al derecho de common law. Desde el momento en que el legislador promulgó la ley de juicio declarativo a través de su materialización actual mediante la CPLR 3001, la ley siempre otorgó a las partes el derecho a solicitar juicio declarativo "ya sea que se exigiera o no una reparación judicial adicional". Por lo tanto, cuando la mayoría depende de la disponibilidad de otras vías de reparación como la razón para exigir el cumplimiento de una cláusula que prohíbe los juicios declarativos, infringe el mandato expreso del legislador: puede hacerse uso de las acciones declarativas independientemente de la disponibilidad de otras vías para la revisión judicial. Nuevamente, debido a que la sociedad tiene un interés en el establecimiento de las obligaciones contractuales de las partes y como el interés es la base para dedicar los recursos de la sociedad para exigir el cumplimiento de los contratos en primer lugar, la política pública exige que tales cláusulas sean inexigibles[3]. El interés público en la

[3] La mayoría basa su argumento en el caso James vs.Alderton Dock Yards and Kalisch-Jarcho (opinión mayoritaria en la sección 12), lo cual es inapropiado. En James, confirmamos el rechazo de la reparación judicial declarativa como parte del ejercicio adecuado de la discreción del tribunal de primera instancia: "el uso de un juicio declarativo, aunque discrecional con el tribunal, depende sin embargo de los hechos y circunstancias que lo hacen útil y necesario" (James vs. Alderton Dock Yards, Ltd., 256 NY 298, 305 [1931]). Del mismo modo, en Kalish-Jarcho (72 NY2d 727 [1988]), el contrato entre la ciudad y el contratista requería que el contratista continuara con el trabajo incluso si la obligación de hacerlo fuera objeto de disputa, sujeto al pago por el trabajo extra al final del contrato. El rechazo nuevamente fue por razones discrecionales. Ninguno de los

reparación judicial declarativa es evidente en casos como este, que implican un contrato de arrendamiento comercial. La certeza y la estabilidad en los asuntos contractuales de una tienda de abarrotes del vecindario implican consecuencias para los residentes y empleados, no solamente para el tendero. La mayoría permite a las partes renunciar a esos beneficios sociales por disposición contractual, algo que nosotros nunca permitiríamos en el caso del régimen de prescripciones o de la normativa sobre admisibilidad de testimonios orales, a pesar de que los beneficios de esta última son más abstractos y atenuados.

B

La facultad que otorga el derecho de common law para acceder a una resolución judicial de disputas contractuales es lo suficientemente fuerte como para ser superada por medio de una acción legislativa (interpretada de manera estricta) o por una modificación judicial del derecho de common law basada en una política pública más importante. En ese sentido, la perspectiva de la mayoría es contraria a lo anterior, toda vez que supone en cambio que las partes son libres de evitar la resolución judicial (y, con el arbitraje ahora firmemente establecido por ley, cuasijudicial) de disputas si así lo desean.

Desde la opinión mayoritaria, resulta difícil comprender que el derecho de common law de Nueva York condenara las cláusulas de arbitraje como contrarias a la política pública, y por lo tanto, inexigibles, porque los acuerdos de arbitraje tenían la intención de evitar a las partes tener que recurrir a los tribunales (Meacham vs. Jamestown, F. & C. R.

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casos respeta la validez de una disposición que pretende extinguir el derecho a solicitar una declaración ya que en esos casos los contratos no contaban con dicha disposición. Incluso si a la disposición en cuestión aquí la consideráramos como nula y en contra de las políticas públicas, nada evitaría que el tribunal de primera instancia rechazara la reparación judicial declarativa o el recurso Yellowstone como un ejercicio propio de su discreción.

Co., 211 NY 346, 354 [1914] [el magistrado Cardozo coincide con lo siguiente: " si la competencia va a sustituirse a través de un contrato, debemos someternos a que puede haber errores judiciales que puedan surgir de estas causas y otras similares. Es cierto que algunos jueces han manifestado la creencia de que las partes deben ser libres de contratar sobre los asuntos que deseen. En este estado la ley lleva mucho tiempo establecida en sentido contrario"]). Desplazar la competencia por medio de un contrato es precisamente lo que la mayoría busca legitimar al teorizar que una parte podría obtener "un beneficio valioso, como una concesión de arrendamiento" a cambio de renunciar al derecho a un juicio declarativo (opinión mayoritaria en la sección 13). De la misma manera una parte podría obtener el mismo beneficio al renunciar a toda resolución judicial y arbitral de disputas contractuales o al renunciar al régimen de prescripciones o a las normas probatorias. Por lo tanto, ni el beneficio para una parte ni la expectativa de las partes determina si se incumple la política pública.

