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Comparative Contracts Law

Gross Disparity, Exemption Clauses, Hardship:

A Comparison of French Contract Law and Uniform Commercial Code Provisions

Using the UNIDROIT Principles

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Introduction

Revised in 2004, the Unidroit Principles Of International Commercial Contracts ("The Principles") are an attempt to codify the *lex mercatoria* by the International Institute for the Unification of Private Law. An expansion of the Convention for the International Sale of Goods, they were designed to serve as a set of rules for international transactions, but also as model rules for the sale of goods, and have known an important success since the publication of their first version, in 1994.[1]

In this context, the purpose of our study is to pursue a comparison of French contract law and the provisions of the Uniform Commercial Code ("The UCC") on the legal issues dealt with by articles 3.10, 6.2.2, 6.2.3 and 7.1.6 of the Principles. Indeed, we will use the Principles as a bridge between the two systems, by analyzing French law (I) and the UCC (II) under the light of the relevant articles of the Principles.

Article 3.10 – Gross Disparity:

(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to

(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and

(b) the nature and purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.13(2) apply accordingly.

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[1] *UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law,* J. M. BONELL, Uniform Law Review 2004, pp. 5-40.

Article 6.2.2 – Definition of Hardship:

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and
(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
(c) the events are beyond the control of the disadvantaged party; and
(d) the risk of the events was not assumed by the disadvantaged party.

Article 6.2.3 – Effects of Hardship:

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
(4) If the court finds hardship it may, if reasonable,
(a) terminate the contract at a date and on terms to be fixed, or
(b) adapt the contract with a view to restoring its equilibrium.

Article 7.1.6 – Exemption Clauses:

A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.

I. French Law

The fundamental principle governing the French law of contracts is that an agreement, when validly made between the parties, has the same value as a law: the judge can only interpret it, but not modify it. The contract is *"the law of the parties,"* and only the necessities of public order can neutralize its effects.

This strict application of the principle of *"pacta sunt servanda"*[2] leaves little room for a revision of the agreement. However, both the application of this rigid rule and its exceptions differ depending on whether the revision is made necessary by a

[2] "Pacts must be respected."

gross disparity (A), the presence of an exemption clause (B), or the occurrence of hardship (C).

A. Gross Disparity

Under the Unidroit Principles, a gross disparity between the parties' rights and obligations can void the clause or term that created the unfair situation. This is not the case in French law, where such relief is exceptional. While it does not apply to general sales (1), similar yet less powerful rules are applicable to consumer contracts (2) and real property sales (3).

1. General Sales

French law does not consider a mere disparity between the obligations of the parties as a good reason to void a contract or a term: the notion of gross disparity – "lésion" in French, a financial damage resulting from the contract for one of the parties – is generally not applicable to ordinary contracts. It is constant that the mere fact that a contract was drafted to the disadvantage of one party does not allow that party to be excused. Article 1118 of the "Code civil" provides: *"Gross disparity only voids contracts in certain contracts or regarding certain persons."*[3] Gross disparity is therefore not a general basis for avoiding a contract; it is not recognized as a "vice of consent."

[3] The end of the sentence, *"regarding certain persons,"* is a reference to the particular status provided by French law to what is called "incapable" persons: minors and adults under various types of supervision ("tutelle" or "curatelle"). On those specific questions, *Droit civil : Introduction. Les personnes. Les biens,* G. CORNU, 11e ed., Monchrestien, Collection Domat Droit Privé, Paris 2003.

When a corporation agreed to sell a business activity without mentioning the amount of the activity's profits and the buyer, by lack of experience and knowledge, agreed to the contract, the Cour de cassation decided that *"the contract can only be questioned in the case of a vice of consent, and only where that vice materially affected the conclusion of the contract and caused a damage."*[4]

Still, some recent cases have admitted the disparity between, for example, a minimum purchase obligation and the obligor's market share[5], thus creating a sort of "exception of disproportionality" which did not exist before.

Some scholars even understand proportionality as the "one and only actual condition to the validity of a contract."[6] But, according to Philippe Malaurie and Laurent Aynès, *"the principle of proportionality in contract law does not exist by itself, but is sometimes used by the legislature (in Competition Law) or the judge (via the absence of cause in the contract)."*[7] Indeed, in some extreme situations where equity and fairness require voiding the contract, the court considers a gross disparity between the two parties' obligations as a proof of the absence of cause to the parties' mutual commitment, therefore voiding the contract.[8]

2. Consumer Contracts

Article L. 132-1 of the Code de la consommation provides as follows:

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[4] Com., 19 janvier 1983.
[5] Com., 5 mai 1997, B. IV, n. 131. The court considered that the obligation was "disproportionate", and therefore "not reasonable."
[6] *La proportionnalité en droit privé des contrats,* S. PECH-LE GAC, th. Paris XI, 1997.
[7] *Les obligations,* P. MALAURIE, L. AYNÈS, 10e ed., Cujas, Droit Civil, Paris 2000.
[8] Com., 14 oct. 1997, Def. 98, a. 36860, n. 105. Remuneration for an almost inexistent service constitutes a disparity leading to the absence of cause in the contract.

"In the contracts made between a professional and a non-professional or consumers, the clauses that aim at creating or eventually create a gross disparity between the rights and obligations of the parties, to the disadvantage of the non-professional or consumer, are abusive. […]

"Abusive clauses are deemed void.

"The evaluation of the abusiveness of the clause does not take into account the main purpose of the contract, or the accuracy of the price or compensation for the good sold or the service provided.

"The contract shall remain applicable regarding its other provisions so long as it is possible without the abusive clauses.

"The provisions of the present article are of public order."

Although these provisions are already closer from article 3.10 of the Principles than the ones we studied before, many differences remain. First, by definition, Article L. 132-1 only applies to consumer contracts and for the benefit of the consumer or "non-professional," whereas Article 3.10 allows any party in the contract to seek avoidance. Second, article 3.10 of the Principles gives a prominent role to the purpose of the contract, whereas article L. 132-1 does the exact opposite, considering it should not play any part. As for the price of the good, although article 3.10 does not mention it, it seems clear that it can be taken into account using subsection (a), or even without it ("among other factors"); article L. 132-1 excludes it as well.

The provisions of article L. 132-1 are enforced by two different authorities: a "commission" ("Commission des clauses abusives") created by law, and the judge. While the commission regularly issues recommendations regarding different types of clauses (for example, in car sales, real estate loans or subscription contracts)[9], the courts do not use article L. 132-1 as often as they could, putting it into balance with the

[9] The complete list of recommendations issued can be found at http://www.clauses-abusives.fr/recom/index.htm.

older principle of the inapplicability of gross disparity. Still, for example, a clause allowing the professional seller to raise the price beyond the application of force majeure has been deemed abusive, and therefore void.[10]

However, in the case of a consumer contract where compensation is at issue, the judge has other means of voiding the clause.[11] But except where the determination of the price is concerned, it appears difficult to find cases where the court has successfully used article L. 132-1 without a recommendation by the commission.

3. Real Property

Article 1674 of the Code civil provides the seller in a real property transaction with a protection against a disparity in the values exchanged with the buyer, superior to seven twelfths of the value of the property sold. That is to say, if the seller sells her property for less than five twelfths of its value.

The statute of limitations for gross disparity in real property is of two years from the day of the definitive sale. The seller must first prove that a gross disparity is *probable* for her action to be receivable. The case is then reviewed by three experts and ruled by the judge. If the judge finds for the seller, article 1681 provides the buyer with an option: the "rescission" of the sale (which is actually a mere cancellation), or the

[10] TGI Grenoble, 31 janvier 2002, published at http://www.clauses-abusives.fr/juris/tgig310102_2123f.htm.
[11] CA Grenoble, 16 mars 2004, published at http://www.clauses-abusives.fr/juris/cag160304f.htm. A clause allowing the seller to modify the price agreed with the consumer is not consistent with article 1134 of the Code civil and must therefore be deleted, as it creates a significant disparity to the disadvantage of the consumer.

"repurchase of the gross disparity": this is accomplished by paying the difference minus one tenth of the total price.

Although this mechanism is totally different from article 3.10 of the Principles, it does provide the seller with a very efficient relief against what is probably the worst disparity in a contract: the disparity between the values exchanged.

B. Exemption Clauses

The Unidroit Principles subordinate the validity of an exemption clause to the consequences of its invocation by the party that benefits from it, having regard to fairness and the purpose of the contract. While the general French law of sales takes another path (1), the rule concerning contracts made between a professional and a non-professional, or a *consumer*, is less remote from Article 7.1.6 of the Principles (2).