La política de Nueva York era acorde con otros tribunales de common law, los cuales durante siglos habían sido profundamente recelosos del arbitraje, lo cual se remonta hasta Inglaterra (véase Angelina M. Petti, Note, *Judicial Enforcement of Arbitration Agreements: The Stay-Dismissal Dichotomy of FAA sección 3*, 34 Hofstra L. Rev. 565, 570-71 [2005]). Nueva York estuvo a la vanguardia del cambio de actitud a nivel nacional hacia las cláusulas de arbitraje con la Ley de Arbitraje, aprobada en 1920, la cual sirvió como base para la ley federal aprobada cinco años después. El Tribunal de Apelaciones aceptó esa derogación legislativa del derecho de common law, aunque con una fuerte advertencia: "La nueva norma no significa que haya una inquisición en lugar de un juicio, y que las pruebas desconocidas para las partes y obtenidas sin previo aviso puedan

convertirse en la base del juicio" (Stefano Berizzi Co. vs. Krausz, 239 NY 315, 319 [1925] [El magistrado Cardozo que redacta para el Tribunal]).

Dado lo anterior, abordar el argumento mayoritario acerca de los acuerdos de arbitraje no representa dificultad. El legislador modificó el derecho de common law en 1920 para hacer que los acuerdos de arbitraje fueran exigibles, en contra de una ley general que los anulaba por ser contrarios a la política pública. Al disponerse expresamente que la reparación judicial declarativa es posible "independientemente de que se exija o no una reparación adicional", el legislador nunca dispuso que las partes privadas pudieran contratar de otra manera. Paradójicamente, la mayoría ahora justifica la eliminación contractual de la concesión del legislador al confiar en la "disponibilidad [...] de otras vías judiciales" (opinión mayoritaria en la sección 13).

Las opiniones mayoritarias sobre el arbitraje ignoran la historia anterior y, por lo tanto, invierten de manera errónea la presunción en contra de la derogación del derecho de common law (Fitzgerald vs. Quann, 109 NY 441, 445 [1888] ["para que la regla se establezca de forma sólida y se acate de forma universal, deben interpretarse estrictamente las leyes que cambian el derecho de common law, y no debe derogarse más allá de lo que estrictamente lo exija la importancia del lenguaje claro utilizado en las leyes"]; Morris vs. Snappy Car Rental, 84 NY2d 21, 28 [1994] ["es innegable con respecto a las promulgaciones legislativas en derogación del derecho de common law… que se considera que ellos abrogan el derecho de common law solo en la medida que lo requiera el significado claro del lenguaje legal"]; Artibee vs. Home Place Corp., 28 NY3d 739, 748 [2017] ["debido a que la CPLR 1601 es una ley que deroga el derecho de common law, debe interpretarse rigurosamente"]). El derecho de common law siempre ha sido receloso

de las cláusulas que buscan limitar el acceso a los tribunales. Las historias de las cláusulas de arbitraje demuestran exactamente lo opuesto de lo que ha concluido la opinión mayoritaria.

C

El hecho de que ciertos derechos que se otorgan a los individuos sean renunciables es cierto, pero poco interesante e irrelevante para este análisis[4]. Los trabajadores de la televisión pueden cambiar sus descansos legales de comida a través de negociación colectiva (Am. Broadcasting Cos. vs. Roberts, 61 NY2d 244 [1984]), y los maestros