1. General Sales

As far as sales are concerned, Alain Bénabent notes that *"[t]he Code charges the seller with warranties rather than liabilities."*[12] Indeed, the idea of warranty implies in French law that the seller's responsibility is automatic. Under French contract law, sales are protected by two sets of warranties: one against "eviction," the other against the latent defects of the item sold. The former protects the buyer from being unable to benefit from what he bought; the latter provides remedy for the situation where the object of the sale later presents defects that did not appear at the time of the sale.

[12] *Les contrats spéciaux civils et commerciaux,* A. BÉNABENT, 4e ed., Monchrestien, Domat Droit Privé, Paris 1999.

According to article 1628 of the Code civil, the seller remains bound by the first warranty if the damage results from his personal behavior, even where the contract specifically excludes this warranty. For example, French courts will find that *"The seller of a business activity has the obligation to restrain from any act aiming at diverting the clientele from the business sold."*[13]

Between professionals in the same field, or when the seller is not a professional, in the cases where the contract provides for an exemption from any other warranty (eviction by a third person, hidden defect), the parties are free to draft their agreement as they desire.

When the contract is made between a professional seller and a non-professional buyer, the rules on consumer contracts apply.

2. Consumer Contracts

As far as consumer contracts are concerned, the general rules about exemption clauses are still applicable, but with the addition of a specific body of rules.

An exemption clause in a consumer contract will be viewed as void under article L. 132-1 and deemed abusive under this section if it significantly alters the balance between the rights and obligations of the parties.[14] That is to say, exemption clauses are viewed as potentially a type of abusive clauses.

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[13] Com., 16 juin 1969, D. 1970.37.

[14] Civ. 1ere, 19 juin 2001 (Unpublished, N. pourvoi: 99-13395), A clause drafted so as to let the consumer think it only authorizes the negotiation of the price, but which aims to exempt the service provider of any liability, creates a significant disparity between the parties' rights and obligations, is abusive, and therefore void.

Article 7.1.6 of the Principles does not deem the clause void, but simply deprives it of any effect where it *"would be grossly unfair to do so, having regard to the purpose of the contract."* In the cases where the clause is not deemed abusive in itself, but where its application would be unfair or inconsistent with the purpose of the contract – or in the cases where the suing party is the seller, not the buyer –, the French courts will be likely to use article 1134 of the Code civil's obligation to execute contracts in good faith.

C. Hardship

In French law, hardship usually cannot trump the fundamental rule of article 1134 stating, *"Legally concluded contracts are the law of those who agreed to them."* (1). Still, the parties can fill the gap with contract provisions (2). Administrative contracts follow the opposite rule (3), due to the distinction between the civil and administrative orders.

1. General Contracts

Hardship, defined by the Principles as the situation *"where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished,"*[15] does not produce any effect in French general contract law.

[15] Unidroit Principles, Article 6.2.2, Definition of Hardship

This rule was first affirmed in 1876, in "Canal de Craponne"[16]. This landmark case was ruled about contracts made in the sixteenth century for the supply of water from the owner of an irrigation canal. Three centuries later, the compensation had become ridiculous due to depreciation, and the owner sued to obtain a judicial revaluation. The Court of Appeals of Aix-en-Provence ruled for the plaintiff, considering that sequential contracts implying the payment of periodical rents can be modified by the judge *"when because of time and change in the circumstances, there is no longer an equilibrium between the rents and the costs."*

The Cour de cassation ruled against the Court of Appeals, on the basis that *"the principle of obligatory observance of contracts being general and absolute, it is not the tribunals' duty to take into account time and change in circumstances to modify the contracts between the parties."* The rule is therefore that *"[n]o consideration of time or equity can allow the judge to modify the valid and freely accepted contract."*[17]

A recent case, decided by the Cour de cassation on March 16th, 2004[18], might be interpreted as a turning point in the court's old tradition. The plaintiff corporation was operating a "social restaurant" *(meaning the price of the meals was decided by the city council)* on behalf of another corporation, and sought relief from its obligations based on the fact that the changed low prices set by the public body were grossly altering the equilibrium of the contract.