[4] La observación mayoritaria de que el legislador ha especificado ciertos tipos de acuerdos como nulos y en contra de la política pública (opinión mayoritaria en la sección 9) es cierta pero irrelevante. Nadie discute la capacidad del legislador para hacerlo (consulta, entonces, si la supuesta fuerza de la libertad contractual es tan grande como lo afirma la mayoría), pero la capacidad del legislador para declarar nulos los términos contractuales en contra de la política pública no inhabilita al derecho de common law para hacerlo también. Los casos que la mayoría cita para sustentar el planteamiento según el cual el hecho de que el legislador no impida una renuncia es "un factor significativo que va en contra de la anulación de un término contractual por razones de política pública" (id. en 10) no respaldan en absoluto este planteamiento. El caso Ballentine vs. Koch (89 NY2d 51 [1996]) no contiene tal declaración, rechazó la demanda de los demandantes porque "ellos impugnan como un aspecto inexigible de la legislación que fue necesario para la creación de los derechos que solicitaban para exigir el cumplimiento", y rechazaron su argumento de la cláusula contractual. El caso de Abramovich vs. Board of Educ. of Cent. School Dist.N.º1 of Towns of Brookhaven & Smithtown (46 NY2d 450 [1979]) no es un caso en el cual el legislador guardó silencio; por el contrario, concluimos que la renuncia no fue en contra de la política pública porque la ley expresamente "autorizó la renuncia debido a la clara negligencia" y la "renuncia sirvió como intercambio de favores para los beneficios compensatorios". El caso de Feinerman vs. Board of Coop. Educ. Servs. of Nassau County (48 NY2d 491 [1979]) no dice nada acerca de la inacción legislativa, sino que es simplemente una continuación de Abramovich que concluye que el profesorado ocasional tiene, *con mayor motivo*, menos derechos sobre el inmueble que el profesorado permanente y, por consiguiente, también pueden renunciar a los derechos establecidos como renunciables en Abramovich. Únicamente Slayko menciona la inacción legislativa, pero lo condiciona expresamente al rechazo del intento del demandante de equiparar el campo altamente regulado de seguros de automóviles al seguro del propietario: "los casos que involucran cobertura de seguro de automóvil, un área en la cual la relación contractual y muchos otros de sus términos y condiciones están prescritos por la ley, ofrecen una base débil para la generalización sobre las restricciones que la política pública impone a otros contratos de seguro" (Slayko vs. Sec. Mut. Ins. Co., 98 NY2d 289, 295 [2002]).

pueden renunciar a la titularidad de las protecciones de la Ley de Educación (caso de Abramovich vs. Board of Educ. of Cent. School Dist. N.º1 of Towns of Brookhaven & Smithtown, 46 NY2d 450 [1979]). Esos derechos son personales y dejamos que cada persona determine si se beneficiaría personalmente al hacer valer un derecho o al renunciar a esos derechos en una situación particular. Como se explicó anteriormente, la libertad contractual no es meramente un derecho individual; es un motor social para el crecimiento y la estabilidad.

Un acusado puede preferir testificar que guardar silencio; otro puede decidir lo contrario. A la sociedad le da igual la decisión que se tome, siempre que sea consciente y voluntaria. Sin embargo, a la sociedad le interesa el hecho de que las partes contratantes puedan obtener un establecimiento rápido de sus derechos y obligaciones antes de que ellos deban o puedan tomar acciones que estarían mejor informadas (y a menudo diferentes) con una declaración en mano. Nosotros como sociedad no nos beneficiamos ni nos vemos afectados por la decisión del demandado; nos vemos afectados cuando la elección de una parte contractual se basa en conjeturas sobre los derechos contractuales, y nos beneficiamos cuando las partes contractuales toman decisiones informadas por conocimiento de sus derechos y obligaciones. En efecto, el hecho de que la mayoría acepte tácitamente que las partes no pueden renunciar contractualmente a todas las revisiones judiciales y cuasijudiciales —como nuestras decisiones de derecho de common law que anulan las cláusulas de arbitraje antes de que el legislador intervenga— demuestra la diferencia fundamental entre los derechos renunciables que la mayoría señala y la cláusula que prohíbe reparación judicial declarativa que se cuestiona en este caso.

D

La proposición de que solo un "grupo limitado de intereses de política pública" es lo suficientemente fuerte como para superar la libertad contractual es errónea e irrelevante aquí. Es errónea por la siguiente razón: la mayoría de personas respetuosas de la ley no firman acuerdos contrarios a la política pública. Innumerables partes celebran acuerdos que incumplen las leyes civiles y penales; esas leyes incorporan miles de políticas públicas, pero esas partes no acuden al tribunal para solicitar el cumplimiento de acuerdos para traficar drogas o personas o para solicitar indemnización por daños y perjuicios de un negocio ilícito de acciones que resultó mal. En lugar de la afirmación general de la mayoría, una declaración más precisa sería que hay un número reducido de casos en los que los tribunales han anulado un acuerdo en contra de la política pública porque esa circunstancia surge solo cuando el supuesto incumplimiento de la política pública se considera que es inminente.

La proposición mayoritaria también es irrelevante en este caso: describe cuando una política pública distinta de la libertad contractual es suficiente para sobrepasar esta última. En este caso, el asunto es si la política pública subyacente a la libertad contractual por sí misma anula la presunta prohibición de juicio declarativo, y no la cuestión de si alguna política pública distinta la anula. Como se analizó anteriormente, la libertad contractual es fundamental debido a los beneficios que resultan para la sociedad, no por ningún derecho individual para que el gobierno exija el cumplimiento de los acuerdos entre las partes. Como lo reconoció el legislador cuando dispuso una declaración de derechos independientemente de la existencia de otros recursos, la sociedad se beneficia cuando las disputas entre las partes contratantes pueden resolverse por medio de una declaración de derechos y se perjudica cuando las partes deben conjeturar y actuar bajo su

responsabilidad.

V

Este caso ofrece una ilustración concreta de por qué la política pública que subyace a la libertad contractual requiere anular las disposiciones contractuales que prohíben juicios declarativos. En el año 2010, 159 MP Corp. y 240 Bedford Ave Realty Holding Corp. (en adelante denominados conjuntamente "MP") celebraron contratos de arrendamiento por veinte años para local comercial y espacio de almacenamiento con el fin de gestionar una tienda de abarrotes en el sector Williamsburg de Brooklyn. Dos años después, el arrendador, BFN, vendió el inmueble a Redbridge Bedford, LLC. En el año 2014, Redbridge Bedford envió a MP una "notificación de diez (10) días para reparar incumplimientos". La notificación alegaba que en el lugar se habían realizado trabajos sin las debidas aprobaciones de las agencias gubernamentales, que el establecimiento de la tienda incumplía los términos y condiciones del contrato de arrendamiento, que a las agencias gubernamentales se les había negado de manera inadecuada el acceso a las instalaciones para inspeccionar el sistema de riego, y que el sistema de ventilación incumplía el contrato de arrendamiento y se había tenido que eliminar. MP impugna todos los incumplimientos, y afirma que dependen de interpretaciones erróneas del contrato de arrendamiento o errores de hecho.

MP presentó una demanda verificada en la que incluyó cuatro pretensiones: (1) una solicitud para declarar que el contrato de arrendamiento estaba vigente y que no se habían producido incumplimientos; (2) una solicitud para evitar que Redbridge Bedford tomara cualquier medida para resolver el contrato de arrendamiento; (3) una solicitud para evitar que Redbridge Bedford reclamara la existencia de infracciones, si es que las hubo, a las

que él y BFN habían dado su consentimiento; y una solicitud de indemnización por daños y perjuicios. Para mantener el status quo, MP también solicitó un recurso Yellowstone, el cual afectaría el periodo de reparación durante el transcurso de la acción.

Redbridge Bedford solicitó un juicio sumario de conformidad con lo siguiente: "el mero comienzo de la acción de juicio declarativo constituía un fundamento contractual para resolver los contratos de arrendamiento" (159 MP Corp. vs. Redbridge Bedford, LLC, 160AD3d 176, 181 [2.º Dept. 2018]). Redbridge Bedford se basó en la disposición contractual que indica que MP:

> "renuncia a su derecho de iniciar una acción de juicio declarativo con respecto a cualquier disposición de este contrato de arrendamiento o en relación a cualquier notificación enviada en virtud de las disposiciones de este contrato de arrendamiento. Cualquier incumplimiento de este parágrafo constituirá un incumplimiento sustancial de las obligaciones del arrendamiento y será motivo para la resolución inmediata de este contrato de arrendamiento. Además, se acordó que en el caso de que el arrendatario solicitara una medida cautelar y fuera otorgada, el propietario tendrá derecho a recuperar las costas por oponerse a dicha solicitud o acción, lo que incluye los honorarios de abogado que él efectivamente asuma, en caso de que sea voluntad de las partes que en adelante sus disputas se resuelvan a través de procesos sumarios".

Tanto el Tribunal de Primera Instancia como la División de Apelaciones denegaron la solicitud de recurso Yellowstone con fundamento en la disposición contractual anterior.