[16] Civ. 16 mars 1876, DP 76.I.193
[17] Article 1147 of the Code civil does provide for an excuse in the case of force majeure, but it can only be used where performance has become impossible.
[18] Civ. 1ere, 16 mars 2004, JCP E n. 20-21, p. 817.

Instead of using the same reasoning as in *Canal de Craponne*, the court noted that the plaintiff was *"questioning a disparity that existed at the time the contract was concluded, not the city council's refusal to take into account a modification of the circumstances and renegotiate the contract in good faith,"* and therefore considered that the plaintiff *"could not base its claim on a structural disparity in the contract."*

On one hand, the court strongly reaffirms the inapplicability of gross disparity to most contracts in French law[19]. On the other hand, the case can be read, *a contrario*, to leave the door open to an obligation to renegotiate in good faith in case of hardship. Although this might well be the first case of a long-awaited change, it is too soon to tell, and the parties still have to draft their own law of hardship.

2. Contract Provisions

A usual element of long-term international contracts, the hardship clause has recently appeared in certain domestic French contracts, such as collective labor agreements[20]. The parties agree to renegotiate when external circumstances materially alter the equilibrium of the contract.

The French theory of obligations requires the hardship clause not to make the renegotiation depend on the sole will of one of the parties[21]. The clause must not

[19] See *supra*, on gross disparity.
[20] Soc. 30 mars 1982, BV n. 232. The clause provided that if the reevaluation of salaries promised to the employees ended up altering the financial balance of the company, the employer could reduce the salaries by following a precise procedure. The clause was upheld.
[21] If the condition stated in the clause appears to be shallow and the renegotiations can actually be started at will by one party, the clause will be void under article 1170 of the code.

delete the object of the contract, and must be clear enough so as not to leave the agreement with no determinable price.

Under article 1134 of the Code civil, those renegotiations must be held in good faith: the proposals must be serious and the parties bound by reasonable delays, and must strictly follow the delays provided by the clause. When the parties have included such a clause in their contract, the judge can also suggest the ways to adapt the contract to the new circumstances.[22]

While important contracts made by major corporations fill the gap created by the lack of hardship provisions in French law, smaller entities are often stuck with impracticable agreements. Conversely, administrative contracts have enjoyed hardship provisions for almost a century.

3. Administrative Contracts

While in the United States, contracts made between the federal government and private parties are under a specific, sort of "federal law of contracts," this is not always the case in France. A certain category of contracts, "administrative contracts," is placed under a specific set of rules.

A contract is deemed administrative when it contains one ore many clauses that make it seem indesirable to place it under the general law of contracts[23], and its object is closely related to a public service[24].

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[22] TGI Paris, 28 septembre 1976, JCP 1978, 2, 18810.
[23] For example, unilateral modification clause (CA Paris, 24 octobre 1995, CJEG 1996), or a clause related to the common welfare (Civ. 1ere, 7 mars 1984, Bull. N. 91).
[24] CE 20 avril 1956, Bertin, GAJA p. 527. The contract must constitute a modality of the execution of the public service.

When a contract complies with these two conditions, its enforcement is also under the authority of the administrative judge, not the civil or commercial one. As a consequence, many rules are different depending on the administrative nature of the agreement: one of those rules is hardship.

In the famous case *Compagnie générale d'éclairage de Bordeaux*[25], the highest court in the administrative order (the Conseil d'Etat) applied a theory of hardship ("imprévision") in the absence of any contractual provision.

During World War I, coal prices more than tripled in fifteen months (from January 1915 to March 1916); a private contractor requested from the city of Bordeaux an importance raise in gas prices as compared to the value written in the 1904 contract, as well as an indemnity for the damages caused by the sudden raise. The court ruled for the private party, considering that (1) the hardship was caused by an unforeseeable contingency, (2) that contingency was independent from the private party's will, (3) it led to a massive alteration of the equilibrium of the contract, and (4) the alteration was only temporary. This last condition does not appear in the Principles: if the alteration is permanent, the parties are in the case of an "administrative force majeure," and hardship is no longer applicable.

If hardship applies, the remedy is usually a "hardship indemnity," as a temporary damage can be calculated and repaired by a fixed sum of money. In practice, however, the choice of adaptation is usually made.[26]

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[25] CE 30 mars 1916, S. 1916, 3, 17, GAJA p. 182).
[26] For more information on the law of administrative contracts, see *Droit des contrats administratifs*, L. RICHER, 2e ed., LGDJ, Paris 1999.

II. Uniform Commercial Code

The Uniform Commercial Code article 2 has a philosophy of elastic performance, to try to keep deals together. As a result, its provisions are often closer than the French law of contracts to those in the Unidroit Principles.

Regarding the disparities that could arise from the contract itself or one of its terms, the UCC uses the notion of *unconscionability* (A), which is often also applied to exemption clauses (B), while hardship falls within the scope of *impracticability* (C).

A. Unconscionability

Unconscionability is defined in Black's Law Dictionary[27] as *"[t]he principle that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms, especially terms that are unreasonably favorable to one party while precluding meaningful choice for the other party."*

After examining the general principle (1), we will turn to cost-price (2), bargaining power (3) and experience and knowledge (4) disparities.

1. General Principle

UCC § 2-302 provides:

"(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

[27] *Black's Law Dictionary,* 8th ed., 2004.

"(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

According to the Official Comment of the UCC, *"[t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."* It appears quite clearly, as a result, that article 3.10 of the Principles is very close, in both spirit and form, to the notion of unconscionability.

One minor difference could result from the distinction sometimes made between *procedural* and *substantive* unconscionability. According to this doctrine, procedural unconscionability is related to *"(1) assent obtained by reason of ignorance or carelessness of one party known to the other; (2) assent obtained by signature to forms difficult to read or deceptively arranged; or (3) an attempt to contract out of the dominant purpose of the contract."*[28] While the two first elements are closer from the French notion of "vice of consent", the third one reminds us of subsection (b) of article 3.10, concerning regard to be had to *"the nature and purpose of the contract."*

Substantive unconscionability falls exactly into the scope of article 3.10 of the principles, as it concerns *"one-sided," "oppressive"* or *"harsh"* transactions.[29]

[28] *Hawkland Uniform Commercial Code Series,* W. D. HAWKLAND, § 2-302:1.
[29] *Ibid.*

However, many commentators argue that the distinction is purely theoretical, and not necessarily made by the courts.[30]

The best way to evaluate the differences between the UCC and the Principles on that matter is therefore to study a few practical examples.

2. Cost-Price Disparity

A disparity between cost and price is not enough to prove unconscionability. As § 2-302 of the UCC is more often used for consumer protection purposes than in commercial transactions[31], the financial resources of the purchaser must be *limited* in order to obtain relief. Indeed, the combination of the two elements *"indicates such a gross inequality of bargaining power as negates the existence of the meaningfulness of choice essential to the making of a contract."*[32]

3. Disparity in Bargaining Power

While the Principles use the term *"dependence"*[33] to describe the situation where one party does not have any economic alternative to the contract proposed, the UCC takes into account the *"absence of meaningful choice."* However, the rules are very similar, and some American cases could have been decided under the provisions of the Principles without any difference.[34]

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[30] *Anderson on the Uniform Commercial Code,* L. LAWRENCE, on § 2-302.
[31] *Hawkland Uniform Commercial Code Series, op. cit.,* § 2-302: 6.
[32] Jones v. Star Credit Corp. (1969) 59 Misc 2d 189, 298 NYS2d 264, 6 UCCRS 76.
[33] UNIDROIT Principles, Article 3.10, subsection (a).
[34] Leprino v. Intermountain Brick Co. (Colo App) 759 P2d 835, 6 UCCRS2d 377, for example, where the court found that *"[i]n order to support a finding of unconscionability, there must be evidence in the record of some overreaching on the part*

As a result, in situations where the lack of bargaining power of one party, caused by various circumstances, and where no alternatives are available, one-sided or oppressive terms are likely to be found unconscionable by the judge, as freedom of contracting was somewhat impaired by the circumstances.

4. Disparity in Experience and Knowledge

Unconscionability can also exist where one party's lack of experience and knowledge is unfairly used by the other in order to get an excessive advantage. The court will find that *"[i]n determining whether a contract is unconscionable, factors such as the age and education of the contracting parties, their commercial experience, and their relative bargaining positions should be considered."*[35]

It has even been held that *"[t]he doctrine of unconscionability is primarily a means with which to protect the commercially illiterate consumer beguiled into a grossly unfair bargain by a deceptive venture or finance company."*[36]

Overall, the provisions of the Principles on gross disparity and those of the UCC on unconscionability are very similar. The remedy is the same, as the judge may avoid the problematic cause or the entire contract if necessary, or adapt the terms at issue to better standards of fairness (under the UCC, this will be done by limiting the application of the clause *"as to avoid any unconscionable result."*[37])

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of one of the parties, such as that which results from an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of the second party, together with contract terms unreasonably favorable to the first party."