El recurso Yellowstone surge del caso First Natl. Stores, Inc. vs. Yellowstone Shopping, Ctr., Inc. (21 NY2d 630 [1968]). En ese caso, decidimos que el hecho de que un arrendatario no obtuviera una orden de restricción temporal antes de la expiración del periodo de reparación de 10 días establecido en el contrato de arrendamiento, privó al tribunal de la facultad de extender el periodo de reparación (id. en 637-38). Al hacerlo, aprobamos de manera implícita lo que se conocería como el recurso Yellowstone, el cual

permite al tribunal suspender la ejecución de un periodo de reparación para que los arrendatarios puedan obtener una declaración sobre la existencia de un supuesto incumplimiento en el contrato de arrendamiento y mantener la posibilidad de reparar dicho incumplimiento una vez que sus obligaciones hayan sido establecidas. El recurso Yellowstone es un complemento importante a un tipo de acción de juicio declarativo, en el cual un arrendatario en riesgo de desalojo basado en reclamos de incumplimiento que son discutibles puede obtener una resolución judicial de deliberación antes de decidir si repara, no preserva obligación alguna de reparar o acepta el desalojo. Aunque la disposición CPLR 3001 (y su antecesora) no menciona la posibilidad de extensión judicial de un periodo de reparación contractual, explicamos que la "reparación judicial declarativa es *sui géneris* e involucra tanto al *common law* como al derecho de *equity*… De este modo, en un caso idóneo un tribunal tiene la máxima libertad para elaborar su fallo de conformidad con las necesidades de la ocasión" (21 NY2d 630, 637 [1968] [en el que se cita a Borchard, Declaratory Judgments (2.ª ed.), pág. 239]).

MP ha puesto en funcionamiento una tienda de abarrotes en un vecindario que ha experimentado y continúa experimentando una gentrificación acelerada, lo que trae como consecuencia que el bien inmueble tenga un valor considerablemente mayor. Su contrato de arrendamiento es por 20 años, con una opción adicional de renovación por otros 10 años. A MP le gustaría continuar administrando la tienda de abarrotes de conformidad con los términos del contrato de arrendamiento. En cambio, a Redbridge Bedford indudablemente le gustaría resolver el contrato de arrendamiento y obtener un mayor beneficio del mismo. Supongamos que existe una disputa legítima sobre la obligación que tiene MP de reparar los incumplimientos alegados por Redbrige. MP solicitó una

declaración, junto con un recurso Yellowstone, en la que se le permitiría conocer cuáles de los incumplimientos alegados, si es que hay alguno, estaría obligado a reparar, y podría entonces decidir si repara alguno de los cuales es responsable o si acepta la resolución del contrato de arrendamiento. La aplicación de la disposición de renuncia elimina esa posibilidad, por lo cual requiere que MP tome una de las siguientes opciones sin el beneficio de conocer su responsabilidad contractual: (1) reparar todos los vicios alegados, aunque podría no ser responsable de ninguno de ellos; (2) no reparar ninguno o algunos de los vicios alegados, suponiendo por cual podría ser considerado responsable, si así fuera, y continuar con la defensa en un proceso de desalojo con la esperanza de que haya supuesto de manera correcta; o (3) aceptar la resolución del contrato de arrendamiento debido a que el resultado del proceso de desalojo es demasiado incierto, e intentar trasladar su negocio a otro lugar o clausurarlo.

La mayoría alega que MP y todos los demás arrendatarios comerciales que en sus contratos de arrendamiento renuncian a la reparación judicial declarativa y al recurso Yellowstone se quedan sin otras vías judiciales a través de las cuales [ellos] pueden obtener una decisión sobre sus derechos en virtud de los contratos de arrendamiento" (opinión mayoritaria en 13). Sin embargo, como la mayoría lo reconoce, la única vía legal disponible que le queda a MP es esperar a que Redbridge Bedford inicie un proceso sumario de desalojo ante un tribunal civil y luego plantear cualquier defensa que pueda tener contra las acusaciones de incumplimiento en ese proceso sumario (véase opinión mayoritaria en 13).

En particular, la disposición de renuncia disputada este caso evita que solo el arrendatario inicie una acción de juicio declarativo para conocer en detalle sus derechos y

responsabilidades. Los contratos de arrendamiento le permiten a Redbridge Bedford iniciar una acción de juicio declarativo a su voluntad. Como lo señaló el magistrado con salvamento de voto de la División de Apelaciones, MP está completamente a merced de Redbridge Bedford para iniciar tal proceso sumario de desalojo antes de que pueda plantear cualquier defensa que tenga a las alegaciones de incumplimiento (véase 160 AD3d 176, 206-207 [2.º Dept. 2018] [magistrado Connolly, con salvamento de voto]). "En otras palabras, los demandantes, después de haber estado en un callejón sin salida, dependerían por completo de que el demandado iniciara un proceso sumario para discutir el asunto sobre la validez de una notificación de subsanación ante un tribunal" (id.). Dicho arrendatario "se enfrentaría a grandes incertidumbres con respecto a cualquier decisión relacionada con la mejora del inmueble, la aceptación de entregas de nuevas existencias o de mercancía, o la negociación de cualquier tipo de acuerdo a largo plazo con clientes o proveedores" (id.).