[35] Kaye v. Coughlin (1969 Tex Civ App 11th Dist) 443 SW2d 612, 6 UCCRS 1057.

[36] Gillman v. Chase Manhattan Bank, N. A. (2d Dept) 135 AD2d 488, 521 NYS2d 729.

[37] Uniform Commercial Code, § 2-302, subsection (1).

B. Exemption Clauses

Under the Uniform Commercial Code, exemption clauses fall directly into the scope of two major provisions: § 2-302 on unconscionability (1), and § 2-719, which reaffirms the former and adds some specific restrictions (2).

1. Unconscionability and Limitations of Liability

To be upheld by the judge, a clause that eludes or limits one party's liability for nonperformance (or a disclaimer of warranty) must not be unconscionable. As a result, the same test as for any clause applies: *"Whether a limitation of remedies is unconscionable depends upon whether the complaining party did not have a meaningful choice and whether the contract unreasonably favors the other party."*[38]

For example, a limitation of the liability of a telephone company for negligently omitting a customer's name from the yellow page directory was unconscionable. According to the Supreme Court of Appeals of Virginia, *"[t]he end result of this analysis is that the liability clause in the 1978 contract between C & P and Art's Flower Shop is void for unconscionability. The positions of C & P and Art's Flower Shop were grossly unequal: C & P had the only Yellow Pages directory in the area."*[39]

2. Other Restrictions

Contractual limitations of liability are under high scrutiny; in addition to the general rules on unconscionability, § 2-719 of the UCC was drafted in order to limit

[38] Hornberger v. General Motors Corp. (1996 ED Pa) 929 F Supp 884, 30 UCCRS2d 483.
[39] Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of West Virginia, Inc. (1991) 186 W Va 613, 413 SE2d 670.

their excessive effects. Subsection (2) provides: *"Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act."*[40]

In a case where *"[t]he purpose of a repair-or-replace contracted remedy is to give the buyer what he bargained for, namely goods that measure up to the contract, (...) [t]his purpose is defeated if the goods are destroyed by their own flaws so that repair or replacement are totally unsatisfactory."*[41]

In addition, according to William D. Hawkland, *"[i]n cases involving commercial contracts, (...) the courts have avoided the use of the concept of unconscionability in resolving the matter under discussion, and have preferred simply to state that the contracted remedy must provide a fair quantity of relief to be valid under Section 2-719."*[42] For example, a clause allowing an allowance on the purchase of new tires if the tires that were purchased turned out to be unfit does provide such quantity.[43]

Under article 7.1.6 of the Principles, *"[a] clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract."*

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[40] Uniform Commercial Code, § 2-719, subsection (2).
[41] Midwest Printing, Inc. v. AM International, Inc., 32 U.C.C. Rep. Serv. 2d 134, 108 F.3d 168 (8th Cir. 1997).
[42] *Hawkland's Uniform Commercial Code Series, op. cit.*, § 2-719:2.
[43] Byrd Motor Lines, Inc. v. Dunlop Tire & Rubber Corp., 36 U.C.C. Rep. Serv. 1169, 63 N.C. App. 292, 304 S.E.2d 773 (1983).

Even though the structure of the provision is somewhat different, a lot of elements are shared with the UCC rule: the reference to the other party's reasonable expectations reminds us of unconscionability and *unfair surprise*; the prohibition of an unfair invocation of the clause can be read to have the same effect as the requirement for a fair quantity of relief (the former being a element of fact, and the latter an element of law); and both provisions refer to the purpose of the contract.

B. Impracticability

While the Uniform Commercial Code does provide for nonperformance due to supervening events (1), hardship is considered as an element of fact, not of law. As a result, the provisions for impracticability are not quite often applied, especially concerning a change in the costs for the seller (2). We will also examine the consequence of the occurrence of other events (3), and the effect of the inclusion of specific provisions in the contract (4).

1. General Principle

UCC § 2-615 provides as follows:

"Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

"(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

"(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his

customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

"(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer."