Adicional a ello, como lo reconoce la mayoría (opinión mayoritaria en 15-16), la disposición de renuncia discutida en este caso evita que MP obtenga un recurso Yellowstone, a pesar de que no mencionó el recurso Yellowstone en sí mismo, debido a que los arrendatarios se limitaron a defenderse en procesos sumarios de desalojo iniciados por Redbridge Bedford ante el tribunal civil y éste carece de plena autoridad para otorgar una medida cautelar (véase la Ley del Tribunal Civil de Nueva York artículo 209 [b]). Por lo tanto, si durante el proceso sumario de desalojo el Tribunal Civil determina que MP es responsable de algunos o todos los incumplimientos alegados, incluso si MP ha estado dispuesto y ha podido reparar esos incumplimientos, será demasiado tarde: los contratos de arrendamiento se considerarán resueltos. Ese "resultado de todo o nada" (Post vs.120

E. End Ave. Corp., 62 NY2d 19, 25 [1984]) debilita tanto las relaciones contractuales como a los vecindarios, y en efecto permite a los propietarios que tienen inmuebles en áreas de gentrificación resolver los arrendamientos comerciales en cualquier momento como consecuencia de incumplimientos técnicos o menores. En otras palabras, si tanto la reparación judicial declarativa como el recurso Yellowstone son exigibles, los propietarios podrán hacer uso de ellos como mecanismos para declarar la nulidad de un contrato que es conforme a la ley. Eso no mantiene el beneficio de las partes de su negociación, por el contrario, lo destruye.

"Es fácil identificar la política pública detrás del recurso Yellowstone: las empresas comerciales que arriendan locales comerciales tienen un gran interés en permanecer en los locales que tienen un reconocimiento por parte de sus clientes, sus instalaciones a menudo están equipadas con accesorios específicos del sector comercial, por lo tanto los desalojos comerciales interrumpen los empleos y la potencial rentabilidad del negocio" (honorable juez Mark C. Dillon, "The Extent to Which 'Yellowstone Injunctions' Apply in Favor of Residential Tenants: Who Will See Red, Who Can Earn Green, and Who May Feel Blue," "El alcance al cual se aplican los 'recursos Yellowstone' a favor de los arrendatarios comerciales: quienes no estarán de acuerdo, quienes podrán recibir compensación económica, y quienes podrán sentirse decepcionados", 9 Cardozo Pub. L. Pol'y & Ethics J. 287, 315-316 [2011]). La eliminación mayoritaria de la opción claramente mejor — conocer los derechos de uno antes de determinar qué acción tomar— impacta en el fondo de los juicios declarativos. Una de las primeras decisiones de conformidad con el entonces nuevo acto de juicio declarativo es muy similar al presente caso:

"El demandante insta a que esta interpretación imponga al arrendatario el riesgo de

> decomiso si este subarrienda, señala la dificultad práctica de encontrar un subarrendatario bajo estas circunstancias (Young vs. Ashley Gardens Properties, Ltd., L. R. [1903] título 2, sección 112) e indica el recurso. En ese caso, el demandante solicitó un juicio declarativo al cual el demandado no tenía derecho a negar su consentimiento. El magistrado Cozens-Hardy, L. redacta lo siguiente: 'no puedo imaginar un ejercicio más racional o benéfico de la jurisdicción para emitir una orden declarativa que aquella que se ha adoptado en este caso'. De conformidad con el título 473 de la Ley de Procedimiento Civil, el demandante puede, si los hechos lo justifican, obtener una declaración similar para el caso actual"

(Sarner vs. Kantor, 123 Misc. 469 [1924]). La mayoría está de acuerdo en que una disposición de contrato de arrendamiento anule y desconozca la creación de los juicios declarativos establecidos por el legislador, la renuencia que muestra el *common law* por las disposiciones que tienen la intención de eliminar la interpretación judicial de los contratos y los antiguos esfuerzos de nuestro tribunal y de los tribunales inferiores a partir de entonces al crear el recurso Yellowstone, el cual, después de cincuenta años de existencia incuestionable, está en sí mismo arraigado al derecho de common law.

El nuevo rechazo mayoritario hacia el recurso Yellowstone no se puede justificar por el hecho de que el legislador haya otorgado un periodo de reparación posterior a la adjudicación de 10 días para los arrendatarios residenciales de la ciudad de Nueva York y haya determinado que ese periodo de reparación fuera irrenunciable (véase RPAPL 753 [4], [5]). Las razones de la mayoría son que la decisión del legislador de establecer ese beneficio "solo a una clase de arrendatarios residenciales indica que el legislador no contempló este tipo de reparación judicial como fundamental para los arrendatarios comerciales" (opinión mayoritaria en 17). Por el contrario, el legislador no promulgó esta protección particular para los arrendatarios residenciales en la ciudad de Nueva York hasta 1982 (véase L 1982, título 870; véase Post, 62 NY2d en 22-24). En ese momento, los recursos Yellowstone habían sido un método establecido desde hacía mucho tiempo para

que los arrendatarios comerciales conservaran su derecho a reparar si se alegaba que ellos habían incurrido en incumplimiento de sus contratos de arrendamiento. Es muy probable que desde 1982 el legislador haya extendido esta protección a determinados arrendatarios residenciales, pero que no la haya extendido a arrendatarios comerciales debido a que el legislador consideraba que el recurso Yellowstone en sí mismo ya había protegido de manera adecuada los derechos de los arrendatarios comerciales. De hecho, un periodo de reparación posterior al periodo de reparación de 10 días para todos los arrendatarios podría ser apropiado para los arrendatarios residenciales, mientras que los arrendatarios comerciales, cuyos usos son más especializados y variados, se dejarían a discreción del tribunal para determinar la duración y naturaleza de cualquier periodo de reparación posterior a la decisión. El razonamiento de la mayoría es contrario, ya que expresa una inferencia negativa acerca de nuestra competencia a partir de la disposición del legislador de otorgar un periodo fijo de subsanación posterior a la decisión para los arrendatarios residenciales. A lo sumo, esto podría considerarse como una inacción legislativa que se ha prolongado por mucho tiempo frente al bien establecido derecho de common law, que comúnmente interpretaríamos como aprobación (véase People vs. Defore, 242 NY 13, 23 [1926] [magistrado Cardozo] ["si hubiéramos malinterpretado la ley o la política pública, unas cuantas palabras de aclaración nos habrían llevado de nuevo por el camino correcto. El proceso de reforma es rápido y simple, no incluye retrasos ni obstáculos que impiden el cambio de constituciones. En tales circunstancias, el silencio mismo es la declaración de una política"]). Al sostener que actualmente los arrendatarios comerciales pueden renunciar a la reparación judicial declarativa y al recurso Yellowstone, la mayoría está efectivamente eliminando 50 años de precedente del derecho de common law basándose,

en parte, en suposiciones erróneas acerca de la intención del legislador.

La mayoría parece asumir que los arrendatarios comerciales tienen un nivel relativamente más alto de experticia y capacidad de negociación que los arrendatarios residenciales, y por consiguiente, a los arrendatarios comerciales se les debe permitir que renuncien a la posibilidad de recurso Yellowstone a pesar de que así no lo puedan hacer algunos arrendatarios residenciales (véase RPAPL 743 [4], [5]). De hecho, en repetidas ocasiones la mayoría afirma que los arrendatarios comerciales "expertos" deberían poder renunciar a su derecho de reparación judicial declarativa. Una disposición contractual que infrinja la política pública, sin embargo, no puede hacerse cumplir independientemente del grado de experticia de las partes (véase 160 AD3d en 207 [magistrado Connolly, con salvamento de voto]; véase p. ej. Riverside Syndicate, Inc. vs. Munroe,10 NY3d 18 [2008] [caso en el cual un arrendatario experto negoció los límites de renta del Código de Estabilización de Rentas como parte de un acuerdo de desalojo que permitía que su arrendamiento continuara a pesar de no ser una residencia principal]; véase también Bissell vs, Michigan S. & N. I. R. Cos., 22 NY 258, 285 [1860] ["no puede negarse el hecho de que los contratos que en realidad contravienen cualquier principio de política pública son ilegales y nulos. La filosofía del derecho es universal, sin excepción"]). Además, no hay pruebas en este expediente que demuestren la experticia de estos arrendatarios en particular.[5] La mayoría supone que como se trataba de arrendatarios comerciales, eran