Conversely to the rule under the Principles, *"[s]ection 2-615 makes specific reference only to a seller, suggesting that its provisions for excusing performance are not available to a buyer."*[44]

In Iowa Electric Light & Power Co. v. Atlas Corp.[45], the court defined the test for the application of the excuse for impracticability under § 2-615 as follows:

"Three elements must be proven before excuse or adjustment becomes available under section 2-615: (1) the seller must not have assumed the risk of some unknown contingency; (2) the nonoccurrence of the contingency must have been a basic assumption underlying the contract; and (3) the occurrence of that contingency must have made performance commercially impracticable."

The first element can be found in article 6.2.2 of the Principles, under subsection (d). The second element refers to the notion of surprise, split in two elements under the Principles: that the event became known to the disadvantaged party *after* the conclusion of the contract, and that it could not have been taken into account at the time of the conclusion. Although the language between the UCC and the Principles is quite different, the underlying idea is the same: unforeseeability.

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[44] *Hawkland Uniform Commercial Code Series, op. cit.,* § 2-615:5.
[45] Iowa Electric Light & Power Co. v. Atlas Corp., 25 U.C.C. Rep. Serv. 163, 166, 467 F. Supp. 129, 134 (N.D. Iowa 1978).

The consequence of these conditions must be, under the Principles, a fundamental alteration of the equilibrium of the contract; under the UCC, performance must have been made commercially impracticable.

Concerning the remedy, while the Principles provides for a whole process based on renegotiations, Sarah Howard Jenkins notes that § 2-615 *"grants as relief an excuse for the delay or nonperformance to the extent the performance was affected by the contingency or adaptation, expressly limited to prorating the seller's production among its customers."*[46]

2. Costs

An official comment to the UNIDROIT Principles suggests that an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a "fundamental" alteration justifying invocation of the doctrine of hardship.[47] Similarly, an *"extreme"* increase of costs can constitute the unforeseen contingency required by the UCC.[48] The same solution was applied in a case where, during the execution of a transportation contract in Alaska, two trucks were lost, and two drivers died. The court considered that *"[c]ompletion of the performance would have caused a great and unforeseen expense,"* and therefore excused the transporter.[49]

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[46] *Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles – A Comparative Assessment*, S. H. JENKINS, *Tulane Law Review* (1998) 2015-2030.
[47] UNIDROIT *Principles of International Commercial Contracts,* Art. 6.2.2, comment 2.
[48] Am. Trading and Prod. Corp. v. Shell Int'l Marine, Ltd., 453 F.2d 939, 942 (2nd Cir.1972), using the Restatement of Contracts: *"American law recognizes that performance is rendered impossible if it can only be accomplished with extreme and unreasonable difficulty, expense, injury or loss."*
[49] Northern Corp. v. Chugach Elec. Ass'n, 523 P.2d 1243

However, according to Joseph M. Perillo, *"[t]he mere lack of equilibrium between the contracting parties caused by supervening events has not been a ground for relief. The dramatic inflation during the period of the Vietnam War produced many cases, but no relief was supplied by the courts."*[50]

According to the courts, a party is therefore expected to use reasonable efforts, and performance is impracticable if those efforts will not suffice. "*The seller must show that she can operate only at a loss, and that the loss will be so severe and unreasonable that failure to excuse performance would result in grave injustice."*[51]

3. Other Events

Other than a severe increase of costs, many events can constitute an unforeseen contingency, so as to excuse the seller's nonperformance. In Selland Pontiac GMC v. King[52], the court considered that when the contract identifies a specific supplier, the existence of that supplier is a basic assumption of the parties, so that if the supplier goes into receivership and stops production, the seller will be excused under § 2-615, provided he informed the buyer of that fact.

In the event of a labor dispute, when a strike renders the seller's performance impracticable and the seller informs the buyer, the seller will be excused as

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[50] *Hardship and its Impact on Contractual Obligations: A Comparative Analysis,* J. M. PERILLO, Centro di studi e ricerche di diritto comparato e straniero, Saggi, Conferenze E Seminari, Roma, 1996.

[51] Northern Illinois Gas Co. v. Energy Cooperative, Inc., 122 Ill App 3d 940, 461 NE2d 1049, 38 UCCRS 1222.

[52] Selland Pontiac-GMC, Inc. v. King (1986 Minn App) 384 NW2d 490, 1 UCCRS2d 463.

well.[53] Similarly, when a fire destroys the seller's factory, the seller will be granted relief under § 2-615.[54]

Conversely, the destruction of the goods in a train derailment did not excuse the seller's performance, as the court considered the loss of the goods to be foreseeable.[55]

Regarding currency fluctuations, it was decided that *"[a] currency fluctuation that substantially reduces the margin of profit does not make the sales contract commercially impracticable."*[56] Indeed, the parties be aware of the possibility of currency fluctuations; the fact that such fluctuations are greater than expected cannot excuse the seller.

Economic and political events usually do not provide any excuse for impracticability. A market collapse, even when it occurs in the very specific field of the seller, cannot be considered as an unforeseeable contingency[57]; the same solution was retained concerning the Arab oil embargo of 1973 and its consequences on a Nevada corporation's business.[58]

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[53] Glassner v. Northwest Lustre Craft Co. (1979) 39 Or App 175, 591 P2d 419, 26 UCCRS 416.
[54] Gold Kist, Inc. v. Stokes (1976) 138 Ga App 482, 226 SE2d 268, 19 UCCRS 1131.
[55] Bende & Sons, Inc. v. Crown Recreation, Inc., 34 U.C.C. Rep. Serv. 1587, 548 F. Supp. 1018 (E.D.N.Y. 1982).
[56] Bernina Distributors, Inc. v. Bernina Sewing Machine Co. (1981 CA10 Utah) 646 F2d 434, 31 UCCRS 462
[57] R.J.B. Gas Pipeline Co. v. Colorado Interstate Gas Co. (1990 Okla App) 813 P2d 14.
[58] Helms Construction & Development Co. v. State (1981) 97 Nev 500, 634 P2d 1224, 32 UCCRS 859.

4. Contractual Provisions

According to William D. Hawkland[59], *"[b]ecause it is believed that Section 2-615 incorporates an unless-otherwise-agreed provision, it follows that its rules apply only where the parties have not expressly or impliedly agreed on whether or not the happening of the contingency in question should discharge the duty to perform."*

As a result, the parties are free to draft their own rule regarding the excuse of the seller. They can choose to impose a tougher standard on the seller, by limiting the excuse to the occurrence of some specific contingencies only: when the contract provides that *"if, for any reason, the seller fails to make shipment or delivery,"* the seller would be liable for the difference between the market price and the price in the contract, such a provision operates in replacement of § 2-615.[60]

On the other hand, the parties are equally free to include softer contract provisions, thereby using a usual *hardship clause* instead of the standard provisions of § 2-615. In a long-term coal supply contract, the presence of a clause allowing price revision in case *"material unforeseen events or changed conditions had occurred and those events or conditions caused price of coal to be inequitable to one of the parties"* waives the application of § 2-615.[61] The presence of a price escalation clause will be considered as a proof the foreseeability of a price change.[62]

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[59] *Hawkland Uniform Commercial Code Series, op. cit.,* § 2-615:8.
[60] Swift Textiles, Inc. v. Lawson (1975) 135 Ga App 799, 219 SE2d 167, 18 UCCRS 115,
[61] Kentucky Utilities Co. v. South East Coal Co. (1992 Ky) 836 SW2d 392.
[62] Northern Illinois Gas Co. v. Energy Cooperative, Inc. (1984 3d Dist) 122 Ill App 3d 940, 78 Ill Dec 215, 461 NE2d 1049, 38 UCCRS 1222.

Conclusion

In conclusion, although the French law of contracts and the rules codified under the UCC sometimes share the same objectives – such as consumer protection, accomplished by the creation of a specific body of rules in French law and by using the notion of unconscionability in American law –, a large number of differences exist between the two systems concerning the traditional sale of goods.

Despite the newer points of view expressed by certain scholars and some recent cases, French law remains rigidly faithful to the old principle of *pacta sunt servanda,* while American law proves to be more flexible, despite the very rare application of unconscionability to sales between professionals, and some important differences between hardship as it is used in international contracts and impracticability.

As a result, the Principles clearly remain a very useful tool, not only for comparison purposes, but also and more importantly to serve as a common ground between the two systems in cross-border transactions, where their modernity and flexibility constitute a highly valuable asset.

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