[5] La mayoría no solo afirma que los demandantes eran "expertos" sino que también estaban "asesorados" (opinión mayoritaria en 11, 17). En el expediente ante nosotros no vemos pruebas de que los demandantes revisaron los términos y condiciones del contrato de arrendamiento con un abogado. El Tribunal de Primera Instancia llegó a la conclusión de que los demandantes tuvieron la "oportunidad" de revisar los contratos de arrendamiento con la ayuda y orientación de un abogado, y no que tal ayuda y orientación realmente ocurriera.

expertos. El grado de experticia de los arrendatarios comerciales y su capacidad de negociación relativa, en cualquier momento puede disminuir entre Wal-Mart y *Cheers*' Sam Malone. No es cierto que todos los arrendatarios comerciales entenderán el significado de una renuncia a una reparación judicial declarativa o que tendrán la capacidad de negociación para negociar la eliminación de dicha renuncia en caso de que la comprendieran, y nosotros no debemos suponer lo contrario

VI

Actualmente la mayoría ha desconocido el trabajo fiel de los tribunales durante los últimos 50 años al crear el recurso Yellowstone, el cual se basa en la comprensión uniforme de los departamentos de la División de Apelaciones de que la ley de juicio declarativo cuando se aplica al contexto de los arrendamientos comerciales requiere una forma especializada de aumentar las medidas cautelares (véase (Another Slice, Inc. vs. 3620 Broadway Invs. LLC, 90 AD3d 559, [1.er Dept. 2011], Caldwell vs. Am. Package Co., Inc., 57 AD3d 15, 18 [2.º Dept. 2008], Kem Cleaners vs. Shaker Pine, 217 AD2d 787 [3.er Dept. 1995], Fay's Inc. vs. Park Ctr. Dev., 226 AD2d 1067 [4.º Dept. 1996]). Una enmienda legislativa suficientemente simple bastaría para suplir dicho desconocimiento. El aspecto más preocupante de la decisión mayoritaria es que, quizás sin darse cuenta, nos conduce por el camino de la jurisprudencia Lochner, la cual está rotundamente desacreditada y en la cual la "libertad contractual" se entendió como un derecho individual en lugar de entenderse como una doctrina por la cual la sociedad decide exigir el cumplimiento solo de aquellos tipos de acuerdos que tienden a mejorar el bienestar social. "[…] La libertad

contractual es un derecho restringido y no un derecho absoluto. No hay libertad absoluta para hacer lo que se quiera o para contratar como se desee" (West Coast Hotel Co. vs. Parrish, 300 US 379, 392 [1937] [en el que se cita a Chicago, B. & Q. R. Co. vs. McGuire, 219 US 549, 567 (1911) y se anula a Adkins vs. Children's Hosp., 261 US 525 (1923) y a Lochner]).

Es fácil ver por qué la libertad contractual se mejora cuando las partes, al tener una disputa acerca de lo que requiere un contrato, pueden resolverla y luego actuar en consecuencia. Eso es lo que mantiene en mejor medida la esencia de su negociación y ofrece garantía a las partes contratantes futuras de que nuestra ley no les exigirá tomar una decisión irrevocable. Por el contrario, ¿qué razón hay para permitir que las partes acuerden prohibir juicios declarativos, aparte de "las partes lo acordaron y tienen el derecho a hacerlo?" como comentó Charles Evans Hughes en apoyo de la Ley de Juicio Declarativo de Nueva York, "[…] cualquier cosa que en la práctica se pueda decir sobre la idoneidad y conveniencia de tal cambio, el hecho de que cualquiera pueda resultar perjudicado de esa manera no puede ser visto como algo bien planteado" (Colegio de Abogados del Estado de Nueva York, 196). Nos merecemos algo mejor que la reincorporación mayoritaria de la "suposición ampliamente desacreditada de que la libertad económica es lo más importante en un sistema constitucional justo". (Robert Green McCloskey, American Conservatism in the Age of Enterprise 83 [1951]). "Lamento sinceramente que no pueda estar de acuerdo con el fallo en este caso, y considero que es mi responsabilidad expresar mi salvamento de voto" (Lochner, 198 US en 74-75 [magistrado Holmes, con salvamento de voto]).

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Sentencia confirmada, con las respectivas costas y el concepto solicitado no se respondió ya que no fue necesario hacerlo. Sentencia redactada por el magistrado ponente DiFiore. Los magistrados Stein, Garcia y Feinman están de acuerdo. El magistrado Wilson disiente en una opinión en la cual están de acuerdo los magistrados Rivera y Fahey.

Fallado el 7 de mayo de 2019